insolvency2020

Oct. 22, 2020, 5:00-6:15 p.m.

ABC: Best Behavior, Use of Technology and Other Taboos

Kirk B. Burkley; Bernstein-Burkley, P.C.
Hon. James M. Carr; U.S. Bankruptcy Court (S.D. Ind.)
Patricia B. Fugée; FisherBroyles, LLP
Hon. David W. Hercher; U.S. Bankruptcy Court (D. Ore.)
Hon. Edward L. Morris; U.S. Bankruptcy Court (N.D. Tex.)
Hon. James J. Tancredi; U.S. Bankruptcy Court (D. Conn.)
Hon. Stephen D. Wheelis; U.S. Bankruptcy Court (W.D. La.)

Educational Materials

A FEW GOOD LAWYERS: BEST BEHAVIOR, USE OF TECHNOLOGY AND OTHER TABOOS

A discussion by ABC Judges – led by Kirk B. Burkley, Esq. & Patricia Fugée, Esq.

Featuring: Hon. James M. Carr, Hon. David W. Hercher, Hon. Edward L. Morris, Hon. James J. Tancredi, & Hon. Stephen D. Wheelis

I: Practicing in Court in a Pandemic

- How are hearings and trials getting done?
  - Telephone
  - Video services
  - In person
    - Any required?
    - Exceptions?

A good example of "Know Your Court" – there are differences in Court practices across the country, and they are changing all the time

Can Testimony be Taken Remotely?

- Bankruptcy Rule 9017/Federal Rule of Civil Procedure 43(a) – "At trial, the witnesses' testimony must be takin in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. *For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmissions from a different location*." (emphasis supplied)
- Rule of Professional Conduct 3.2: Expediting Litigation – a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client

Pandemic Cases Permitting Video Trials

- *Alle v. Gales, et al.*, CC-20-1205 (9th Cir. B.A.P. Sept. 25, 2020) (On appeal from order directing trial on the remaining issues to be decided in the adversary proceeding will be conducted entirely by video-conference technologies per Fed.R.Civ.P. 43(a) (which applies in Bankruptcy cases per B.R. 9017), the B.A.P. found no grounds to grant leave for interlocutory review and dismissed the appeal).
- *Flores v. Town of Islip*, 18-CV-3549 (E.D.N.Y. Sept. 1, 2020) (On plaintiff's application to conduct bench trial using Zoom, the Court compared the practical challenges and safety considerations faced in conducting trials during the pandemic, with the imperative in conducting trials promptly. Under Fed.R.Civ.P. 43(a), the Court found good cause and compelling circumstances to hold the trial via video. The Court also noted the appropriate safeguards, as well as the fact that most witnesses were previously deposed and had previously testified and the long-standing use of video technology before the pandemic).

Challenges with Remote Hearings

- Use of technology
  - Rule 1.1: Competence – A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See comment 8: *a lawyer is required to keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology*
  - Practice Sessions – Important
    - Proper use of mute buttons
    - Don't use "hold"
  - Exhibit Management
    - Providing them to Court, lawyers and parties
    - Use of shared screens
  - Cost
    - Some courts rely on pay services; billable to client?

Telephonic and Video Court is Still Court!

- It is still COURT
  - Be prepared
  - Recognize that telephonic and video hearings are still formal proceedings on the record
    - Attire, appearance
    - Choice of name in video screens
    - Background when using video
    - Avoid participating from car, while moving, distracting locations
    - Avoid interruptions from surroundings as much as possible
  - Rule 3.5: Impartiality & Decorum of the Tribunal: comment (5) duty to refrain from disruptive conduct
  - Civility and Collegiality still apply

II. Lawyers Behaving Badly

APPLICABLE RULES OF PROFESSIONAL CONDUCT

- ***Rule 3.1 Meritorious Claims***
- ***Rule 3.3(a)(1) Candor***
- ***Rule 3.5 Impartiality, Decorum***
- ***Rule4.1(a) Truthfulness***
- ***Rule 4.4(a) Rights of 3rd Persons***
- ***Rule 8.2(a) Statements re Judge***
- ***Rule 8.4 Misconduct***

OTHER AUTHORITY

- **Civil Rule 11**
- **Bankruptcy Rule 9011**
- **The Court's Inherent Power**
- **Bankruptcy Code § 105**

If your client dies – tell the court

- *Marentette v. City of Canandaigua, NY* (case 19-205-cv; 2d Cir. February 4, 2020).
  - The Plaintiff died on the same day judgment was entered for the Defendants.
  - The Plaintiff's counsel timely appealed and Plaintiff's counsel never advised the court of his client's death.
  - Defendant's filed a statement of death a month after Plaintiff died.
  - Ten months later, Plaintiff's counsel moved to substitute Plaintiff's wife based on the expectation that she would be the administratix of the estate.
  - Plaintiff's wife did not become the administratrix.
  - The court dismissed the appeal with prejudice and stated that counsel's failure to notify the Court about his client's death for 11 months, and failure to timely move for substitution and unsatisfactory explanations about their behavior, were inexcusable and constituted a lack of candor.

Be Prepared

- *Brehmer v. Rolls Royce Corp.*, case no. 1:19-cv-02470 (S.D. Indiana, December 10, 2019).
  - An attorney appeared for a court ordered conference with the requisite individuals in attendance and lacking the ability to discuss critical facts in the case.
  - The attorney argued excusable neglect due to a busy case load.
  - In response, the Court admonished the attorney for his shortcomings and required him to reimburse defense counsel attorneys fees and costs incurred in preparing for and attending both conferences.

Truth is Not A Defense to Name-Calling

- Toledo Bar Association v. Yoder, Slip Opinion No. 2020-Ohio-4775 (Ohio Supreme Court, October 6, 2020).
- An attorney called his opponents names in court, he said they were liars, morons and had mental problems.
- He also wrote to nursing board regarding one of the litigants, requesting investigation and questioning nursing license
- Attorney also called the Court's magistrate names in court
- During his disciplinary hearing, the attorney tried to defend himself by arguing that his statements were true.
- He was found to have violated RPC 1.2(e) (threats to obtain advantage), RPC 4.4(a) (using means with no purpose other than embarrass, etc.), RPC 3.3(a)(1) (false statements to tribunal), RPC 3.5(a)(6) (degrading tribunal), RPC 3.1 (asserting issue without basis in law or fact), RPC 4.1(a) (false statements), 8.4(c) (dishonesty, misrepresentation), and 8.4(d) (conduct that is prejudicial to administration of justice)

Do You Have Evidence to Support That?

- *In re Elliott J. Schuchardt*, Case No. 3:18-MC-39, 2019 U.S. Dist. LEXIS 212603 (E.D. Tenn., December 19, 2019).
  - An attorney accused a judge, in open court, of having *ex parte* communications with lawyers about pending cases.
  - The attorney was unable to support his allegations and was sanctioned.
  - This resulted in further investigation into the attorney's behavior in other cases.

Don't Make Me Repeat Myself

- *Sanfilippo v. Brewerton*, 2017 U.S. Dist. LEXIS 192574 (D.S.C. 2017)
- *LCS Grp. LLC v. Shire LLC*, 2020 U.S. Dist. LEXIS 3817 (S.D.N.Y. 2020).
  - Dr. Sanfilippo first filed a Complaint *pro se* and it was dismissed as being not in the proper forum and a lawsuit that was lacking any arguable basis in law or fact.
  - Dr. Sanfilippo then hired an attorney and filed essentially the same Complaint on behalf of his company. The Court dismissed the second Complaint ordered Sanfilippo and his attorney to pay the defendants legal fees which exceeded $130,000.00.

Don't Threaten the Judge

- *Dunlap v. Bd. Of Prof's Responsibility of the Supreme Court of Tennessee,* Case No. M2018-01919-SC-R3-BP (February 7, 2020).
  - An attorney attempted to persuade a judge to issue a certificate of need for a methadone clinic by threatening judge.
    - The attorney said that failure to issue the certificate of need would create the appearance of the judge being a "fixer" for the other side and the judge would be "aiding and abetting" the other attorneys.
  - In response, the judge revoked the attorney's pro hac vice admission and held the attorney violated the following rules of professional conduct:
    - RPC 3.3 – Candor toward the tribunal;
    - RPC 3.5 – Impartiality and decorum;
    - RPC 8.4 – Misconduct

E – in E-mail Stands for Exhibit

- *Baker v., Allstate Insurance Co.*, case number 2:19-cv-08024, U.S. District Court, Central District of California.
  - Plaintiff's lawyer sent e-mails containing profanity to opposing counsel.
  - The e-mails escalated into discriminatory slurs and threats of physical violence to witnesses, attorneys and their families.
  - Leading defense counsel filed an *ex parte* application for a restraining order and sanctions against the attorney.

III. Use of Technology in General

Applicable Rules of Professional Conduct

- Rule 1.1
- Rule 1.6

Other Authority

- 11 U.S.C. §§ 107, 112 (public access; prohibition on disclosure of name of minor children)
- 11 U.S.C. § 332 (consumer privacy ombudsman)
- 11 U.S.C. §§ 329, 504 (debtor's transactions with attorneys; sharing of compensation)
- Bankruptcy Rule 2016 (concerning compensation)
- Civil Rule 11/Bankruptcy Rule 9011
- ECF procedures providing that filing constitutes a signature under Civil Rule 11/Bankruptcy Rule 9011
- ECF procedures regarding login credentials
- ECF procedures regarding redaction
- Bankruptcy Rule 9037(a) regarding redaction obligations
- Electronic discovery issues

Sharing ECF Credentials

- *In re Thach*, Case No. 19-10514 (Bankr.S.D. Ohio, February 13, 2020).
  - An attorney advised the Court that he was not debtor's counsel but was just helping another attorney whom he shared space with but was otherwise not associated, even though filings were submitted to the Court's ECF with his log-in information.
  - Quoting Justice Cardozo, Judge Hopkins reiterated that "[m]embership in the bar is a privilege burdened with conditions. [A lawyer is] received into that ancient fellowship for something more than private gain. He [or she becomes] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice."

Check Your E-mail

- *In re Complaint Against Cramer*, Case No. 2018-038 (Ohio Board of Professional Conduct; Findings of Fact, Conclusions of Law, and Recommendation of the Board of Professional Conduct, December 16, 2019).
  - An attorney requested the Board of Professional Conduct alert her when an e-mail was sent.
  - The request was denied and the attorney was advised to review her e-mail on a timely and regular basis.

IV: Do's, Don'ts and Best Practice in Fee Applications

You Can't Bill Time to Client Files After You're Fired

Nnaka v. Mejia, No. 01-18-00779-CV, 2020 Tex. App. LEXIS 753, at 20 (Tex. App Jan. 28, 2020)

Request for attorney fees are closely review in and outside of bankruptcy.

Attorney's request for fees was brought into question when the time entries included significant discrepancies and inconsistencies, such as eleven hours of work allegedly performed after the termination of the representation legal. And fees for hearing on a day that no hearing had been held.

Attorney may be subject to sanctions on the basis of billing for service not performed or overstated

Sufficiently Describe Your Tasks

U.S. ex re. Bahnsen v. Boston Scientific Neuromodulation Corporation, Case no. 2:11-cv-1210 (D.N.J. February 14, 2020).

- In a non-bankruptcy but still informative decision, Magistrate Judge Mannion from New Jersey recently reminded everyone of the important of sufficiently describing the task completed when seeking approval for attorney's fees.
- The Court specifically called to question various entries. For example, the Court observed that 172 entries with the exact description "Reviewing documents".
- Accordingly, the Court recommended disallowing about $525,000 of the $6.7 million requested on that basis.

Don't Tilt At Windmills

In re Central Processing Services, LLC, Case no. 19-43217 (Bankr. E.D. Mich., December 3, 2019)

- Following dismissal of a chapter 11 case and upon the Debtor's professionals' fees applications, the IRS objected, contending that some of the services were not necessary to the administration of, nor beneficial to, the Debtor's case.
- The professionals disagreed, arguing that they should be compensated for their services that were necessary to the administration of the case.
- The Court then reviewed the history of the case critically, assessing at what point in time the Debtor's professionals should have known that the case was doomed to fail.
- The Court denied the fee application.

Results Matter

In re Village Apothecary, Inc., Case No. 15-56003 (Bankr. E.D. Mich. December 3, 2019).

- A chapter 7 trustee and his special counsel recover about $40,000 in a case, and then filed fee applications for more than that, but then agreed to reduce their requests to the sums available.
- The Court considered billing judgment to reduce fees where the results are not what was hoped, to avoid resulting in fees that are disproportionately high compared to the results obtained.
- The Court reduced the attorneys' fee by 50% choosing "not to ignore the 'results obtained' by the Chapter 7 Trustee and his professionals, and chooses not to approve fees that would leave the creditors with nothing."

Areas to Watch Out For

- *3 Places Overbilling May Be Lurking*
  - First, be careful about too many internal meetings;
  - Second, watch out for billing by partners working with junior lawyers in supervisory roles and firm-business kinds of tasks that aren't billable; and
  - Third, avoid block billing, or more specifically, "miniblock" billing

V: Lawyers and Law Firms as Bankruptcy Debtors

Whose Client is it Anyway?

Diamond v. Hogan Lovells et al., Case No. 18-SP-218 (D.C. Circuit, February 13, 2020).

When a law firm files for bankruptcy, there has been litigation about fees generated in matters initiated at the bankrupt firm and transferred to subsequent firms.

The DC Circuit said that hourly-billed client matters are not "property" of the law firm.

When a partner leaves, the partner owes no continued duty to the firm to account for new profits earned on hourly-billed matters that started at the former firm. A dissolved firm has no interest in profits earned on hourly-billed client matters following dissolution.

Attorneys Should Know Better

In re Boland, 946 F.3d 335 (6th Cir. 2020).

- While serving as a technology expert for defendants in Oklahoma and Ohio, Attorney Dean Boland morphed the "before" photos into "after" exhibits, purporting to show the girls engaged in sex acts.
- Two judgments were granted against Boland under the federal child pornography statute. After losing three challenges to the judgment in the Sixth Circuit Court of Appeals, Boland tried to avoid the liability by filing chapter 7.
- The Sixth Circuit affirmed the BAP and held that the judgment was not dischargeable on the basis of section 523(a)(6) of the Bankruptcy Code.

IOLA/IOLTA Accounts Are Subject to Review and The Rules of Professional Conduct Still Apply

Palisades Tickets, Inc. v. Daffner (In re Daffner), Case No. 8-18-75747-reg (Bankr. E.D.N.Y. Jan. 13, 2020)

- Daffner received funds from the Judgment Debtors that he placed in his IOLA account, which he then disbursed to them, to third parties and to himself at the Judgment Debtors' direction.
- Palisades Tickets filed a state court suit against Daffner alleging that Daffner used his IOLA account to conceal assets and prevent threat collection efforts by Palisades Tickets.
- Daffner filed a chapter 7 and Palisades Tickets filed an adversary proceeding for damages for actual and constructive fraud.
- The Court determined that Daffner was bound by the Rules of Professional Conduct to abide by the Judgment Debtors' decisions with respect to the funds in the IOLA account and in fact, he had an "affirmative duty" to adhere to their instructions.

Q&A

THANK YOU

A Few Good Lawyers: Best Behavior, Use of Technology and Other Taboos:

A discussion with ABC Judges

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Panelists:

The Honorable James M. Carr U.S. Bankruptcy Judge Southern District of Indiana	The Honorable David W. Hercher U.S. Bankruptcy Judge District of Oregon
The Honorable E. Lee Morris U.S. Bankruptcy Judge Northern District of Texas	The Honorable James J. Tancredi U.S. Bankruptcy Judge District of Connecticut
The Honorable Stephen D. Wheelis U.S. Bankruptcy Judge Western District of Louisiana	

These materials and the Panel program were originally prepared for ABI's Annual Spring Meeting in April, 2020. In light of the pandemic, the discussion is also going to include unique professionalism and ethics issues raised as a result of practicing law and conducting Court proceedings using technology.

Practicing in Court in a Pandemic

Rules of Professional Conduct Implicated[1]

Rule 1.1: Competence – A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See comment 8: a lawyer is required to keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology

Rule 1.3: Diligence – A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4: Communications – a lawyer shall communication promptly, consult with client, keep client informed, etc.

Rule 1.6: Confidentiality of Information – a lawyer shall not reveal information relating to representation and shall make "reasonable efforts" to prevent the inadvertent or unauthorized disclosure of or access to information

Rule 3.2: Expediting Litigation – a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client

Rule 3.5: Impartiality & Decorum of the Tribunal: comment (5) duty to refrain from disruptive conduct

Some cases:

Alle v. Gales, et al., CC-20-1205 (9th Cir. B.A.P. Sept. 25, 2020) (On appeal from order directing trial on the remaining issues to be decided in the adversary proceeding will be conducted entirely by video-conference technologies per Fed.R.Civ.P. 43(a) (which applies in Bankruptcy cases per B.R. 9017), the B.A.P. found no grounds to grant leave for interlocutory review and dismissed the appeal).

Flores v. Town of Islip, 18-CV-3549 (E.D.N.Y. Sept. 1, 2020) (On plaintiff's application to conduct bench trial using Zoom, the Court compared the practical challenges and safety considerations faced in conducting trials during the pandemic, with the imperative in conducting trials promptly. Under Fed.R.Civ.P. 43(a), the Court found good cause and compelling circumstances to hold the trial via video. The Court also noted the appropriate safeguards, as well as the fact that most witnesses were previously deposed and had previously testified and the long-standing use of video technology before the pandemic).

[1] All references to the Rules of Professional Conduct are to the ABA Model Rules; note that there are some variations as adopted by certain states, and so care should be taken to always review those adopted in a particular state.

Lawyers Behaving Badly

I. *Applicable Rules of Professional Conduct*[2]

a. Rule 3.1 – A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is basis in law and fact for doing so that is not frivolous

b. Rule 3.3(a)(1) – Candor Toward the Tribunal; (a) a lawyer shall not (1) knowingly making a false statement of fact to a tribunal, or fail to correct a false statement of material fact or law previously made

c. Rule 3.5 – A lawyer shall not (a) seek to influence a judge, juror by means prohibited by law … (d) engage in conduct intended to disrupt a tribunal

d. Rule 4.1(a) -- a lawyer shall not knowingly make a false statement of material fact to a third party

e. Rule 4.4(a) – in representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third party

f. 8.2(a) – a lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judicial officer

g. Rule 8.4 – it is professional misconduct for a lawyer to (a) violate the RPC … (c) engage in conduct involving fraud, dishonesty, deceit or misrepresentation; 4(d) engage in conduct that is prejudicial to the administration of justice

II. *Civil Rule*

a. Civil Rule 11/Bankruptcy Rule 9011 – frivolous pleadings

III. *Other Authority*

a. The Court's inherent power: Bankruptcy Code § 105

IV. *Truth is Not a Defense to Name-Calling*:

a. Toledo Bar Association v. Yoder, Slip Opinion No. 2020-Ohio-4775 (Ohio Supreme Court, October 6, 2020).

i. Summary of Facts:

1. In a grievance proceeding concerning counsel's statements about and to other parties and the Court, including name-calling and threats, respondent attorney attempted to show that his statements were true as a defense to the disciplinary charges.

[2] All references to the Rules of Professional Conduct are to the ABA Model Rules; note that there are some variations as adopted by certain states, and so care should be taken to always review those adopted in a particular state.

2. In pleadings, correspondence, testimony during discipline hearing, and even his *pro se* arguments before the Ohio Supreme Court, respondent said that other parties to litigation and the presiding magistrate, lied, had mental problems, were morons and more.
3. Respondent also sent letters to nursing board regarding one of the litigants, seeking review of her mental health.
4. Respondent also sent threatening letters to grievance hearing witnesses.
5. Respondent introduced evidence and argued that his statements were true.

ii. Court's Ruling:

1. The Board found that the merit of the underlying matters was not properly considered, instead focusing on respondent's conduct to find violations of RPC 3.5 (note that Ohio's RPC includes (a)(6), prohibiting undignified or discourteous conduct that is degrading to a tribunal), 3.3(a)(1), 3.1, 4.1(a).
2. The Supreme Court found that the board's findings of fact and misconduct are supported by the record "but that a more severe sanction is necessary to protect the public from Yoder's ongoing misconduct." Yoder was suspended from practice for two years, with 2 years conditionally stayed, and a condition of reinstatement was evaluation and compliance with any recommendations of the Ohio Lawyers Assistance Program.
3. The Court emphasized that respondent's conduct was the sole issue, and concluded that over eight years, respondent has been unable to address his frustrations in a concise, rational and professional manner. Further, throughout the disciplinary process, he continued to levy false and inflammatory accusations with little or no basis in fact against anyone who disagreed with him, including the bar association's counsel and the member of the board responsible for drafting the report.

V. *Evidence is Required Before Making Allegations of Judicial Misconduct*:

a. In re Elliott J. Schuchardt, Case No. 3:18-MC-39, 2019 U.S. Dist. LEXIS 212603 (E.D. Tenn., December 19, 2019).

i. Summary of Facts:

1. Attorney Schuchardt made allegations against a bankruptcy judge in open court, claiming that the judge engaged in *ex parte* communications with lawyers about pending cases.
2. During a show cause hearing, the lawyer was unable to present evidence in support of his allegations.
3. Judge Bauknight sanctioned him by ordering Schuchardt to attend professionalism training and to forward transcripts of the proceedings

to a local board of professional responsibility. Additional evidence of Schuchardt's misconduct surfaced, including violation of orders, delays in dismissing cases, failing to respond to motions, skipping hearings and more.

ii. Court's Ruling:
1. Judge Bauknight requested that disciplinary proceedings against the lawyer be initiated.
2. The District Court then issued a show cause and, following a hearing, the Magistrate Judge issued a report and recommendation for sanctions.
3. The District Court overruled the lawyer's objections, adopted the report and recommendation, reprimanded him for his accusations against the Judge, and suspended the lawyer for two years. "Solely based on speculation and third hand communications, Schuchardt accused a sitting federal judge of impropriety in court. That claim has not been substantiated in any way and has now been repeated in court filings four more times."
4. The Court was particularly distressed by the attorney's effort to make the proceedings into an inquisition about Judge Bauknight and his attacks on her integrity, rather than addressing his specified misconduct. Indeed, "Schuchardt's 'substantial experience in the practice of law is an aggravating factor because it indicates he should be well aware of applicable expectations and standards.'"

VI. *Don't Make the Judge Tell You Twice*:

a. Sanfilippo v. Brewerton, 2017 U.S. Dist. LEXIS 192574 (D.S.C. 2017) and LCS Grp. LLC v. Shire LLC, 2020 U.S. Dist. LEXIS 3817 (S.D.N.Y. 2020).

i. Summary of Facts:
1. Dr. Sanfilippo, principal of an entity called LCS, filed a *pro se* suit in which the Court, dismissing the action, held that it was not the proper forum for the claims asserted and stating that Sanfilippo was "engage[d] in an ongoing, abusive use of legal process" by bringing a "lawsuit lacking any arguable basis in law or fact." (*Sanfilippo*, 2017 WL 5591615 (D.S.C. 2017)).
2. Sanfilippo then hired counsel, Lobbin, who filed a new complaint on behalf of LCS based on the same operative facts, making numerous allegations contrary to the prior Court's opinion. (*LCS*, case 18-cv-02688, dkt. 75, S.D.N.Y.)

ii. Court's Ruling:
1. Dismissing the second complaint, the Court inferred that Lobbin and Sanfilippo had an improper purpose in filing the suit within the meaning of Rule 11, because that they were on notice that the claims were frivolous from the Court's statement in the first suit.

2. The Court also found that the claims made were frivolous. In deciding on the sanction, the Court was particularly concerned that the prior Court's strongly-worded opinion was not enough to prevent the filing of the second suit, and so ruled that Sanfilippo and Lobbin were jointly and severally liable for the defendants' attorneys' fees, which exceeded $130,000.

VII. *Threatening The Judge is Not Persuasive:*

a. Dunlap v. Bd. Of Prof's Responsibility of the Supreme Court of Tennessee, Case No. M2018-01919-SC-R3-BP (February 7, 2020).

i. Summary of Facts:

1. In an effort to have the Judge issue a certificate of need ("CON") for a methodone clinic without a hearing, the attorney filed a pleading in which he stated that the Judge's failure to issue the CON would create a cause of action against her, that she appeared to be the other party's "fixer," and that the Judge would risk "aiding and abetting" the opposing parties if she did not rule in favor of the attorney.

ii. Court's Ruling:

1. The Judge revoked the attorney's pro hac vice admission in light of the threats, finding the behavior violated RPC 3.3 (candor toward the tribunal), 3.5 (impartiality and decorum) and 8.4 (misconduct).
2. The Chancery Court affirmed, observing that "[n]o lawyer is entitled to use threats and intimidation to force a judge to perform a discretionary act and such conduct evinces a persistent resolve to undermine and to bend the justice system to that lawyer's will."
3. The Tennessee Supreme Court ultimately agreed that "[i]nforming a judge that disciplinary or legal action will follow if the judge does not comply with a desired outcome constitutes a 'veiled threat' in violation of RPC 3.5(a), as well as a violation of RPC 8.4(d).

VIII. *Hiding Your Client's Death is a Lack of Candor:*

a. Marentette v. City of Canandaigua, *NY* (case 19-205-cv; 2d Cir. February 4, 2020).

b. Summary of Facts:

i. The plaintiff client died on January 9, 2019, the same day judgment was entered for defendants, and his counsel filed a timely appeal. However, counsel failed to substitute a personal representative and neglected to even inform the Court of the death.

ii. Defense counsel filed a statement of death on February 8, 2019. Throughout appellate briefing, and despite defense counsel's request to dismiss the appeal on that basis, plaintiff's counsel refused to acknowledge the problem caused by the client's death. On December 17, 2019, months after briefing was completed and shortly before oral argument, plaintiff's

counsel finally moved to substitute plaintiff's ex-wife, based on the expectation that she would be the administratrix.

iii. Defendants opposed and cross moved for dismissal. Then, a week before argument, plaintiff's counsel advised the Court that plaintiff's daughter would be administratrix instead. However, counsel conceded at oral argument that the appointment had not yet been approved, and provided no timeline for that process.

c. Court's Ruling:

i. The Court waited several weeks more, without further motion by plaintiff's counsel, and then granted the motion to dismiss the appeal with prejudice.

ii. In so doing, the Court stated that counsel's failure to notify the Court about the death for 11 months, their failure to timely move for substitution, and their unsatisfactory explanations about their behavior, were inexcusable and constituted a lack of candor warranting a referral to the grievance panel.

IX. *Check Your Facts:*

a. Rock v. Enfants Riches Deprimes, LLC, (Case no. 17-cv-2618, S.D.N.Y., January 29, 2020);

i. Summary of Facts:

1. In a copyright case, Federal Rule 11(b)(3) requires plaintiff's counsel to ensure that the factual contentions in the Complaint, particularly the allegation that the subject photograph was registered, had evidentiary support.
2. Moreover, hiding the failure to do so by stonewalling discovery, repeating the allegations in pleadings, misleading the Court and asserting arguments based on a misinterpretation of a fundamental aspect of copyright claims does not help the situation.

ii. Court's Ruling:

1. The Court awarded fees to the defendants as prevailing parties, and imposed sanctions on the lawyer. This case also shows that a lawyer's behavior before different judges does matter: in awarding sanctions, the Court recognized that counsel "is notorious in this District for his litigation strategy" and quoted another judge as saying "it is no exaggeration to say that there is a growing body of law in this District devoted to the question of whether and when to impose sanctions on Mr. Liebowitz alone.
2. *See also Otto v. Hearst Communications, Inc.,* Case No. 1:17-cv-04712, S.D.N.Y. January 23, 2020) (Denying prevailing parties' fees requested by Liebowitz, who won only $100.00, noting the impropriety of awarding fees "for prolonging litigation in pursuit of an unjustifiably inflated claim" and for making misstatements of fact in the complaint).

X. *You've Heard it Before: Be Prepared for Court*:

a. Brehmer v. Rolls Royce Corp., case no. 1:19-cv-02470 (S.D. Indiana, December 10, 2019).

i. Summary of Facts:

1. Judges should not have to say it, but a recent decision reminds us that "Counsel are expected to be well prepared for Court appearances. This means, at a minimum, that counsel carefully review the order setting the conference to ensure the proper individuals appear at the conference and that the attorney can appropriate address the topics the Court needs to explore.
2. As this case demonstrates, counsel who show up in Court unprepared waste valuable time and subject themselves to sanctions." Counsel had appeared at the initial pretrial conference, unable to address critical facts in the case despite the order's requirement that parties who attend be familiar with and prepared to discuss the facts and legal issues. Given counsel's lack of grasp on the facts, the Court set it for a follow up conference and ordered both counsel and client to appear. However, counsel failed to inform his client that he was required to appear. Following a show cause, counsel claimed excusable neglect due to a busy caseload, but the Court is also busy, and the Court's resources are also scarce.

ii. Court's Ruling:

1. The Court bemoaned what seem to be a troubling practice of lawyers not reading orders in their entirety, or reviewing only the text of a Court entry on CM/ECF but failing to click on and read the order itself.
2. The Court admonished counsel for his shortcomings, and required him to reimburse defense counsel's attorneys fees and costs incurred in preparing for and attending both conferences. The Court also required counsel to certify under Rule 11 what measures he has taken to ensure that his mistakes will not occur again.

XI. *You've Heard it Before: That Nasty Email Becomes Exhibit A*:

a. Law360 article, December 16, 2019 entitled *'This Profession Doesn't Need You,' Judge Tells Profane Atty*, reporting on the case *Baker v., Allstate Insurance Co.*, case number 2:19-cv-08024, U.S. District Court, Central District of California.

i. Summary of Facts:

1. Law360 reported about a case in the Central District of California, where the plaintiff's lawyer sent profanity-laced emails to defense counsel, which escalated into discriminatory slurs and threats of physical violence to defendant's witnesses, attorneys and their families, leading defense counsel to file an *ex parte* application for a restraining order and sanctions against the lawyer.

2. The litigation involved an insurance coverage dispute over water repairs, with about $200,000 at stake, but plaintiff's counsel demanded hundreds of millions of dollars; he asserted that his behavior was an aggressive negotiating strategy to procure a settlement.

ii. Court's Ruling:

1. The Judge was reportedly (and understandably) visibly upset by the emails, especially the threats of violence against families, and reportedly terminated the hearing after telling plaintiff's counsel about options to remove him from the legal profession. While plaintiff's counsel recognized that he obviously failed to conduct himself in a professional manner, it was evident that this won't be the end of it.
2. Whether and to what extent the lawyer is ultimately sanctioned for his conduct isn't presently known, but there is no question that this is not the sort of publicity one wants.

XII. *Disgorgement & More*:

a. In re Willis, 604 B.R. 206 (WDPA Bankr. Aug. 5, 2019).

i. Summary of Facts:

1. Attorney Willis, received an advance expense retainer for filing fees. Despite receiving the retainer he filed the cases without the payment of the requisite filing fees. He then filed motions asking if his clients could pay the fees on an installment plan. Attorney Willis represented that his clients were unable to pay the filing fees upfront.
2. This is troubling because not only did Attorney Willis receive an advance, his clients had liquid assets that enabled them to pay the filing fees. Also troubling was that during this time, attorney Willis received payout of attorney's fees in some of his cases. Instead of paying the filing fees or placing the fees in his IOLTA account, he placed the funds in his operating account.
3. The Chapter 13 trustee filed Disgorgement Motions to Compel. At the hearing Attorney Willis admitted that in the 32 cases at issue, the expense retainer and installment fee requests were processed and commingled in his operating account.
4. Attorney Willis also admitted that he his clients never the saw the installment plan motions and he affixed their name to the motions without their consent. The Court ordered Willis to disgorge the fees.

ii. Court's Ruling:

1. The Court also held that Willis violated Fed. R. Civ. P. 11 and Fed. R. Bankr. P. 9011 by affirmatively representing that he had his clients sign petitions and installment Motions when they had not.

2. Additionally, the Court found that he had violated Pa.R.Prof. Conduct 1.16(d) by retaining excess expense funds in his operating account after a case had been closed or dismissing.
3. Finally, the Court held Willis had violated Fed. R. Bankr. P. 1006 for accepting further compensation when filing fees remained unpaid.

Use of Technology

I. *Applicable Rules of Professional Conduct*[3]

a. RPC 1.1 – competence; comment 8: a lawyer is required to keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology

b. RPC 1.6 – confidentiality of information and the obligation to prevent disclosure and access; Comment 18 provides that the unauthorized access to info does not constitute a violation of the rule if the lawyer has made reasonable efforts to prevent the access or disclosure

II. *Other Authority and Provisions*

a. 11 U.S.C. §§ 107, 112 (public access; prohibition on disclosure of name of minor children)

b. 11 U.S.C. § 332 (consumer privacy ombudsman)

c. 11 U.S.C. §§ 329, 504 (debtor's transactions with attorneys; sharing of compensation)

d. Bankruptcy Rule 2016 (concerning compensation)

e. Civil Rule 11/Bankruptcy Rule 9011

f. ECF procedures providing that filing constitutes a signature under Civil Rule 11/Bankruptcy Rule 9011

g. ECF procedures regarding login credentials

h. ECF procedures regarding redaction

i. Bankruptcy Rule 9037(a) regarding redaction obligations and Electronic discovery issues

III. *Sharing Your ECF Credentials May Be Sanctionable Conduct:*

a. In re Thach, Case No. 19-10514 (Bankr.S.D. Ohio, February 13, 2020).

i. Summary of Facts:

1. Behaving badly can occur in connection with technology as well as in Court. Bankruptcy Judge Hopkins was recently led to remind

[3] All references to the Rules of Professional Conduct are to the ABA Model Rules; note that there are some variations as adopted by certain states, and so care should be taken to always review those adopted in a particular state.

attorneys "of the importance of the office they occupy in our justice system and the attendant elevated responsibilities."

2. Quoting Justice Cardozo, Judge Hopkins reiterated that "[m]embership in the bar is a privilege burdened with conditions. [A lawyer is] received into that ancient fellowship for something more than private gain. He [or she becomes] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice." The Judge's statements came in an order to show cause directed to attorneys Hewitt, Foster and Goldberger as to why sanctions should not be imposed against them.
3. Preliminary findings began with the recognition of ECF procedures to the effect that electronic filing using credentials constitutes the credentialed attorney's signature for Rule 11 purposes. Specifically, the petition and other pleadings were filed using attorney Hewitt's credentials, but he "stunningly" advised the Court at the confirmation hearing that he was not Debtor's counsel and instead, he had simply been helping attorney Foster, with whom he shared space but was not regularly associated.
4. Hewitt advised that both he and Foster had previously accepted contract work from Upright Law but by the time of the hearing, they had discontinued doing so and instead, were both working with Amourgis & Associates. However, Foster was not at the hearing because, Hewitt advised, attorney Goldberger, the managing attorney for the Cincinnati office of Amourgis, had directed Foster to attend a different hearing.
5. After being admonished by the Court of potential rules violations, Hewitt filed a "notice confirming attorney representation" further confusing the representation issues among Upright Law, Hewitt and Foster. The Court also noted numerous reported decisions questioning the practices of Upright Law, the fact that Hewitt and Foster were not listed on the Amourgis website, but on the Upright Law website, and the Ohio Supreme Court's directory that Hewitt was with Hewitt Foster Legal Group and Foster was a solo practitioner, not Amourgis.

ii. Court's Ruling:

1. This lead the Court to state that "[t]he arrangement between Mr. Hewitt, Ms. Foster, Upright Law, and Amourgis & Associates calls into question who the Debtor's attorney is, and whether any of the compensation he or she has received should be subject to disgorgement."
2. The Court also questioned whether the lawyers were in compliance with 11 U.S.C. §§ 329, 504 and Bankruptcy Rule 2016. More serious was the Court's concern about potential Rule 9011

violations, which appear to have been "trampled upon" given the use of Hewitt's ECF credentials when he knew nothing about the case but instead professed initially that he was not Debtor's counsel.

3. This conduct also likely violated RPC 1.1, competent representation, and RPC 1.5(e), prohibiting certain fee sharing.

IV. *Check Your Email*:

a. In re Complaint Against Cramer, Case No. 2018-038 (Ohio Board of Professional Conduct; Findings of Fact, Conclusions of Law, and Recommendation of the Board of Professional Conduct, December 16, 2019).

i. In a disciplinary hearing, respondent requested that the Board of Professional Conduct either call or text message her whenever an email was sent, thereby alerting her that she needed to review her email since she did not check it often. The request was denied, and responded was instructed to review her email on a timely and regular basis.

V. *But Be Careful About Emails:*

a. Ransomware Attacks Hit Three Law Firms in Last 24 Hours, LawSites, February 4, 2020.

i. As reported in Law 360, there is a "ransomware" ring claiming to have hacked into five law firms, threatening to post sensitive data. In *New Ransomware Ring Aims to Publicly Shame Its Victims* (February 14, 2020), it was reported that the "Maze" hacker group was purportedly exfiltrating data before locking victims out of their networks, and if the victims don't pay multi-million dollar ransoms, the group publicizes the victims and posts their sensitive data. At least five law firms were claimed victims.

ii. The article reiterated that "[c]ybersecurity experts have long considered the legal industry attractive to hackers because of the bevy of sensitive data attorneys hold, from medical data to trade secrets."

iii. Posting confidential legal information creates difficult ethical notification issues and in fact, in October 2018, the ABA unveiled ethics requirements saying that attorneys should tell current clients about data breaches. In another report about Maze, a threat analyst with Ensisoft, a cybersecurity company, was quoted as saying that the hackers infiltrate systems using email with malicious attachments crafted in such a way that lawyers are likely to open them.

VI. *Don't Assume Your Insurance Covers Email "Phishing" Scams:*

a. *Quality Plus Services, Inc. v. National Union Fire Insurance Company of Pittsburgh, PA*, Case No. 3:18cv454 (E.D. PA January 15, 2020).

i. Summary of Facts:

1. Many insurance policies contain exclusions and limitations that may be difficult to meet. For example, a Quality Plus employee received numerous emails from what turned out to be one or more crooks

who posed as another Quality Plus employee and duped the legitimate employee into making five wire transfers totaling $1.6 million into accounts in Mexico and Hong Kong.

2. National Union Fire Insurance contested its obligation to cover the loss, citing certain territorial limitations in the policy and damages caps per occurrence.

ii. Court's Ruling:

1. The Court denied summary judgment motions because of factual disputes as to the location from which the sender or senders transmitted the emails, and the number of people who sent the emails (and thus number of occurrences), thereby requiring a trial on the merits. So, while the policy contained a funds transfer fraud provision that appeared to cover precisely this kind of loss, various other provisions in the policy made coverage a litigation issue, i.e., expensive to determine.
2. Moreover, the fact issues identified by the Court, where the emails originated and how many different people sent them, are both issues that can be very difficult to prove in cases of phishing.

VII. *Cybersecurity is Not Just a Small Firm Issue:*

a. Wilson Elser Took Network Offline After Cyber 'Incident,' Law360 (February 10, 2020).

i. As reported in Law360, the 800-lawyer firm Wilson Elser Moskowitz Edelman & Dicker recently had to take its entire network offline for several days, after a recent cybersecurity incident. While it appears that no client data was compromised, the incident disrupted the phone and email systems of the firm.

VIII. *Malpractice Suit Over Hacking:*

a. Clark Hill Can't Duck $50M Malpractice Suit Over Hacked Docs, Law360, (February 21, 2020).

i. As recently reported in Law360, a Chinese entrepreneur may proceed with most of $50 million malpractice suit against Clark Hill PLC because he submitted sufficient evidence to suggest the firm breached its contract and fiduciary duty by mishandling his personal information in an asylum bid and failing to protect the data from hackers. Guo Wengui's personal information was accessed from the firm's website and published on social media. After the attack, the firm withdrew its representation of Mr. Wengui.

People interested in the impact of technology on the legal profession are encouraged to review ABI's excellent materials from the 2020 Caribbean Insolvency Symposium entitled *The Impact of Technology on the Legal Profession, and Ethical Considerations to Avoid Malpractice*.

Lawyers and Law Firms as Bankruptcy Debtors

I. *Whose Client Is It Anyway?:*

a. Diamond v. Hogan Lovells et al., Case No. 18-SP-218 (D.C. Circuit, February 13, 2020).

i. Summary of Facts:

1. When a law firm files for bankruptcy, there has been litigation about fees generated in matters initiated at the bankrupt firm and transferred to subsequent firms.
2. The District of Columbia Court of Appeals answered certified questions by the Ninth Circuit, reiterating that under applicable rules of attorney-client relationships and professional responsibility, the *clients* own the matters, not the law firms.
3. The Howry firm voted to dissolve, amending its partnership agreement at the time to provide that the partnership had no claim to clients, cases or matters ongoing at the time of dissolution, other than entitlement to collections for work performed prior to the dissolution. It subsequently filed for bankruptcy in California, and the Trustee filed claims against the firms that hired former Howrey partners, seeking the profits earned from matters begun at Howrey on an unjust enrichment theory and asserting that the waiver amendment in the partnership agreement was a fraudulent transfer.

ii. Court's Ruling:

1. On a motion to dismiss, the bankruptcy court allowed the claims to proceed but the district court reversed, concluding that "new" matters, including existing hourly-billed matters, were not owned by the firm.
2. The Ninth Circuit concluded DC law applied, and so certified questions to the DC Circuit. The DC Circuit said that hourly-billed client matters are not "property" of the law firm, given that a client has an almost unfettered right to choose or discharge counsel, such that the firm has no more than a "unilateral expectation" to future fees.
3. When a partner leaves, the partner owes no continued duty to the firm to account for new profits earned on hourly-billed matters that started at the former firm. A dissolved firm has no interest in profits earned on hourly-billed client matters following dissolution. *Diamond v. Hogan Lovells et al.,* Case No. 18-SP-218 (D.C. Circuit, February 13, 2020). The case referred to decisions in New York and California, which also concluded that hourly-billed matters are not law firm property, *In re Thelen LLP*, 24 N.Y.3d 16 (2014); *Heller Ehrman LLP v. Davis Wright Tremaine LLP*, 411 P.3d 548 (Ca. 2018). The Court also noted that the "unfinished business rule" could apply only to certain contingency fee matters involving

dissolved partnerships, though revisions to the partnership statute made it unclear whether the result would be the same in subsequent cases.

II. *Attorneys Should Know Better:*

a. *In re Boland*, 946 F.3d 335 (6th Cir. 2020).

i. Summary of Facts:

1. Attorney Dean Bolan was a lawyer and expert witness in child pornography cases. While serving as a technology expert for defendants in Oklahoma and Ohio, Boland attempted to create doubt as to the claims against them by creating "before-and after" exhibits. Using stock photos founds online of two girls, Boland morphed the "before" photos into "after" exhibits, purporting to show the girls engaged in sex acts. The argument was that since these were easy to create, then so too were the materials in defendants' hands, thereby showing there's no way of knowing whether real children are depicted in pornography found on the internet.
2. Boland tried his exhibits in an Oklahoma federal court and after the prosecution asserted that they were actionable pornography, the Judge told Boland to delete the images. He didn't and instead, sent his computer to Ohio, where he then used them as exhibits in testimony. Federal prosecutors in Ohio threatened charges, and Boland entered into a pre-trial diversion agreement in lieu of prosecution in which he admitted that he violated federal law by morphing the images. Meanwhile, the prosecutors identified the girls in the photos, "Doe" and "Roe," and told their parents, who then sued Boland under the civil-remedy provision of the federal child pornography statute, resulting in awards of $150,000 each against Boland based upon his admissions and the statutory minimum damages. After losing three challenges to the judgment in the Sixth Circuit Court of Appeals, Boland tried to avoid the liability by filing chapter 7.

ii. Court's Ruling:

1. Doe and Roe objected to discharge of the debt under section 523(a)(6) for willful and malicious injury, and the Bankruptcy Court overruled their objection but the BAP reversed.
2. The Sixth Circuit affirmed the BAP and held that the judgment was not dischargeable. In particular, the Court rejected Boland's arguments that he did not know *for sure* that the photos depicted real minors, emphasizing that "federal courts don't dabble in metaphysics."
3. Further, the Court questioned whether anything Boland said could have made a difference because of the irrefutable evidence that

Boland knew he morphed images of real minors and thereby, willfully and maliciously injured Doe and Roe.

4. His allegation that he did not intend to harm children was not relevant because the law presumes that such acts cause injury, and as a lawyer and expert on such matters who advertised recoveries under the state statute, he certainly knew it.

III. *IOLA/IOLTA Accounts Are Subject to Review and The Rules of Professional Conduct Still Apply*:

a. Palisades Tickets, Inc. v. Daffner (In re Daffner), Case No. 8-18-75747-reg (Bankr. E.D.N.Y. Jan. 13, 2020)

i. Summary of Facts:

1. Attorney Daffner represented a group of clients (the "Judgment Debtors") after Palisades Tickets obtained judgment against them. While the Judgment Debtors were long time clients, Daffner did not represent them in the litigation leading to the judgment. During the course of his representation (which was the same timeframe in which Palisades Tickets was trying to collection against the Judgment Debtors), and as he had for many years prior to the litigation in question, Daffner received funds from the Judgment Debtors that he placed in his IOLA account, which he then disbursed to them, to third parties and to himself at the Judgment Debtors' direction.
2. Palisades Tickets filed a state court suit against Daffner under New York's Debtor and Creditor Law ("DCL") with respect to the Judgment Debtors' funds, alleging that Daffner used his IOLA account to conceal assets, conspired with the Judgment Debtors to hinder collection efforts, and received fraudulent transfers.
3. Following motion practice and the striking of his answer as a discovery sanction, Daffner filed a chapter 7. Palisades Tickets filed an adversary proceeding for damages for actual and constructive fraud under the DCL and a request that the damages be nondischargeable under §§ 523(a)(4) and 523(a)(6).

ii. Court's Ruling:

1. In post-trial briefing, Palisades Tickets argued that Daffner's status as an attorney and use of his IOLA account (as opposed to a personal account) was irrelevant, but the Court disagreed: "the record before the Court establishes that the Defendant acted at all times as an attorney on behalf of his clients, which is *pivotal* in determining whether the Defendant violated the relevant DCL sections relied upon by Plaintiff." (emphasis supplied).
2. The Court reviewed the NY RPC, recognizing a lawyer's obligations to represent a client and abide by the client's decisions,

as well as promptly pay or deliver the client's funds in the lawyer's possession. Since the funds in Daffner's IOLA account were property of the Judgment Debtors and were not subject to a lien claim by Palisades Tickets, Palisades Tickets did not establish that it was entitled to the funds. Instead, Daffner was bound by the RPC to abide by the Judgment Debtors' decisions with respect to the funds in the IOLA account and in fact, he had an "affirmative duty" to adhere to their instructions.

3. Similarly, since the funds were in the IOLA account, Daffner did not have sufficient dominion and control over then and accordingly, he was not a transferee under the DCL. The Court concluded that Palisades Tickets was not a creditor of Daffner since it had no valid claim against him.
    a. It should be noted, as Bill Rochelle did in his summary of the case, that this was a circumstance where the creditor failed to prove the elements of its claim. The result certainly could have been different if the creditor had relied on testimony of the Judgment Debtors rather than just attorney Daffner.
    b. As the Court noted, "[w]hile it is not inconceivable that an attorney could venture beyond these duties to conspire with his or her client to injure the client's creditor, the record cannot support a finding that such a circumstance exists here." From the sheer number of transactions, it certainly seemed like the Judgment Debtors were utilizing the lawyer's trust account as a bank in order to avoid collection efforts by the creditor, which suggests that the lawyer may not have been acting appropriately. But the creditor did not produce that evidence.

Do's, Don'ts and Best Practices in Fee Applications

I. *You Can't Bill Time to Client Files After You're Fired:*

a. Nnaka v. Mejia, No. 01-18-00779-CV, 2020 Tex. App. LEXIS 753, at 20 (Tex. App Jan. 28, 2020)
   i. Summary of Facts:
      1. While it isn't a bankruptcy case, this case does demonstrate some "don'ts" in billing practices. Attorney Kenneth Nnaka was retained by Blanca Mejia for a personal injury case, but was fired about 6 weeks later. After the case was filed, the Texas trial court held a hearing on Nnaka's request for fees and ruled that Nnaka was entitled to no fees. The court also issued a show cause as to why he and his paralegal should not be sanctioned or held in contempt, stemming from the filed fee statement.
   ii. Court's Ruling:
      1. After the show cause hearing, the Court ordered Nnaka to attend a 4.0 hour ethics CLE about billing practices, provide proof of attendance, and pay a $2,500 sanction.
      2. On appeal, the Texas Court of Appeal recognized the Court's inherent power to sanction for an abuse of the judicial process that may not be covered by any specific rule or statute, which incidentally, sounds like the Bankruptcy Court's inherent power.
      3. In affirming the sanction, the Court noted that among other things, Nnaka billed for services he did not perform and overstated time he spent performing services, and by submitting the fee statement, knowingly made false statements of material fact to the Court. The fee statement contained significant discrepancies and inconsistencies, such as eleven hours of work allegedly performed after Mejia terminated his representation. He also billed three hours of time at the rate of $425 an hour to create the fee statement, but testified that his secretary actually created it and he did not vet it very well. Numerous entries were not supported by any evidence such as an activity log or calendar, and Nnaka admitted some dates were wrong. The Court also noted that Nnaka billed Mejia for a hearing on a day that no hearing had been held.

II. *Do Consider Seeking Fees on an Hourly Basis for Chapter 7 Work, When the Case is Subsequently Converted to Chapter 13:*

a. In re Laronda Freeman, Case no. 18-50250 (Bankr. E.D. Mich., November 4, 2019).
   i. Summary of Facts:

1. In the Eastern District of Michigan, Debtor's counsel filed a chapter 7 case, accepting a flat fee for the representation. Counsel then vigorously defended against the US Trustee's motion to dismiss or convert the case under section 707(b), which ultimately concluded when the Debtor filed a motion to convert to chapter 13. Counsel's new Rule 2016(b) statement provided that the Debtor agreed to pay a flat fee, but that fees could exceed this sum, based on hourly rate billing, if the Debtor's attorney filed a fee application and it was granted. After plan confirmation, Debtor's counsel sought fees incurred on an hourly basis for work performed during the chapter 7 case as well as the chapter 13 case.

ii. Court's Ruling:
   1. The Court concluded that notwithstanding the Supreme Court's decision in *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004) prohibiting post-petition payment of chapter 7 debtor's attorneys' fees, the Court did have authority under 11 U.S.C. § 330(a)(4)(B) to allow some of the chapter 7 fees, following *In re Genatossio*, 538 B.R. 615 (Bankr. D.Mass. 2015).
   2. The Court read 330(a)(4)(B) to allow fees for work "in connection with" the chapter 13 phase of the case, *i.e.* that the fees incurred in opposing the U.S. Trustee's motion to dismiss or convert were not incurred "in connection with" the chapter 13 case. Only those pre-conversion fees incurred in the motion to convert the case to chapter 13, and in furtherance of the chapter 13, were allowed. It should be noted that the Court found no reason to require the Debtor's counsel to refund any of the flat fee paid for the chapter 7 case.

III. Make Sure You Sufficiently Describe Your Tasks:

a. U.S. ex re. Bahnsen v. Boston Scientific Neuromodulation Corporation, Case no. 2:11-cv-1210 (D.N.J. February 14, 2020).
   i. Summary of Facts:
      1. In a non-bankruptcy but still informative decision, Magistrate Judge Mannion from New Jersey recently reminded everyone of the important of sufficiently describing the task completed when seeking approval for attorney's fees.
      2. Attorneys for the Plaintiff filed a motion seeking attorneys' fees and costs in the amount of $7,621,908.82 after litigating the case for eight years and reaching a settlement.
   ii. Court's Ruling:
      1. In determining the reasonableness of the attorneys' fees request, Magistrate Judge Mannion from New Jersey recently reminded

everyone that a fee application for "reviewing documents" is too vague to support a finding of reasonable fees.

2. The Court specifically called to question various entries, especially given the amount of time that the firm's partners spent on them. For example, the Court observed that 172 entries with the exact description "Reviewing documents" and no more, amounting to 918.5 hours of time. Notably, a partner who billed at $1,050 per hour, had 42 such entries amounting to 330.5 hours. The attorney sometimes used only this description for 8 hours per day, every day, for week-long stretches.
3. "Although such vague billing is occasionally acceptable for junior associate performing initial document review, such descriptions are nowhere near detailed enough for the court to review the reasonableness of the hours and partners and senior associates." It is not reasonable, however, for senior attorneys to be performing the type of initial document review that does not warrant further description.
4. Accordingly, the Court recommended disallowing about $525,000 of the $6.7 million requested on that basis.

IV. Don't Tilt At Windmills:

a. In re Central Processing Services, LLC, Case no. 19-43217 (Bankr. E.D. Mich., December 3, 2019).
   i. Summary of Facts:
      1. Following dismissal of a chapter 11 case and upon the Debtor's professionals' fees applications, the IRS objected, contending that some of the services were not necessary to the administration of, nor beneficial to, the Debtor's case as required by § 330(a)(3)(C), nor were they reasonably likely to benefit the Debtor's estate, as required by § 330(a)(4)(A)(ii)(I).
      2. Essentially, the IRS argued that the chapter 11 case was doomed to failure from the start and that fees incurred by the debtor's professionals after a certain point in time should be disallowed as a result.
      3. The professionals disagreed, arguing that they should be compensated for their services that were necessary to the administration of the case, and because they had a reasonable belief that the Debtor could reorganize for a longer period of time than the IRS.
   ii. Court's Ruling:
      1. The Court acknowledged that "[t]here are legitimate questions in a failed Chapter 11 case like this one as to whether the services of the

professionals on behalf of the debtor in possession were truly necessary or beneficial to the administration of the case at the time they were being performed, and whether those services were reasonably likely to benefit the debtor's estate during the time that they were performed." While these questions must be answered by reference to the time that the services were rendered, not in hindsight, the Court recognized that the services must relate to a realistically obtainable goal, noting that "[f]ees generated in tilting at windmills will be disallowed."

2. The Court then reviewed the history of the case critically, assessing at what point in time the Debtor's professionals should have known that the case was doomed to fail and concluded it was when the Debtor's effort to obtain a new loan with which to pay outstanding post-petition withholding taxes failed and the IRS announced it was unwilling to cooperate further.
3. The Court then reviewed the fees to see whether the professionals cut back their services at that point, but they did not and instead, continued to litigate certain issues pertaining to a reorganization plan that clearly was never going to occur. The Court denied those fees.

V. Results Matter:

a. In re Village Apothecary, Inc., Case No. 15-56003 (Bankr. E.D. Mich. December 3, 2019).
   i. Summary of Facts:
      1. A chapter 7 trustee and his special counsel recover about $40,000 in a case, and then filed fee applications for more than that, but then agreed to reduce their requests to the sums available.
   ii. Court's Ruling:
      1. The Court did the lodestar analysis, finding that the hourly rates and hours spent were both reasonable, but then considered the various factors that support discretionary divergence from the lodestar result. Focusing on the results obtained, the Court reduced outside counsel's fees by 50%, saying that "[t]he Court must remember that a critical function of the Chapter 7 Trustee and the professionals employed by the Chapter 7 Trustee is to produce results for the creditors in the case – to maximize distributions that are paid to creditors."
      2. The Court also considered billing judgment to reduce fees where the results are not what was hoped, to avoid resulting in fees that are disproportionately high compared to the results obtained. Added insult to injury: the Court initially reduced the fees by 50% in June, 2018, counsel appealed and the District Court reversed, directing the

Bankruptcy Court to expressly consider the lodestar before exercising discretion, and the Bankruptcy Court did so with the exact same result achieved nearly two years earlier. "In doing so, this Court chooses not to ignore the 'results obtained' by the Chapter 7 Trustee and his professionals, and chooses not to approve fees that would leave the creditors with nothing."

VI. Fee Application Must be filed Timely if you want to avoid forfeiting your attorney's fees:

a. Cripps v. Foley (In re Cripps), 566 BR 172 (WD Mich 2017).
   i. Summary of Facts:
      1. The Dietrich Law Firm (the "Law Firm") presented debtors in a chapter 13 case. The chapter 13 plan provided for payment of secured claims over six months. Upon the completion under the chapter 13 plan, the Trustee filed a report of the plan completion. Two days after the Trustee's report was filed, the Law Firm filed a final application seeking additional fees in the amount of $686.60.
      2. The Trustee filed an objection to the fee application contending that the Law Firm should not be award an administrative claim due to the untimely filing of the fee application and the imminent entry of the discharge.
      3. During the pendency of the adjudication of the fee application, the bankruptcy court entered an order of discharge.
   ii. Court's Ruling:
      1. The Bankruptcy Court issued an opinion approving in part and denying in part the fee application. The court awarded compensation in the amount of $642.60 pursuant to 11 U.S.C. § 330(a), but determined that the compensation awarded shall not be paid as an administrative expense under 11 U.S.C. § 503, and was discharged pursuant to 11 U.S.C. §§ 524(a) and 1328(a). The Law Firm appealed the Bankruptcy Court's decision.
      2. The Michigan Western District Court affirmed the Bankruptcy Court's decision. The District Court determined that while there is no deadline for a professional to seek an award of compensation, there is an implicit deadline that results from various sections of chapter 13 under the Bankruptcy Code, "when considered together, require that a request for an administrative expense be made, at the latest, prior to completion of plan payments."
      3. Due untimeliness of fee application and to the completion of the chapter 13 plan, the administrative fees could not be provided throughout the life of the plan.

4. Additionally, the District Court determined that the attorneys' fees did not survive discharge as there sound reasoning that attorneys' fees raising in chapter 13 case do not constitute post-petition debt.

b. In re ASR 2401 Fountainview, LLC, No. 14-35323-H3-11, 2015 Bankr LEXIS 4033 (Bankr SD Tex Nov. 30, 2015).
   i. Summary of Facts:
      1. The Bankruptcy Court approved the employment of the law firm of Okin & Adams LLP (the "Applicant") as counsel of various debtors in related chapter 11 cases. The Debtors successfully received a confirmation order for their chapter 11 plan. The confirmed plan required all request for professional fees to be filed no later than 30 days from the effective date of the Plan. The Applicant's fee application was untimely filed and various objections were filed by parties-in-interest.
      2. At the hearing the Applicant testified that the filing deadline was incorrectly calendared resulting in the late filing. The Applicant further agreed to discount its fees to ensure that other claims were paid in full pursuant to the distribution provided by the plan.
   ii. Court's Ruling:
      1. While relying on Bankruptcy Rule 9006(b)(1), the Bankruptcy Court allowed for the late filing finding that the Applications failure to act was the result of excusable neglect.
      2. The Bankruptcy Court determined that application was filed no more than 20 days after the date set forth in the plan and that there was no prejudice to adverse parties in light of the Applicant's wiliness to discount its fees.
      3. The Bankruptcy Court determined that the Applicant acted in good faith and granted the fee application, subject to the limitation that all other claims receive full distribution to which they are entitled under the plan.

VII. Areas to Watch Out For:

a. In a recent Law360 article, Law360, *3 Places Overbilling May Be Lurking*, December 31, 2019, the authors worked with several professional fee auditors to identify three overbilling trouble spots to watch out for, and while they are not specific to bankruptcy cases, they are nonetheless good reminders.
   i. First, be careful about too many internal meetings.
      1. Pros suggest that a good rule of thumb is that internal meetings should represent 5% or less of all time billed, since anything more reasonably invites questions about whether the client is paying to have billers 'listen in' rather than push the client's case forward.

ii. Second, watch out for billing by partners working with junior lawyers in supervisory roles and firm-business kinds of tasks that aren't billable.
    1. Things like training, assigning and proofing should be avoided. "There is a trust factor here, and there is also good word choice," said one expert, "And if I ever see the words 'ponder' or 'consider,' well, that sounds to me like something you should be doing in the shower."

iii. Third, avoid block billing, or more specifically, "miniblock" billing.
    1. Where the listed tasks are all obviously related, it's fine, but be careful about entries that group more than three tasks in one block or bill for large chunks of time. Experts suggest that you "[t]ake the few extra seconds [to] [c]ome up with some words that describe what you really did…. Don't put a copy-and-paste description on the time sheet." Law360, *3 Places Overbilling May Be Lurking*, December 31, 2019.

Faculty

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Hon. James M. Carr is a U.S. Bankruptcy Judge for the Southern District of Indiana in Indianapolis, appointed in 2013. Previously, he was a partner at Faegre Baker Daniels LLP and had been in private practice for 38 years, focusing on the representation of business debtors and creditors in chapter 11 cases, financial restructurings and commercial litigation. Judge Carr is Board Certified in Business Bankruptcy Law by the American Board of Certification and is a Fellow in the American College of Bankruptcy and the American Bar Foundation. Judge Carr was named in *The Best Lawyers in America* from 1987-2012 in Bankruptcy and Creditor Rights, Insolvency and Reorganization Law and Bankruptcy Litigation, and has been a panelist and chair of many seminars on bankruptcy, reorganization, creditor rights and lender liability sponsored by the Indiana Continuing Legal Education Forum, Federal Bar Association and Indiana Bankers Association. He is also an adjunct professor at the Indiana University Maurer School of Law, served on the law school's Board of Visitors, and is a past member and president of its Alumni Board. Judge Carr received his B.A. in English from Indiana University in 1972 and his J.D. *magna cum laude* in 1975 from the Indiana University Maurer School of Law in Bloomington, where he was a member of the Order of the Coif.

Patricia Brown Fugée is a partner in the Perrysburg, Ohio, office of FisherBroyles, LLP and chairs its Bankruptcy, Financial Restructuring & Reorganization Practice Group. She focuses her practice on all aspects of creditors' rights law, including real estate lending transactions, bankruptcy, foreclosure, workout and commercial litigation matters. In lending matters, Ms. Fugée serves on the firm's opinion team, providing mortgage-enforceability opinions and bankruptcy opinions. In bankruptcy matters, she represents secured and unsecured creditors, landlords, asset-buyers and trustees, including chapter 7, 13 and 11 trustees. Ms. Fugée's work spans numerous industries, including manufacturing, hotel and hospitality, health care and medical facilities, and retail and commercial real estate. She represents parties such as banks and financial institutions, borrowers, debt-buyers, asset-buyers, landlords and trade creditors in various proceedings, including bankruptcy cases, foreclosures, workouts and receiverships. Her clients have also included bankruptcy trustees, a securities trustee under the Securities Investor Protection Act, state and federal receivers, and debtors. As part of her practice, Ms. Fugée represents clients in the investigation, prosecution and recovery of assets where fraudulent activity is involved, including Ponzi schemes, fraudulent transfers, bankruptcy fraud, bank fraud and similar conduct, as well as discharge litigation. In commercial litigation matters, she has experience

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Hon. David W. Hercher is a U.S. Bankruptcy Judge in the District of Oregon in Portland. Prior to taking the bench in 2017, he was an attorney and partner at Miller Nash LLP in both their Portland and Seattle offices. Judge Hercher received his B.A. from the University of Oregon in 1977 and his J.D. from the University of California at Berkeley School of Law in 1981.

Hon. Edward L. Morris is a U.S. Bankruptcy Judge for the Northern District of Texas in Fort Worth, appointed on Nov. 22, 2018. He received his B.A. in 1989 from the University of Texas at Austin and his J.D. in 1993 from the University of Houston Law Center.

Hon. James J. Tancredi is a U.S. Bankruptcy Judge for the District of Connecticut in Hartford, sworn in on Sept. 1, 2016. Prior to his appointment to the bench, he was a commercial litigation and business restructuring partner at Day Pitney, LLP (f/k/a Day Berry & Howard), where, as a business litigator and commercial restructuring lawyer, he co-founded the firm's regional and national bankruptcy practice. During his 37 years in private practice, he represented financial institutions and other major constituents in a broad range of prominent insolvency related proceedings pending in courts on the Amtrak corridor. During his career, Judge Tancredi frequently lectured at the University of Connecticut School of Law and at bar association Continuing Legal Education programs on a broad range of commercial, real estate, and restructuring issues and strategies. His professional and bar association activities included service as president and director of the Hartford County Bar Association and the Connecticut Turnaround Management Association. He also has been an active member of the Connecticut Bar Association, American Bar Association and the American Trial Lawyers Association, and he was a director of the Hartford County Bar Foundation and Connecticut Mental Health Association. He is also a Connecticut Bar Foundation James W. Cooper Fellow. Judge Tancredi has written widely about business restructuring issues and co-authored the Connecticut chapter in *Strategic Alternatives for and Against Distressed Businesses*, 2016 edition, published by Thomson Reuters. He received his B.A. *magna cum laude* in urban studies and political science from the College of the Holy Cross in Worcester, Mass., and his J.D. *magna cum laude* from the University of Connecticut School of Law.

Hon. Stephen D. Wheelis is a U.S. Bankruptcy Judge for the Western District of Louisiana in Alexandria and Monroe, appointed on April 25, 2019. Prior to his appointment, he was a shareholder with Wheelis & Rozanski, APLC in Alexandria, La., for more than 20 years and initially practiced as a partner with Provosty, Sadler & deLaunay for 14 years prior to forming Wheelis & Rozanski. His primary practice areas included the representation of creditors and trustees in all bankruptcy chapters,

banking, business and commercial law, and litigation and appeals. Prior to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Judge Wheelis represented debtors in chapter 11 reorganizations and chapter 7 matters. He actively practiced bankruptcy law throughout all districts of Louisiana and in many other states *pro hac vice*, having appeared in bankruptcy courts on behalf of clients in more than 25,000 cases since 1985. During his 33 years in private practice, he appeared before 15 Louisiana bankruptcy judges. He previously served as an adjunct professor for paralegal studies at Northwestern State University and Louisiana College, and he taught courses for the American Institute of Banking. Judge Wheelis is a board-certified business bankruptcy specialist, certified by the Louisiana Supreme Court and the American Board of Certification (ABC) on Jan. 1, 1997. He served from 2011-19 on ABC's board of directors and on its Standards and Faculty Committees. Judge Wheelis received his B.A. in legal studies from Northeast Louisiana University (now University of Louisiana Monroe) in 1981 and his J.D. in 1985 from Tulane University School of Law.