insolvency2020

Oct. 13, 2020, 5:00-6:15 p.m.

Views from the Bench: Ethics

Hon. Kevin J. Carey (ret.); Hogan Lovells US LLP
Hon. Rosemary Gambardella; U.S. Bankruptcy Court (D. N.J.)
Hon. Laurel M. Isicoff; U.S. Bankruptcy Court (S.D. Fla.)

Educational Materials

ABI VIEWS FROM THE BENCH: ETHICS -- FEES

Honorable Rosemary Gambardella & Honorable Laurel Isicoff

Moderated by: Hon. Kevin Carey (Ret.)

Materials prepared by Baraka Nasari, Associate, Hogan Lovells US LLP

Rules

Rule 1.3: Diligence

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

While the rule itself is short, the expectations it places upon attorneys is not. This rule requires attorneys to be diligent in handling their matters. Lawyers must be zealous advocates for their clients, pursuing whatever strategies they think are best through a combination of professional discretion and discussions with the clients to strive for their client's preferred outcome. This rule does not, however, require attorneys to be attack dogs or use whatever strategies are necessary to win at all costs; strategic discretion and a general sense of civility that is expected in the profession should dissuade such tactics. Diligence also includes proper case-load management to ensure that each matter an attorney is working on can be handled competently.

Promptness is also not only a key virtue for attorneys to have, but it is also a necessary attribute to prevent tension and other disputes with your clients, other attorneys and the court. Clients will expect reasonably prompt replies to their questions; if those questions will require extensive research or the attorney is handling other matters at the time, a simple holdover email letting the client know the attorney has seen their request and is looking into the matter will go a long way to assuaging any concerns the client might have. The same principle applies to communications with other attorneys, whether co-counsel or opposing counsel. Finally, and arguably most importantly, it is critical that attorneys keep track of court deadlines and ensure that they are able to meet those deadlines. Failing to meet a court deadline, such as a bar date or an objection deadline, can greatly harm a client's legal position in a case and potentially destroy any claims the client might have. If an attorney fears that he or she will be unable to meet a court deadline, it is imperative that that attorney either brings in additional attorneys to help meet that deadline or ask opposing counsel and the court for a reasonable extension to the deadline.

Rule 1.5: Fees

- Rule 1.5(a): A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
    - the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
    - the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
    - the fee customarily charged in the locality for similar legal services;
    - the amount involved and the results obtained;
    - the time limitations imposed by the client or by the circumstances;
    - the nature and length of the professional relationship with the client;
    - the experience, reputation, and ability of the lawyer or lawyers performing the services; and
    - whether the fee is fixed or contingent.

The eight factors described in the above rule are not exclusive. Neither will each factor be relevant for each case. Judges must look at the totality of the circumstances in their cases in order to decide which facts and factors must be taken into account to determine if attorneys' fees and expenses are reasonable.

- Rule 1.5(b): The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

A written document describing the services that will be provided, the rate or total amount of the fees and the scope of expenses the client will be responsible for reimbursing reduces the possibility of misunderstanding, disputes and litigation.

- Rule 1.5(c): A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such

expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Outside of the Rules of Professional Conduct, there might be additional state or local rules that guide or limit contingency fees. Attorneys should be sure to have an understanding of any such guidelines before offering contingency fees to a client.

- Rule 1.5(d): A lawyer shall not enter into an arrangement for, charge, or collect:
    - any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
    - a contingent fee for representing a defendant in a criminal case.

- Rule 1.5(e): A division of a fee between lawyers who are not in the same firm may be made only if:
    - the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
    - the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
    - the total fee is reasonable.

Fee divisions are most often seen in instances where one lawyer could not serve the client to the adequate level of representation given the issues that have arisen, such as when a trial specialist or some other specific issue of fact or law must be handled in a way that the referring lawyer is not able to alone. The client must be aware of the additional counsel, the structure of the fee division and must signal their consent in writing.

Rule 1.7 Conflict of Interest: Current Clients

- Rule 1.7(a): Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
    - the representation of one client will be directly adverse to another client; or

- there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Material limitation occurs when lawyers are restricted in their ability to recommend or carry out courses of action for their client due to their other responsibilities. If a lawyer represent multiple parties where a settlement is being offered with different terms to the different parties, the lawyer is likely to be materially limited in recommended positions to take because of the lawyer's duty of loyalty to the others.

Personal interests, whether arising out of family, relationships, or employment prospects, must be carefully avoided. In some instances informed consent can overcome these conflicts, in others representation is explicitly prohibited.

- Rule 1.7(b): Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
  - the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
  - the representation is not prohibited by law;
  - the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
  - each affected client gives informed consent, confirmed in writing.

Informed consent requires that any and all affected clients be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have negative effects on the interests of that client. A client who has given informed consent may revoke the consent and terminate the attorney-client relationship at any time.

Rule 3.3: Candor Toward the Tribunal

- Rule 3.3(a): A lawyer shall not knowingly:
  - make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
  - fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
  - offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer

> comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

While lawyers are mandated to zealously advocate for their clients, there are limits to that advocacy. Lawyers cannot make false statements or fail to correct a previously made false statement. Lawyers also are obligated to disclose to the court adverse authority in the controlling jurisdiction, though that obligation does not extend to fully laying out the weaknesses of their arguments. Finally, there is a prohibition on lawyers offering evidence that lawyer knows to be false. There is however a series of caveats on that final sub-rule. If a lawyer only has an inference or reasonable belief that the evidence is false it can still be offered into evidence; only the explicit knowledge that the evidence is false precludes its presentation. If a portion of a witness's testimony will be false, the witness can be called to testify but the lawyer should not ask questions the lawyer knows would solicit the false testimony.

- Rule 3.3(b): A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

- Rule 3.3(c): The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

- Rule 3.3(d): In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Since ex parte proceedings do not have all parties present to advocate for their clients' positions, the lawyers present have additional obligations. Since an equitable and just decision is still the aim of ex parte proceedings, the lawyer for the represented party at the hearing is obligated to disclose any known facts that the judge might need to make an informed decision, even if those facts are adverse to their client's position.

Rule 3.3 requires remedial measures be taken if false statements or evidence is presented to the court. One first remedial effort if a false statement is given is to seek to get the client or witness's consent to withdraw or correct the false statement. If that fails or the person who presented the false statement refuses to correct the statement, then disclosure to the court or withdrawal of representation may be necessary.

Rule 4.1: Truthfulness in Statements to Others

- Rule: In the course of representing a client a lawyer shall not knowingly:
    - make a false statement of material fact or law to a third person; or
    - fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Lawyers are required to be truthful with dealing with third parties on a client's behalf and cannot make false statements of material fact. All statements do not qualify for this, estimates of value and other points of negotiation are generally accepted as one such exception.

If a client asks for assistance in conduct the lawyer knows to be criminal or fraudulent, the lawyer is not allowed to counsel the client in this. Remedies for such a request include withdrawing from representation and sometimes even disclosing information related to the representation if necessary to avoid the appearance of having assisted the client's illegal actions.

Rule 7.1: Communications Concerning a Lawyer's Services

- Rule: A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

This rule prohibits lawyers from misleading or lying about a lawyer's services, including in advertising. This includes lawyers holding themselves out as practicing together in a firm when they are not one, using the name of a lawyer holding public office during a substantial period where that lawyer is not actively practicing with the firm and presenting prior results in a way that might lead reasonable persons to form an unjustified expectation that the same results could be obtained for them or other clients in similar matters.

As a general principle, disclaimers or qualifying language should be used in instances when language could be construed as misleading.

Rule 7.3: Solicitation of Clients

- Rule 7.3(a): "Solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

- Rule 7.3(b): A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the contact is with a:

- lawyer;
- person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or
- person who routinely uses for business purposes the type of legal services offered by the lawyer.

"Live person-to person contact" means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection. This does not include billboards, internet advertisements, television commercials, text messages, chat rooms or other methods recipients can easily disregard.

- Rule 7.3(c): A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (b), if:
  - the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
  - the solicitation involves coercion, duress or harassment.

Courts take additional scrutiny regarding coercion, duress or harassment to populations who might be especially vulnerable, such as the disabled or those whose first language is not English.

- Rule 7.3(d): This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.
- Rule 7.3(e): Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Rule 8.4: Misconduct

- Rule: It is professional misconduct for a lawyer to:
  - violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
  - commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
  - engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

- engage in conduct that is prejudicial to the administration of justice;
- state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
- engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Bankruptcy Rule 2014

- Rule 2014(a): An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to §327, §1103, or §1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.
- Rule 2014(b): If, under the Code and this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, or if a named attorney or accountant is employed, any partner, member, or regular associate of the partnership, corporation, or individual may act as attorney or accountant so employed, without further order of the court.

Cases

In re Nestor, 2019 WL 4735833 (Bankr. S.D. FL 2019)

- After the Debtor was removed from handling the estate and an Trustee was appointed, the Court issued an opinion on the fee applications for four different law firms that represented the Debtor after objections from the Trustee and two creditors.
- Regarding the Oppenheim fee application, who was hired as special counsel for litigation, the objections related to the fact that Oppenheim sought compensation for work done before retention despite the application not asking for retention *nunc pro tunc*, that Oppehneim represented the Debtor pre-petition and was paid post-petition for those prepetition obligations without disclosing any of those facts, and that a cross claim it filed was not included in its scope of services.
    - The Court found that the failure of Oppenheim to disclose that it was not disinterested is disqualifying.
    - Since the Oppenheim Employment Application did not request its fees *nunc pro tunc*, it was not compensated for work done before employment was approved.
    - The cross claim fees were allowed as the intent to bring those claims was addressed in an earlier hearing on fees.
- The same cross claim objection was made regarding the Udell fee application, as well as objections based on Udell not seeking court authority prior to filing a lawsuit against Akerman LLP that Udell seeks compensation for and for a breach of obligations to the estate by representing the Debtor's husband.
    - The Court held that an attorney is not entitled to compensation for post-petition services if the employment was not approved by the Court.
    - The Court held that the representation of the Debtor's husband was an adverse action to the interests of the bankruptcy estate as it interfered with the Trustee's settlement efforts.
- L&T saw objections based on a series of mistakes made in their employment and retention applications, plan and disclosure statement filings, and other issues with their time as counsel.
    - The Court recognized that L&T was not competent to represent the Debtor but given the positives the firm managed to do in their time as counsel they were still awarded a portion of their fees.

In re NNN 400 Capital Center 16, LLC, Case No. 16-12728 (Bankr. Del. 2016)

- Debtors' counsel Rubin & Rubin faced allegations that the firm (1) entered into an improper fee sharing arrangement with a loan broker pre-petition and failed to disclose the agreement at the time of its retention; (2) filed a false sworn statement with the Court at the time of its retention stating it did not have any fee sharing agreements; (3) failed to seek retention of the same loan broker post-petition; (4) entered into another improper fee

sharing agreement with the loan broker post-petition without disclosure to the Court; (5) caused the Debtor to pay the expenses of the loan broker post-petition without Court approval; (6) failed to disclose at the time of its retention its' pre-petition representation of the Debtors' real estate property manager (and a creditor of the Debtors), a conflict of interest, and a direct violation of its own engagement agreement with the Debtors; and (7) filed a false sworn statement that it did not represent any of the Debtors' creditors pre-petition.

- The Court noted that Rule 2014 requires that professionals disclose all connections and potential connections that could be problematic. Regarding the fee sharing issues, the Court found that Rubin & Rubin violated an affirmative duty to notify the Court of that agreement, and that their fee splitting agreement violated the Rules of Professional Conduct by acquiring an interest adverse to the Debtors.
- As a result of Rubin & Rubin's violations, the Court ordered their disqualification from acting as counsel to the Debtors, the disgorgement of all fees and expenses paid or to be paid to Rubin & Rubin in connection with its representation of the Debtors and the refunding of the Debtors for amounts paid in partial satisfaction of its improper fee sharing arrangement.

In re Universal Building Products, 486 B.R. 650(Bankr. D. Del 2010)

- In this case the Debtors and the US Trustee objected to the Official Unsecured Creditors' Committee applications to retain two law firms as counsel. Through discovery, the Court learned that the law firms and Dr. Liu, an interpreter who had formerly held a proxy for a member of the committee, collaborated in their efforts to obtain the proxies of certain foreign creditors to secure their retention with the committee. After successfully being appointed to the committee, Dr. Liu convinced his fellow members to retain the law firms as committee counsel. However, the parties failed to disclose the full extent of their preexisting relationships with one another, as well as their tactics in procuring committee member proxies.
- The Court relied on Rule 7.3 of the Rules of Professional Conduct, stating that soliciting creditors when there is no professional or close personal relationship is against the Rules of Professional Conduct and subjects the attorney to disqualification as committee counsel. The Court also found violations of Rule 8.4 in the use of third parties to violate the Rules of Professional Conduct.
    - Judge Walrath also provided further recommendations requesting that the US Trustee keep creditors in a separate room from prospective professionals before the committee formation meeting, as well as ament the questionnaire it sends to prospective committee members to include questions regarding whether they were solicited by anyone in connection with the case.

Matter of Coyne, 136 A.D. 3d 176 (2016)

- In this case disciplinary proceedings were opened after the attorney in question made false statements to the court regarding if he was the attorney for the plaintiff in a case, offered inadequate and inconsistent statements to back up that false claim, commenced an action on the plaintiff's behalf without a written retainer agreement, and generated a retainer agreement later and backdated it.
- The Court found his actions to be in violation of rules 3.3 and 8.4 and handed down a one-year suspension.

Faculty

Hon. Kevin J. Carey is a partner in Hogan Lovells US LLP's Business Restructuring and Insolvency practice in Philadelphia and a retired bankruptcy judge. He was first appointed to the U.S. Bankruptcy Court for the Eastern District of Pennsylvania in 2001, then in 2005 began service on the U.S. Bankruptcy Court for the District of Delaware (as chief judge from 2008-11). Judge Carey is ABI's Vice President-Membership, a past global chairman of the Turnaround Management Association and an honorary member of the Turnaround, Restructuring and Distressed Investing Hall of Fame. He also is a Fellow of the American College of Bankruptcy and a member of the International Insolvency Institute, and he is a member of the National Conference of Bankruptcy Judges. In addition, he is a part-time adjunct professor in the LL.M. in Bankruptcy program at St. John's University School of Law in New York City. Judge Carey began his legal career in 1979 as law clerk to Bankruptcy Judge Thomas M. Twardowski, then served as clerk of court in the U.S. Bankruptcy Court for the Eastern District of Pennsylvania. He received his B.A. in 1976 from Pennsylvania State University and his J.D. in 1979 from Villanova University School of Law.

Hon. Rosemary Gambardella was sworn in as a U.S. Bankruptcy Judge on May 3, 1985, in the District of New Jersey in Newark, becoming the first woman to serve on its bankruptcy court. From 1980-85, she was senior staff counsel to Hugh M. Leonard, then U.S. Trustee for the Districts of New Jersey and Delaware. Judge Gambardella served as Chief Judge of the U.S. Bankruptcy Court for the District of New Jersey from Aug. 12, 1998, to Aug. 11, 2005. She is a member of the Lawyers Advisory Committee of the U.S. Bankruptcy Court for the District of New Jersey, a member and former president of the New Jersey Bankruptcy Inn of Court, and a member of the Bankruptcy Committee of the Third Circuit Task Force on Equal Treatment in the Courts - Gender Commission. In addition, she is a member of the National Association of Women Judges, the National Conference of Bankruptcy Judges, ABI and the Turnaround Management Association, and is a former member of the Bankruptcy Judges Advisory Group for the Administrative Office of the U.S. Courts. Judge Gambardella was the bankruptcy judge representative to the Judicial Conference of the United States (2009-11) and is a Fellow of the American College of Bankruptcy. She received the Rutgers School of Law – Newark Distinguished Alumni Award in 2012, the New York Institute of Credit Women's Division Judge Cecelia H. Goetz Award, the William J. Brennan, Jr. Award in 2013 and the Conrad B. Duberstein Memorial Award in 2015. Judge Gambardella received her B.A. in history in 1976 from Rutgers University, where she was elected to Phi Beta Kappa, and her J.D. from Rutgers Law School-Newark in 1979, after which she clerked for the late Chief Bankruptcy Judge Vincent J. Commisa from 1979-80.

Hon. Laurel M. Isicoff is Chief Judge for the U.S. Bankruptcy Court for the Southern District of Florida in Miami, initially appointed on Feb. 13, 2006, and named chief judge on Oct. 1, 2016. She is the president of the National Conference of Bankruptcy Judges, and serves on the Judicial Conference Committee on the Administration of the Bankruptcy System. Judge Isicoff is a member of the Pro Bono Committee of the American College of Bankruptcy and immediate past chair of its Judicial Outreach Committee. She also currently serves as judicial chair of the Pro Bono Committee of the Business Law Section of the Florida Bar and is a member of the Florida Bar Standing Committee on Pro Bono. Prior to becoming a judge, Judge Isicoff specialized in commercial bankruptcy, foreclosure and workout matters both as a transactional attorney and litigator for 14 years with the law firm of

Kozyak Tropin & Throckmorton, after practicing for eight years with Squire, Sanders & Dempsey, now known as Squire Patton Boggs. In private practice, she also developed a specialty in SEC receiverships involving Ponzi schemes. After graduating from law school, Judge Isicoff clerked for Hon. Daniel S. Pearson in the Florida Third District Court of Appeals before entering private practice. She is a past president of the Bankruptcy Bar Association (BBA) of the Southern District of Florida, and, until she took the bench, chaired the BBA's Pro Bono Task Force. A former ABI Board member, Judge Isicoff speaks extensively on bankruptcy around the country and is committed to increasing *pro bono* service, diversity in the bankruptcy community and financial literacy. She received her J.D. from the University of Miami School of Law in 1982.