Bankruptcy 2023: Views from the Bench

Ethics

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2023

ABI: VIEWS FROM THE BENCH 2023

ETHICS

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I. Judicial Recusal

The importance of impartiality cannot be overstated; a fair trial is the cornerstone of our legal system. Even the appearance of partiality will taint litigants' faith in a judge's ability to render a fair decision and can ultimately lead to a loss of the public's confidence in the judiciary. Thus, judges are selected, in part, for their capacity to be fair-minded.

Before presiding over their first case, federal judges take an oath affirming their impartiality.[1] Many newly appointed federal judges also attend a training seminar provided by the Federal Judicial Center (affectionately called, "baby judges' school"), where the curriculum includes ethical canons and recusal standards. Essentially, judges with grounds to recuse themselves are expected to do so of their own accord.[2] Accordingly, decisions to recuse are often made *sua sponte*.

Absent a judge's proactive recusal, litigants may move for recusal by showing sufficient facts demonstrating that the judge should have recused himself. The burden of proof for such relief lies with the movant. If the facts warrant recusal, the judge must belatedly do so.

There are several sources of authority for judicial recusal: (1) the Due Process Clause of the Constitution; (2) codes of judicial conduct, such as the *Code of Conduct for United States Judges* (the "Code of Conduct") adopted by the Judicial Conference and applicable to, among others, United State circuit judges, district judges, bankruptcy judges, and magistrate judges; and (3) §§ 47, 144 and 455 of title 28 of the United States Code.

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[1] Specifically, 28 U.S.C. § 453 provides:

> Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, ___ ___, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ___ under the Constitution and laws of the United States. So help me God."

[2] Behind the scenes, federal court administrators and judges review new filings for recusal purposes.

Due Process Clause

The Supreme Court, in reviewing what it referred to as extraordinary facts, held that the Constitution's Due Process Clause provides a basis for judicial recusal where there is a probability of judicial bias and thus an impairment of a litigant's due process rights. *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, 2254 (2009) (disqualifying state supreme court judge because principal of party appealing adverse trial judgment expended very substantial funds to influence election of judge to appellate court). The Court noted that the Due Process Clause was an exceptional basis for disqualifications. *Id.* at 2267.

Code of Conduct

Canon 3(C) of the Code of Conduct[3] provides a list of circumstances in which judges must recuse themselves, notably where the judge's impartiality might be questioned and where the judge has a personal bias or prejudice concerning a party. When faced with the decision of whether to recuse themselves, judges may request an advisory opinion from the Judicial Conference's Committee on Codes of Conduct (the "Judicial Conduct Committee"). However, such opinions are non-binding, and a judge may decline recusal even when it is recommended by the Judicial Conduct Committee.

United States Code

Recusal motions may be made pursuant to § 47 if the appellate judge also served as the trial judge. It provides: "No judge shall hear or determine an appeal from the decision of a case or issue tried by him." 28 U.S.C. § 47.

Motions for recusal may be based on § 144, which provides:

> Whenever a party to any proceeding in a **district court** makes and files a timely and sufficient affidavit that the judge before whom

[3] *See* Appendix B.

> the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 144 (emphasis added).

Notably, due to the qualifier "district court" in §144, it is construed as inapplicable to bankruptcy judges. *In re Krichevsky*, 640 B.R. 524, 537 (Bankr. E.D.N.Y. 2022); *In re Loy*, No. 07–51040, 09–51379, 2011 WL 5118462, at *4 (Bankr. E.D. Va. Oct. 27, 2011); *In re Syntax-Brillian Corp.*, 400 B.R. 21, 25 (Bankr. D. Del. 2009).

Motions to recuse bankruptcy judges are made pursuant to § 455. Federal Rule of Bankruptcy Rule 5004 states that § 455 governs bankruptcy judge disqualification motions. [4]

Section 455 Motions

Motions made pursuant to § 455 are core proceedings. The judge subject to the motion will normally hear the matter and render a decision. However, it is within the judge's discretion to transfer the motion to be heard by another judge. *See USX Corp. v. TIECO, Inc.*, 929 F. Supp.

[4] Fed. R. Bankr. P. 5004 provides:

> (a) Disqualification of Judge. A bankruptcy judge shall be governed by 28 U.S.C. § 455, and disqualified from presiding over the proceeding or contested matter in which the disqualifying circumstances arises or, if appropriate, shall be disqualified from presiding over the case.
>
> (b) Disqualification of Judge from Allowing Compensation. A bankruptcy judge shall be disqualified from allowing compensation to a person who is a relative of the bankruptcy judge or with whom the judge is so connected as to render it improper for the judge to authorize such compensation.

1460 (N.D. Ala. 1996). An order denying the motion for recusal is interlocutory and is reviewed for abuse of discretion. *In re Deepwater Horizon*, 824 F.3d 571, 579-80 (5th Cir. 2016).

Section 455 has two subsections.[5] First, § 455(a) provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Parties to the proceeding may waive a judge's recusal only if such recusal is pursuant to § 455(a). *See* 28 U.S.C. § 455(e).

Second, § 455(b) enumerates five circumstances requiring a judge's recusal, the most oft-cited being 455(b)(1) which provides that a judge shall disqualify himself "where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. § 455(b)(1).

Given the subjectivity of the phrases "[where the judge's] impartiality might reasonably be questioned" in § 455(a) and "[w]here [the judge] has a personal bias or prejudice concerning a party" in § 455(b)(1), recusal decisions are highly fact based. In reviewing the facts, a judge must consider whether an objective, reasonable person would conclude from the facts that the judge's impartiality might reasonably be questioned (and not only whether the judge is in fact impartial). *In re Syntax-Brillian Corp.*400 B.R. 21; *In re Olsen*, 358 B.R. 609 (Bankr. S.D.N.Y. 2007).

The caselaw on recusal is replete with allegations of partiality and bias. Although these motions are often denied, the decisions illustrate when facts might, or might not, support recusal.

For instance, friendship between a judge and counsel does not mandate recusal. *In re Cooke*, 160 B.R. 701, 708 (Bankr. D. Conn. 1993) ("A judge's friendship with a lawyer

[5] *See* Appendix A for full text of § 455.

appearing before the judge does not give rise to an appearance of partiality unless that friendship is very much out of the ordinary course, and . . . presents a potential for actual impropriety if the worst implications are realized." (citation omitted)). Generally, recusal is denied if based only a judge socializing with a party or counsel for a party. Courts have ruled that a judge should be free to attend social events, even if parties to proceedings before the judge are also in attendance. *Conroy v. Amos*, 338 F. Supp. 3d 1309 (M.D. Ga. 2018).

A judge consistently issuing adverse rulings against one party, without more, does not indicate partiality or bias. *Matter of Huntington Commons Assocs.*, 21 F.3d 157 (7th Cir. 1994); .*In re Scott*, 627 B.R. 134 (B.A.P. 8th Cir. 2021); *In re Lee*, 561 B.R. 93 (B.A.P. 8th Cir. 2016); *Mohorne v. Beal Bank, S.S.B.,* 419 B.R. 488 (S.D. Fla. 2009); *In re Hussey*, 391 B.R. 911 (Bankr. S.D. Fla. 2008) (holding that the bankruptcy judge did not show bias when he questioned an expert witness's qualifications because pleadings filed on corporation's behalf appeared incompetent); *In re Olsen*, 358 B.R. 609. Similarly, a judge's denial of a *pro se* party's requests for adjournments of hearings and extensions of time to make filings does not indicate partiality or bias. *In re Krichevsky*, 640 B.R. 524, 539.

Nor is recusal required where the judge makes a criminal referral to the United States Department of Justice. *In re Goodwin*, 194 B.R. 214, 222-23 (B.A.P. 9th Cir. 1996).

Judges may also publish articles on issues or speak on topics which they may later find themselves presiding over. *Starbuck v. R.J. Reynolds Tobacco Co.*, 59 F. Supp. 3d 1377 (M.D. Fla. 2014) (district judge praised trial lawyers and criticized big law lawyers; counsel for defendant moved for recusal and motion was denied.).

A judge's romantic relationship with an employee of a law firm representing a party to the proceeding is not grounds for recusal if that employee is not in any way involved in the proceeding. *In re Trafford Distrib. Ctr., Inc*., 435 B.R. 745 (Bankr. S.D. Fla. 2010).

Although much of the caselaw on recusal is dedicated to the appearance of impartiality under § 455(a) and bias or prejudice under § 455(b)(1), courts have also heard arguments as to the other enumerated factors of 455(b). For instance, § 455(b)(4) requires recusal if the judge (or a member of the judge's family) has a financial interest in the outcome of the case. *See* 28 U.S.C. § 455(b)(4). Despite this strict requirement, § 455(f) provides an exception to § 455(b)(4) where the judge, after devoting substantial time to the matter, discovers the financial interest and divests himself of that interest.

The case *In re Literary Works in Electronic Databases Copyright Litigation*, 509 F.3d 136 (2d. Cir. 2007) involved a class action arising from the unauthorized electronic reproduction of various written works. The Second Circuit reversed the lower court's certification of the class and approval of a settlement. Contemporaneous with this ruling, two of the judges sitting on the appellate panel issued a memorandum explaining that they recently discovered that they were likely members of the class based on their authoring articles which were included on the electronic databases in question. The judges renounced any financial interest as potential class members and observed that § 455(f) allows judges to balance whether to recuse themselves by considering the appearance of impartiality against certain practicalities such as the availability of other judges, costs of recusal, interests of the parties and public. Therefore, the judges held that recusal was not required where the financial interest was small, belatedly discovered and renounced, and the class would very likely include most judges. Interestingly, prior to deciding against recusal, the judges consulted the Judicial Conduct Committee and the advisory opinion

recommended they recuse. *See In re Literary Works in Elec. Databases Copyright Litig.*, 509 F.3d 136, 144 (2d. Cir. 2007).

Recent Developments – Archdiocese of New Orleans

An ongoing saga in the recusal arena emanates from the Eastern District of Louisiana, where the bankruptcy case for the Archdiocese of New Orleans (the "Debtor" or the "Archdiocese") is pending. This case spawned an appeal to the United States Court of Appeals for the Fifth Circuit, where the issue is whether orders entered by the judge prior to his recusal should be vacated.

For background, the Debtor filed for bankruptcy on May 1, 2020. The United States Trustee then formed the committee of unsecured creditors (the "UCC"), which consisted of several creditors of the Archdiocese, including six sexual abuse claimants, four of whom were represented by the same counsel ("Counsel"). Shortly after the appointment of the UCC, the bankruptcy court entered a protective order providing that counsel to the UCC, the UCC members, and the attorneys for the UCC members, were prohibited from sharing any information they received in discovery.

During discovery, the Debtor produced a list of priests accused of sexual abuse. Recognizing one of the names on the list, Counsel texted his cousin who employed the priest at a local school and also emailed a journalist, who subsequently published an article naming the priest and disclosing details about the allegations against him. The Debtor, the UCC, and the United States Trustee conducted investigations for over six months, ultimately identifying Counsel as the source of the leak.

The bankruptcy judge entered orders removing Counsel's clients from the UCC and imposing a $400,000 fine on Counsel (reflecting a portion of the legal fees incurred by the UCC

and the Debtor in investigating and dealing with the breach of the protective order). Counsel appealed both orders to the district court, where the matter was assigned to Judge Guidry.

On March 27, 2023, Judge Guidry issued an opinion affirming the bankruptcy court's orders. Counsel immediately filed motions for a rehearing, and Judge Guidry held a telephonic status conference, during which Judge Guidry shared that it had been brought to his attention that his history of making charitable donations to the Archdiocese, as well as his participation on the board of an organization under the umbrella of the Archdiocese, could give rise to his recusal. Judge Guidry advised the parties that he would seek an advisory opinion from the Judicial Conduct Committee. A subsequent telephonic status conference was held on April 20, 2023, in which Judge Guidry shared that the Judicial Conduct Committee had delivered an advisory opinion against recusal and that he would not recuse himself from the case.

However, an article was published on April 21, 2023, suggesting that Judge Guidry could not be impartial because of his prior donations and service as a board member. On April 28, 2023, Judge Guidry issued a recusal order which reads in full:

> I do not believe disqualification pursuant to 28 U.S.C. § 455 is mandated, and no party has filed a motion to disqualify me pursuant to 28 U.S.C. § 144; however, balancing my duty to decide the case with my duty to consider self-recusal if appropriate, I have decided to recuse myself from this matter in order to avoid any possible appearance of personal bias or prejudice.

Order of Recusal, In Re Roman Cath. Church of the Archdiocese of New Orleans, No. 22—1740, (E.D. La. Apr. 28, 2023), ECF No. 99. The case eventually landed before Judge Ashe, and Counsel filed a motion to vacate Judge Guidry's March 27, 2023, opinion and corresponding judgments on the basis that they were entered prior to Judge Guidry's recusal.

On June 21, 2023, Judge Ashe issued an opinion denying Counsel's motion.[6] Judge Ashe first recognized that because Judge Guidry ultimately recused himself, it is presumed that he should have recused himself at the outset of the case. In determining whether this demands vacatur of the opinion and judgments entered by Judge Guidry prior to his recusal, Judge Ashe considered (1) the risk of injustice to the parties in the particular case, (2) the risk that the denial of relief will produce injustice in other cases, and (3) the risk of undermining the public's confidence in the judicial process. Judge Ashe ruled that failing to vacate the affirmance orders posed no risk of injustice to the parties nor did it undermine the public's confidence in the judiciary, because Judge Guidry had consulted the Judicial Conduct Committee regarding his recusal and because Counsel still enjoyed the opportunity to further appeal the adverse rulings, which, importantly, centered on his failure to obey a court order and abide by judicial process. Balancing these facts, Judge Ashe upheld Judge Guidry's orders, a decision which Counsel promptly appealed to the Circuit Court.

[6] *See* Opinion, In Re Roman Cath. Church of the Archdiocese of New Orleans, No. 22-cv-1740, (E.D. La. June 21, 2023), ECF No. 107.

II. Know Your Filings – The Ethics of "Plagiarizing" Motions and Artificial Intelligence

When drafting motions, lawyers may find that certain motions are more routine than others. For instance, it is not uncommon to see motions for relief from the automatic stay citing the same sections of the Bankruptcy Code, discussing the same caselaw, and even sharing similar facts. Attorneys (and their clients) may value the efficiency of incorporating language from other motions during the drafting process. This practice raises several questions: Is copying text from another law firm's motion into your own considered plagiarism? Is it ethical? What if your law firm preserves a bank of template motions in which attorneys simply input the particulars of their case, but maintain the "stock" language – such as jurisdiction, applicable Bankruptcy Code sections, caselaw? Additionally, as technology develops, to what extent can lawyers rely on artificial intelligence to draft their motions?

The short answer is that selectively copying language from other motions is not a *per se* violation of ethical rules. But doing so may lead lawyers to file motions that incorporate out-of-date caselaw, inapplicable facts, and contain many other deficiencies which make the motion, at best, a waste of the court's time and, at worst, indicia of the filing attorney's intent to deceive the court. There are instances where courts have disapproved of extensive copying, especially when the plagiarized material is an opinion or academic writing and it appears that the lawyer was trying to pass off the thoughts of another as their own. In such circumstances, the court may find ethical violations and issue sanctions.

To illustrate, advisory opinions regarding ethical rules in North Carolina and New York (respectively, the "N.C. Advisory Opinion" and "New York Advisory Opinion") view plagiarism itself as permissible but caution that lawyers must nonetheless provide competent representation

– simply "cutting and pasting" may lead to sloppy work and poor results.[7] The caselaw demonstrates that such conduct may implicate Rule 8.4(c) of the Model Rules of Professional Conduct.[8] Rule 8.4(c) is adopted by various jurisdictions in one form or another (*e.g.,* Rule 8.4(c) of the New York Rules of Professional Conduct, Rule 8.4(c) of the D.C. Rules of Professional Conduct, and Rule 8.4(c) of the Virginia Rules of Professional Conduct).

Rule 8.4(c) provides that "[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Model Rule 8.4(c); *United States v. Flynn*, 411 F. Supp. 3d 15 (D.D.C. 2019) (where the court noted the applicability of Rule 8.4(c) of the D.C. Rules of Professional Conduct upon discovering that four pages of the litigant's motion were copied verbatim from a motion filed by another firm in another court.).

Is Plagiarism Unethical?

Borrowing some language from another motion is not unethical when it is done carefully. The negative connotation of "plagiarism" weighs strongly on our conscience because most, if not all of us, were taught beginning in elementary school that copying others' work is a serious offense deserving severe consequences. An important framework for this topic is that there is a noted distinction between academic plagiarism and copying language from other motions. On this subject, the New York Advisory Opinion notes that the purpose of academic work is to present an original idea in the author's own words, while the purpose of a pleading is to simply persuade the court, not to convey an original idea or express an idea in an original way. *See* New York Advisory Opinion at 6. The New York Advisory Opinion additionally notes that motions

[7] *See* for New York: Formal Opinion 2018-3: Ethical Implications of Plagiarism in Court Filings, New York City Bar, https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2018-3-ethical-implications-of-plagiarism-in-court-filings (last visited Sept. 13, 2023); *see also* for North Carolina: 2008 Formal Ethics Opinion 14, https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-14 /(last visited Sept. 14, 2023).

[8] Other Model Rules potentially related to plagiary include: Rule 1.1(a) (competence); Rule 1.3 (diligence); Rule 3.1 (non-meritorious claims and contentions); and Rule 3.3 (conduct before a tribunal).

are tailored for clients who pay for the lawyer's time, meaning clients have an interest in efficiency. *Id*. When one motion copies language from another, the ethical concern should not be concerned with a lack of originality, rather the concern should be the quality of the filing.

However, the caselaw demonstrates that there are boundaries to this practice – notably where the act of plagiary leads to sloppy work, but also where the plagiarizing attorney demonstrates deceit by extensively copying another person's original thought and attempts to pass it off as their own. *Flynn*, 411 F. Supp. 3d 15 at 27 (using four pages in motion taken verbatim from a motion filed in another case); *Consol. Paving, Inc. v. Cnty. of Peoria, Ill.*, No. 10–1045, 2013 WL 916212, at *5 (C.D. Ill. Mar. 8, 2013) (making lawyer subject to discipline when he submitted a thirteen-page brief, five pages of which were copied nearly verbatim from an opinion and presented as his own thoughts); *Iowa Sup. Ct. Bd. of Pro. Ethics & Conduct v. Lane*, 642 N.W.2d 296, 300 (2002) (indicating attorney who filed a brief containing eighteen pages copied from a legal treatise committed plagiarism warranting disciplinary action); *Matter of Steinberg*, 206 A.D.2d 232, 234, 620 N.Y.S.2d 345, 346 (1994) (demonstrating that as two writing samples, the lawyer submitted copies of memoranda written by other lawyers but which substituted his name in place of the original authors).

The takeaway is that copying language from other motions should be done concisely and accurately and without attempting to pass off extensively written original thought by someone else as your own. Relatedly, citing to a motion template that you or your firm maintains is permissible, so long as the cases are double-checked and the template is sufficiently revised to fit the facts of the case. *See In re Mundie*, 453 Fed. App. 9 (2d. Cir. 2011). Without taking such precautions, offending lawyers may run afoul of ethical rules and be subject to sanctions under Rule 11 of the Federal Rules of Civil Procedure or Bankruptcy Rule 9011.

Motions Generated by Artificial Intelligence

The use of technology as a research aid is fairly routine. The algorithms employed by websites such as Westlaw, LexisNexis, Bloomberg, Google, just to name a few, help lawyers find authorities relevant to their search inquiries. Reliance on technology to draft original content is more novel, and the rules governing its use are still in their infancy. At present, only one case, *Mata v. Avianca, Inc.*, No. 22—1461, 2023 WL 4114965 (S.D.N.Y. June 22, 2023), has addressed the use of artificial intelligence in drafting a motion, and at least two judges have implemented chamber rules regarding artificial intelligence.[9]

Despite the current dearth of authorities on artificial intelligence, the future is rapidly approaching and with it uncertainty how artificial intelligence fits into the practice of law. For instance, the University of Michigan Law School banned the use of artificial intelligence in admission essays only a week before Arizona State University's Sandra Day O'Connor College of Law announced that prospective students were permitted to use artificial intelligence to assist in drafting their admission essays.[10]

Avianca and chambers' rules both handle the use of artificial intelligence as a drafting tool the same way – the lawyer must ensure that anything drafted by artificial intelligence is correct and applicable to the argument, which aligns with the concerns regarding plagiarism – that lawyers may file sloppy motions. Notably, neither *Avianca* nor the chambers' rules provide

[9] *See Judge Brantley Starr: Judge Specific Requirements*, Northern District of Texas, https://www.txnd.uscourts.gov/judge/judge-brantley-starr (last visited Sept. 13, 2023) (stating that along with their notice of appearance, attorneys and pro se litigants must also file a certificate attesting that no portion of any filing will be drafted by artificial intelligence, or that any language that is drafted by artificial intelligence will be double checked); *see also Standing Order for Civil Cases Before Magistrate Judge Fuentes* (May 31, 2023), https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/Fuentes/Standing%20Order%20For%20Civil%20Cases%20Before%20Judge%20Fuentes%20rev'd%205-31-23%20(002).pdf (stating that any filing using language generated by artificial intelligence must disclose in that filing that artificial intelligence was used).

[10] Sara Merken, *Students can use AI on applications, Arizona State law school says*, Reuters (July 28, 2023) https://www.reuters.com/legal/transactional/students-can-use-ai-applications-arizona-state-law-school-says-2023-07-28/.

an outright ban against lawyers drafting motions using artificial intelligence, but both authorities serve as reminders that lawyers should tread cautiously and double-check any language generated by artificial intelligence.

In *Avianca*, the plaintiff was an airline passenger who was injured by a serving cart during his flight. The plaintiff sued Avianca Airlines, which subsequently moved to dismiss the case. In opposition to Avianca Airlines' motion to dismiss, the plaintiff's two lawyers filed an "Affirmation in Opposition" in March 2023 in which they cited several cases in support of their argument.

Lawyers for Avianca Airlines quickly filed a response that they could not locate several of the opinions cited in the Affirmation in Opposition, implying that those opinions did not exist. This response prompted the court to ask the plaintiff's attorneys for copies of the opinions cited in the Affirmation in Opposition. In response, the plaintiff's lawyers submitted copies of bogus opinions that were generated by the app "ChatGPT" and admitted that other case citations did not lead to a copy of any opinion, whether bogus or authentic. The court found that the plaintiff's lawyers never took the time to cite check their cases, and did not admit the truth until after May 25, 2023, when the court issued an order to show cause why the lawyers should not be sanctioned. The court held that submitting the Affirmation in Opposition constituted poor and sloppy research, but the fact that the lawyers did not quickly come clean demonstrated bad faith deserving of sanctions.

III. Sanctions for Non-Disclosure and Fee Sharing

Transparency is paramount to the bankruptcy process. Professionals involved in a bankruptcy case are required to make fulsome disclosures as a condition to their employment and payment and, with limited exceptions, fee sharing arrangements are prohibited.

Recent decisions from the Third Circuit affirming the Delaware Bankruptcy Court (albeit not precedential) and from the Bankruptcy Court for the Eastern District of Virginia are instructive.

***In re NNN 400 Capitol Ctr. 16* (3d Cir. Dec. 21, 2022)**

The Third Circuit issued an opinion (written by Judge Thomas Ambro) affirming orders of Judge John Dorsey of the Bankruptcy Court for the District of Delaware disqualifying debtor's special counsel for disclosure failures, including undisclosed fee sharing with a broker, and awarding sanctions. *In re NNN 400 Capitol Ctr. 16 LLC.*, Nos. 21-3013. 22-1639, 2022 WL 17831445 (3d Cir. Dec. 21, 2022).

The bankruptcy involved multiple affiliated tenant-in-common limited liability companies that together owned a commercial building filed chapter 11 cases in December 2016 and June 2017 (together, the "Debtors"). The Debtors' cases were jointly administered (Case No. 16-12728) and later converted to chapter 7.

The bankruptcy court approved the Debtors' retention of their pre-petition counsel ("R&R") as special counsel for litigation in the bankruptcy cases. Subsequently, during the course of discovery in an adversary proceeding, it came to light that R&R was actually a trade name for two law firms sharing resources and fees. In his initial opinion in August 2019, Judge Dorsey found R&R's retention disclosure defective. (Adv. Pr. No. 18-50384, ECF No. 247-1). However, he held the error was negligent and not done with intent to deceive, and found that the

fee sharing basis between the two law firms was akin to that of a single law firm and noted he would likely have approved if it had been disclosed. Therefore, he did not initially disqualify R&R but ordered R&R to supplement its disclosures and imposed sanctions.

At a subsequent hearing, Judge Dorsey found that R&R had a fee sharing arrangement with a loan broker, who had agreed to pay R&R a portion of any refinancing fees it earned from the Debtors. This was a step too far. In his October 2019 opinion, Judge Dorsey held that R&R's undisclosed fee sharing arrangement with the broker demonstrated that R&R had a pecuniary interest adverse to the Debtors and warranted disqualification. (*Id*., ECF No. 302) He disqualified R&R and ordered it to disgorge fees.

The district court and the Third Circuit affirmed Judge Dorsey's orders. Judge Ambro emphasized that disclosure of the fee sharing agreement with the broker was not dependent on whether fees were paid, holding that Section 329 of the Bankruptcy Code requires disclosure of compensation paid or agreed to be paid.

***In re Kebede*, (Bankr. E.D. Va. May 2, 2023)**

Judge Klinette Kindred of the United States Bankruptcy Court for the Eastern District of Virginia recently issued an opinion finding that an attorney ("Attorney") should be sanctioned for an undisclosed fee sharing arrangement with a broker. *In re Kebede*, No. 18-12086, 2023 WL 3219659 (Bankr. E.D. Va. May 2, 2023).

Attorney, whom the Court described as having over forty years of bankruptcy experience including service as a chapter 7 panel trustee, had a long-standing arrangement with a broker ("Broker"), whereby Broker would pay Attorney a fee for work Broker received from work referred to it by Mr. Ross. To drum up work for Broker, Attorney would contact debtor's

counsel in newly filed chapter 11 cases throughout Virginia, Maryland, and the District of Columbia and recommend the services of Broker.

In *Kebede*, the debtor filed chapter 11 and subsequently filed a retention application to employ Broker to assist in selling her real property (the evidence further indicated that Attorney ghostwrote Broker's retention application). As a result of the sale, Attorney was paid a commission by Broker. Neither the retention application, sale motion, nor sale report mentioned the fee sharing arrangement between Broker and Attorney.

Judge Kindred found that Attorney impermissibly failed to disclose his arrangement with Broker regardless of his not appearing formally in the case. Since Attorney drafted the Broker retention application behind the scenes the duty to disclose fell to him (not only to Broker). The court found that the Broker – Attorney fee sharing arrangement violated Bankruptcy Code § 504. As a sanction, the court approved the disgorgement of Attorney's fee to the estate.

IV. Disqualification Risk When Representing a Distressed Portfolio Company and Its Sponsor - *In re HRB Winddown, Inc.*, No. 19-12689 (BLS), 2023 WL 3294623 (Bankr. D. Del. May 5, 2023)

Attorneys must be cognizant of potential conflicts when engaging clients. This obligation, however, does not cease once the engagement letter is signed. Rather, conflicts must be evaluated (and reevaluated) as circumstances change. One change in circumstances that should prompt a reevaluation of potential conflicts is a client's slide into financial distress. Distress can be especially problematic in situations where a law firm has represented both a distressed company and the company's equity owner. A recent opinion of Judge Brendan Shannon in Delaware highlights an important concern that these dual representations raise in the context of bankruptcy.

The Facts

Several years prior to its bankruptcy filing, the debtor had been acquired by a private equity fund. The fund was the long-time client of a prominent New York law firm (the "Firm"). Following the acquisition, the Firm continued to represent the fund as well as its newly acquired portfolio company. Post-acquisition, the debtor completed a significant recapitalization transaction to pay off certain loans related to the acquisition, and the Firm represented both the debtor and its sponsor in connection with this transaction.

After completing the recapitalization, the debtor was forced to seek bankruptcy relief. The court eventually confirmed the debtor's plan of reorganization. The plan provided for the creation of a post-confirmation trust to prosecute certain retained claims and causes of action. Those claims included fraudulent transfer and breach of fiduciary duty claims against the private equity sponsor related to the recapitalization. After commencing an adversary proceeding against the private equity sponsor, the trustee also moved to disqualify the Firm from representing the sponsor in connection with the litigation, citing the Firm's prior representation of the debtor. The

trustee argued that (1) the trust stood in the debtor's shoes; (2) the trust was therefore a former client of the Firm, and (3) as a former client of the Firm, the trust could prevent the Firm from representing the sponsor in litigation between the parties.

The Court's Decision

At the outset, the court noted that disqualification of an opponent's chosen counsel cannot be sought in order to obtain a tactical advantage in litigation. However, recognizing the "complex history" and "intertwined relationship" between the debtor and its private equity owner, the court found that the disqualification motion could not be disregarded as merely a tactical ploy.

The court then turned to the trust's key allegation—that the trust was the "former client" of the Firm. The court viewed the threshold question as being whether the trust actually "stood in the shoes" of the debtor. On this point, the court found it significant that, under the plan, the debtor's existence continued after the plan's effective date, as the plan specifically provided for the continuity of the debtor's management, assets, and affairs through a plan administrator. Unlike the trust, which was only responsible for a defined set of assets, the plan administrator was the post-confirmation representative of the estate more generally. Accordingly, the court held that, to the extent there was a "former client" of the Firm, it would be the plan administrator and not the trust.

The court distinguished cases involving chapter 7 trustees. A chapter 7 trustee, once appointed, is "vested with statutory authority over all aspects of a debtor's estate." A post-confirmation trustee, on the other hand, is a "creature of contract" that "possesses only property and powers" identified by the plan. This distinction made comparisons to a chapter 7 trustee "unavailing." The court instead found that the reasoning of cases involving "issues similar to the one presented"

supported the conclusion that the trust, as a newly formed entity, could not be characterized as the former client of the Firm. The court denied disqualification on this basis.

Takeaway

Although the court denied the disqualification motion, the outcome could have been different. First, as the opinion notes, "case law on this specific issue is scant." In the absence of well-developed case law, a different court may reach a conflicting conclusion when presented with this issue. Perhaps more importantly, the court's disqualification ruling largely turned on the particular structure of the plan. The court quoted the plan's language extensively in reaching the conclusion that the trust was not the Firm's former client, finding that the plan "carefully delineate[d] boundaries" between the plan administrator and the trust. Alternatively, though, if the plan had not employed this dual plan administrator-trust construct and instead provided for a single entity to serve as the debtor's successor, then that entity presumably would have been the Firm's former client. So, while the Firm managed to escape disqualification in this case, the decision highlights an important risk for attorneys representing companies and their sponsors. Indeed, given the expanding role of private equity in bankruptcy, and the interrelationship between portfolio companies and their sponsors, potential conflict issues must be front of mind when considering a dual representation of a debtor and its owner.

APPENDIX A

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part I. Organization of Courts (Refs & Annos)
Chapter 21. General Provisions Applicable to Courts and Judges

28 U.S.C.A. § 455

§ 455. Disqualification of justice, judge, or magistrate judge

Currentness

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the

outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 908; Pub.L. 93-512, § 1, Dec. 5, 1974, 88 Stat. 1609; Pub.L. 95-598, Title II, § 214(a), (b), Nov. 6, 1978, 92 Stat. 2661; Pub.L. 100-702, Title X, § 1007, Nov. 19, 1988, 102 Stat. 4667; Pub.L. 101-650, Title III, § 321, Dec. 1, 1990, 104 Stat. 5117.)

Notes of Decisions (1686)

28 U.S.C.A. § 455, 28 USCA § 455
Current through P.L.118-13. Some statute sections may be more current, see credits for details.

End of Document

APPENDIX B

Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently(C) *Disqualification*.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or lawyer has been a material witness;

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding;

(d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person is:

(i) a party to the proceeding, or an officer, director, or trustee of a party;

(ii) acting as a lawyer in the proceeding;

(iii) known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or

(iv) to the judge's knowledge likely to be a material witness in the proceeding;

(e) the judge has served in governmental employment and in that capacity participated as a judge (in a previous judicial position), counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

(2) A judge should keep informed about the judge's personal and fiduciary financial interests and make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system; the following relatives are within the third degree of relationship: parent, child, grandparent, grandchild, great grandparent, great grandchild, sister, brother, aunt, uncle, niece, and

nephew; the listed relatives include whole and half blood relatives and most step relatives;

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;

(d) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation.

(4) Notwithstanding the preceding provisions of this Canon, if a judge would be disqualified because of a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the judge (or the judge's spouse or minor child) divests the interest that provides the grounds for disqualification.

(D) *Remittal of Disqualification*. Instead of withdrawing from the proceeding, a judge disqualified by Canon 3C(1) may, except in the circumstances specifically set out in subsections (a) through (e), disclose on the record the basis of disqualification. The judge may participate in the proceeding if, after that disclosure, the parties and their lawyers have an opportunity to confer outside the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate. The agreement should be incorporated in the record of the proceeding.

Faculty

Hon. Daniel P. Collins is a U.S. Bankruptcy Judge for the District of Arizona in Phoenix, appointed on Jan. 18, 2013. He served as chief judge from 2014-18 and is presently a conflicts judge in the Districts of Guam, Hawaii and Southern California. Previously, Judge Collins was a shareholder with the Collins, May, Potenza, Baran & Gillespie, P.C. in Phoenix, practicing primarily in the areas of bankruptcy, commercial litigation and commercial transactions. He is president of the National Conference of Bankruptcy Judges, is a Fellow in the American College of Bankruptcy, served on ABI's Board of Directors, is on the board of the Phoenix Chapter of the Federal Bar Association and is a member of the University of Arizona Law School's Board of Visitors. He also is a founding member of the Arizona Bankruptcy American Inn of Court. Judge Collins received both his B.S. in finance and accounting in 1980 and his J.D. in 1983 from the University of Arizona.

Mary Joanne Dowd is a partner in the Bankruptcy & Financial Restructuring Group of ArentFox Schiff LLP in Washington, D.C., where she represents chapter 11 debtors as well as entities with loans, contracts, real estate leases, intellectual property licenses, supply agreements, franchise agreements, and other business relationships with debtors or potential debtors. She has particular experience in the intersection of bankruptcy and automotive, broadcast, construction, cryptocurrency, intellectual property, real estate and nonprofit law Ms. Dowd litigates a wide variety of bankruptcy and commercial matters, including lift stays, plan confirmations, claim objections, contract and lease assumptions and rejections, preferences, fraudulent transfers, withdrawals of reference and guarantee claims. She has served as a court-appointed chapter 11 trustee in the Eastern District of Virginia and on the chapter 7 bankruptcy trustee panel for the District of Maryland. Ms. Dowd represented a nationwide coalition of automotive dealers in their successful effort to have federal legislation enacted in the wake of the Chrysler and General Motors bankruptcy cases. She also represented several Canadian debtors in the transportation industry in ancillary bankruptcy proceedings in the U.S., and represented the Pension Benefit Guaranty Corp. in bankruptcy cases. Previously, Ms. Dowd clerked for the U.S. bankruptcy judges for the Western District of New York. She also worked at a major New York law firm. She has served on the Advisory Committee on Local Bankruptcy Rules for the District of Columbia and serves as a member of the advisory board for ABI's Views from the Bench program. Ms. Dowd is a member of the Walter Chandler Inn of Court and was an adjunct professor of bankruptcy at the Georgetown University Law Center. In addition, she has served on the Dean's Advisory Council for the State University of New York at Buffalo Law School for over 15 years, and, since its inception in 2015, she has been a mentor to an incoming attorney at the D.C. Affordable Law Firm. *Chambers USA* has recognized Ms. Dowd as a leading bankruptcy and restructuring lawyer in Washington, D.C., annually since 2006. She also has been listed in *The Best Lawyers in America* annually since 2006; in 2023, the publication named her "Lawyer of the Year" for Litigation – Bankruptcy, Washington, DC. In addition, *Washingtonian* magazine has named her a "Top Lawyer" in bankruptcy law. Ms. Dowd lectures on asset sales in the insolvency context, treatment of intellectual property licenses in bankruptcy, individual chapter 11 bankruptcy issues, ethics and evidentiary issues in bankruptcy litigation. She is admitted to practice in the District of Columbia, Florida, Maryland, New York and Virginia, and before the U.S. Court of Appeals for the Fourth Circuit, as well as the U.S. District Courts for the District of Columbia, District of Maryland, the Eastern, Northern, Southern and Western Districts of New York, the Middle, Northern and Southern Districts of Florida, and the

Eastern and Western Districts of Virginia. Ms. Dowd received her B.A. *summa cum laude* and her J.D. from State University of New York at Buffalo.

Hon. Rosemary J. 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 earned her B.A. in history in 1976 from Rutgers University, where she was elected to Phi Beta Kappa. After receiving her J.D. from Rutgers Law School-Newark in 1979, Judge Gambardella served as law clerk to the late Chief Bankruptcy Judge Vincent J. Commisa from 1979-80.

Kristin K. Going is a partner in McDermott Will & Emery's Business Restructuring practice in New York and represents clients in bankruptcy and insolvency proceedings. She also also is a co-managing partner of the firm's New York office and a member of the firm-wide Management Committee. Ms. Going concentrates her practice in commercial bankruptcy and insolvency matters, creditors' rights, out-of-court workouts and restructurings and financial services litigation. She has represented a broad array of clients in bankruptcy and insolvency proceedings, including loan agents and indenture trustees, secured lenders, corporate boards, officers, directors, creditors' committees, bondholder committees, unsecured creditors, chapter 11 debtors, commercial landlords, insurance companies and entities seeking to acquire assets through a chapter 11 bankruptcy. Ms. Going's experience encompasses all facets of bankruptcy and insolvency, including liquidating trusts, chapter 11 plan restructuring and related litigation, § 363 sales, valuation disputes, lien-perfection disputes, single-asset real estate, debtor-in-possession financing, municipal bond finance deals, adversary actions and bankruptcy appeals. She also frequently counsels companies and their boards on strategic decisions relating to bankruptcy and insolvency issues. In addition to being named as one of the top 100 female lawyers in New York City in *Crains New York*, Ms. Going is recognized by *Chambers USA* as a leading restructuring lawyer. She is a member of the *ABI Law Review* advisory board, the American Bankers Association, ABI, The Economic Club of New York, IWIRC, Practical Law and John's University School of Law advisory boards, the Turnaround Management Association and ABI's Views from the Bench advisory board. She also chairs the American Bar Association's Trust Indentures and Indentures Trustee Committee. Ms. Going received her B.A. in 1995 from Syracuse University, her J.D. in 1998 from Cleveland-Marshall College of Law, and her LL.M. in Bankruptcy in 2002 from St. John's University School of Law.

Hon. Clifton R. Jessup, Jr. is a U.S. Bankruptcy Judge for the Northern District of Alabama in Decatur, appointed on March 2, 2015. He was formerly a principal shareholder in the Dallas office of the international law firm of Greenburg Traurig, LLP where he concentrated his practice in business reorganization and bankruptcy. During his more than 35 years of bankruptcy-related practice before taking the bench, Judge Jessup represented secured creditors, unsecured creditors, committees, equity-holders, debtors and trustees in federal bankruptcy cases in more than 37 states and Puerto Rico. He also represented purchasers of assets in bankruptcy cases, and served as examiner and mediator in many cases. In 2001, Judge Jessup was selected as the liquidating trustee under the confirmed chapter 11 plan in the Baptist Foundation of Arizona, the largest nonprofit bankruptcy cases filed to date. The cases involved more than 13,000 investors and claims in excess of $600 million. In 2009, he represented the Opus West Corp. in a chapter 11 case involving more than 50 commercial real estate properties in California and Texas with claims in excess of $1.2 billion. Judge Jessup is a member of the Advisory Committee to ABI's Commission to Study the Reform of Chapter 11 and of the Texas State Bar. He received his J.D. in 1978 from the University of Michigan.

Hon. Kesha L. Tanabe is a U.S. Bankruptcy Judge for the District of Minnesota in St. Paul, appointed on Jan. 7, 2022, and the first Asian-American woman on the federal bench in Minnesota. She previously was a bankruptcy attorney with Tanabe Law in Minneapolis and is licensed in North Dakota, Minnesota and New York. Judge Tanabe started her career as an assistant attorney general in New York. Prior to starting her own firm, she was a partner at ASK LLP, Maslon LLP and Faegre Baker Daniels. Additionally, she was a subchapter V trustee in Region 12 and taught bankruptcy law at the University of St. Thomas School of Law. Judge Tanabe is a board-certified business bankruptcy specialist, a former member of the Bankruptcy Practice Committee for the District of Minnesota and a former co-editor in chief of the *MSBA Bankruptcy Bulletin*. She is a frequent lecturer on bankruptcy topics nationwide, and she is a member of several legal and community organizations, including the Japanese American Citizens League, International Women's Insolvency & Restructuring Confederation, Minnesota Asian Pacific American Bar Association and Minnesota Lavender Bar Association. She also served as a Special Projects Leader for ABI's Bankruptcy Litigation Committee. Judge Tanabe is a graduate of the University of St. Thomas and the London School of Economics, and she received her J.D. in 2005 from Cardozo School of Law.