

Delaware Consumer Bankruptcy CLE Program February 23, 2022

Views from the Bench: Ethical Obligations

Honorable Brendan L. Shannon

Honorable Laurie S. Silverstein

Michael B. Joseph, Esquire – Chapter 13 Trustee

4:15 p.m. -5:15 p.m.

1. Confidentiality, Attorney Client Privilege, and Personal Identifiable Information in Bankruptcy Court

- a. Confidentiality-duty a lawyer owes to a client: Attorney -Client privilege is right not to disclose certain communications client has with an attorney.
- b. 11 USC Sec 107- General rule of the public nature of all papers filed in a bankruptcy case. PACER places all items on the internet. To seal or not to seal? FRE 408-Confidentiality of settlement discussions. Attorney has obligation to inform a client of the requirement under the Bankruptcy Code of a full and complete disclosure of personal financial information, assets and liabilities. Failure to do so may result in serious consequences See: 18 USC Sec. 152- Concealment of Assets
- c. Who is the client? Identifying the client and establishing the scope of representation of the attorney-client relationship. Issues can arise when a lawyer represents multiple family members vs. an individual or a husband and wife. Elderly client representation sometimes present unique issues, including diminished capacity and competency.

ABA Model Rule 1.6 Confidentiality Client-Lawyer Relationship

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - (1) to prevent reasonably certain death or substantial bodily harm;
 - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
 - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
 - (4) to secure legal advice about the lawyer's compliance with these Rules;
 - (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based

upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

d. BR 9037-Privacy Protection for Filings Made with the Court

Local Rule 9037-1 Redaction of Personal Data Identifiers.

(a) Responsibility for Redaction. The responsibility for redacting personal data identifiers (as defined in Fed. R. Bankr. P. 9037) rests solely with counsel, parties in interest and non-parties. The Clerk, or claims agent if one has been appointed, will not review each document for compliance with this Rule. In the event the Clerk, or claims agent if one has been appointed, discovers that personal identifier data or information concerning a minor individual has been included in a pleading, the Clerk, or claims agent if one has been appointed, is authorized, in its sole discretion, to restrict public access (except as to the filer, the case trustee, the United States Trustee and the claims agent) to the document in issue and inform the filer of the requirement to file a motion to redact.

(b) Method of Redaction. The filer of the document containing personal data identifiers shall, in accordance with CM/ECF procedures, file a motion to redact that identifies the proposed document for redaction by docket number or if applicable, by claim number. The filer shall submit, with the motion to redact, an exhibit containing the document to be substituted for the original filing.

(c) Clerk's Action upon Filing. Upon filing of the motion to redact, the Clerk's Office will restrict the original image containing the personal data identifiers from public view (except as to the filer, the case trustee, the United States Trustee and the claims agent) on the docket.

(d) Notice. The filer shall include a certificate of service at the time the motion to redact is filed, showing service to the following recipients: the debtor, anyone whose personal information has been disclosed, the case trustee (if any) and the United States Trustee.

2. Filing of Petition by Power of Attorney or Representative:

a. BR 9010:

(a) AUTHORITY TO ACT PERSONALLY OR BY ATTORNEY. A debtor, creditor, equity security holder, indenture trustee, committee or other party may (1) appear in a case under the Code and act either in the entity's own behalf or by an attorney authorized to practice in the court, and (2) perform any act not constituting the practice of law, by an authorized agent, attorney in fact, or proxy.

(b) NOTICE OF APPEARANCE. An attorney appearing for a party in a case under the Code shall file a notice of appearance with the attorney's name, office address and telephone number, unless the attorney's appearance is otherwise noted in the record.

(c) POWER OF ATTORNEY. The authority of any agent, attorney in fact, or proxy to represent a creditor for any purpose other than the execution and filing of a proof of claim or the acceptance or rejection of a plan shall be evidenced by a power of attorney conforming substantially to the appropriate Official Form. The execution of any such power of attorney shall be acknowledged before one of the officers enumerated in [28 U.S.C. §459](#), §953, Rule 9012, or a person authorized to administer oaths under the laws of the state where the oath is administered.

b. **BR 1004.1.** Petition for an Infant or Incompetent Person

If an infant or incompetent person has a representative, including a general guardian, committee, conservator, or similar fiduciary, the representative may file a voluntary petition on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may file a voluntary petition by next friend or guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person who is a debtor and is not otherwise represented or shall make any other order to protect the infant or incompetent debtor.

CASES:

- c. Daughter held Durable Power of Attorney. She initiated 3 bankruptcy cases in debtor/mother's name, and allegedly without the knowledge of her mother. The debtor sought relief from the Court to expunge and remove the filing of the cases to help her re-establish her credit, which the court refused to do. The Court found that the POA documents sufficiently empowered the daughter's actions.

IN RE CHAPMAN, Bankr. Court, ED Wisconsin 2021

- d. Attorney electronically filed a joint petition under chapter 13 for husband and wife. Several weeks later the attorney filed the First POA, and after that an amended POA was executed by Mr. Rice (husband) granting authority to retain attorneys and sign a bankruptcy petition. The Court found that there was a failure to disclose the POA designation at the petition date, and the electronic signature of the husband was nothing more than a forgery by the wife. Further, the debtors' attorney violated BR 9011. The Court nevertheless allowed the case to proceed as the debtor husband ratified the bankruptcy actions. Counsel however was required to obtain 6 hours of CLE in ethics and professionalism.
- e. Motion denied to waive appearance at Section 341 meeting by Limited Power of attorney. Court examined the authority to act in a bankruptcy case under a limited POA. Debtor is a 86 year old with no children and lives in a nursing home with cognitive and physical deficits. POA is her niece. Court finds that a Guardian ad litem would be better process. In re Matthews, 516 BR 99 - Bankr. Court, ND Texas 2014

- f. *In re Cuellar*, Case No. 8:16-bk-05222-RCT (Bankr. M.D. Fla. Aug. 29, 2016) A 90 year old incompetent debtor allowed to proceed in Chapter 13 by “next friend” granddaughter to propose a plan to cure taxes and insurance defaults on a reverse mortgage.
- g. Pro Se elderly debtor in default of equity line of credit on home, numerous credit cards with large balances and recent purchases, and home listed for sheriff’s sale. Petition brought to court and filed by “relative” with numerous deficiencies.
- h. Incarcerated debtor proceeding in Chapter 7 with a POA. Debtor wants to reaffirm loan.

- i. To Seal or Expunge Records: LR 9018-1 (Filings under seal)

In re Joyce, 399 BR 382 - Bankr. Court, D. Delaware 2009 (J. Walsh), Debtor sought relief to vacate, expunge, or otherwise amend the bankruptcy filing where a discharge had previously been entered. Judge Walsh reviewed the applicable cases finding that expungement an extraordinary remedy and would not be applied in this case. The Court found that the case was voluntarily commenced, and debts listed and discharged were debts incurred by the debtor. Therefore, the bankruptcy record would remain.

- j. Bankruptcy Code Section 521(e)(2)(A)(i) and (ii) provides that a debtor must supply tax returns to the trustee in a chapter 7 or 13 case, and to a creditor who timely requests such copy. Must the debtor provide copies that contain personal identifying information such as names, addresses and social security numbers of dependents including minor children? Or a redacted version that only includes financial information?
- k. Attorney Client Privilege in Bankruptcy: Who controls the privilege? The debtor or the trustee? May a bankruptcy trustee waive the privilege?

In re Horvath Bankr ND Ohio 2015

As discussed in *French v. Miller (In re Miller)*, 247 B.R. 704 (Bankr. N.D. Ohio 2000) (J. Speer), with respect to whether a trustee can waive an individual's attorney-client privilege, the cases fall into three categories. At one end of the spectrum are those that hold, as a matter of law, the trustee succeeds to the attorney-client privilege of an individual debtor. *In re Smith*, 24 B.R. 3, 4 (Bankr. S.D. Fla. 1982). At the other end of the spectrum are those that hold an individual's privilege never passes to the

trustee. See, e.g., *In re Tippy Togs of Miami, Inc.*, 237 B.R. 236, 239 (Bankr. S.D. Fla. 1999). A third approach, and the one adopted in *Miller*, is that an individual debtor's attorney-client privilege does transfer to the trustee and the trustee has the power to waive the privilege when, on balance, the trustee's duty to maximize the value of the debtor's estate and represent the interests of the estate outweigh the policies underlying the attorney-client privilege and the harm to the debtor upon a disclosure. *Miller*, 247 B.R. at 710-11; *Degiolamo v. Daily & Haskins (In re Wittmer)*, Adv. No. 11-6007, 2011 WL 6000799, *2 (Bankr. N.D. Ohio Nov. 30, 2011) (J. Kendig); *Moore v. Eason (In re Bazemore)*, 216 B.R. 1020, 1025 (Bankr. S.D. Ga. 1998); *Ramette v. Bame (In re Bame)*, 251 B.R. 367, 377 (Bankr. D. Minn. 2000). For the reasons discussed in *Miller*, this court concludes that the balancing approach is the proper approach in determining whether a trustee may waive an individual's attorney-client privilege.

- l. Valuation of exempt property at issue and Trustee wants information from Debtor's attorney about basis debtor and attorney arrived at values placed in the petition. Trustee seeks turnover of the attorney files that includes the property valuation, information as well as all documented communication between the debtor and the attorney such as emails, letters, and work product notes.
- m. At the Section 341 meeting the debtor asserted her 5th Amendment right against self-incrimination as she is concerned about a later prosecution for fraud in using consumer's deposits for business' design work. The business has accounts receivable and some other assets and as a part of the discovery the Trustee wants to waive the debtor's attorney client privilege and obtain all of the debtor's attorney's files and work product.

3. Bankruptcy Courts have inherent authority to control admission and practice before the Court

Delaware Local Rules

Del. Bankr. L.R. 9010-1 Bar Admission

LR 9010-1 (c) Must have Delaware Counsel

LR 9010-1(d) 28 days to obtain Delaware counsel

LR 9010-1(f)

Standards for Professional Conduct. Subject to such modifications as may be required or permitted by federal statute, court rule or decision, all attorneys admitted or authorized to practice before this Court, including attorneys admitted on motion or otherwise, shall also be governed by the Model Rules of Professional Conduct of the American Bar Association, as may be amended from time to time.

a. Attorney's conduct in bankruptcy proceedings were abusive and inappropriate including maintaining frivolous arguments, filing meritless petitions, causing unnecessary delays all in bad faith.

"Nora's litigation activity in federal court warrants a suspension itself. Federal courts' inherent authority to disbar or suspend lawyers for misconduct is longstanding and well established. *In re Snyder*, 472 U.S. 634, 643, 105 S.Ct. 2874, 86 L.Ed.2d 504 (1985); *see also Ex parte Burr*, 22U.S. (9 Wheat.) 529, 531, 6 L.Ed. 152 (1824) (Marshall, J.) (holding the power to suspend attorneys is "incidental to all Courts, and is necessary for the preservation of decorum, and for the respectability of the profession"

See: **In the MATTER OF: Steven Robert LISSE, Debtor.Appeals of: Wendy Alison Nora. 921 F.3d 629 (Seventh Cir 2019)**

b. "..... Robinson and Walton argue that the bankruptcy court did not have the authority to unilaterally suspend them from practice under the local rules governing attorney discipline. The district court found that the suspension was proper under the bankruptcy court's inherent authority to discipline attorneys appearing before it and pursuant to the local rules authorizing exercise of that authority, and we agree. Bankruptcy courts have the authority to sanction persons appearing before them, and this authority includes the right to "control admission to [their] bar." 687*687

See *In re Burnett*, 450 B.R. 116, 132 (Bankr. E.D. Ark. 2011) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)); *Law v. Siegel*, U.S. _____, 134 S.Ct. 1188, 1194, 188 L.Ed.2d 146 (2014)); *In re Clark*, 223 F.3d 859, 864 (8th Cir. 2000)

4. Motion to Withdraw: LR 9010-2

***In re Spencer*, No. 19-41859, 2020 WL 4810064, at *2–*3 (Bankr. N.D. Ohio July 17, 2020) (Kendig)** With “hesitation” bankruptcy court grants counsel’s motion to withdraw from representation of Chapter 13 debtor. Missed payments to trustee and incurring debt without permission are not necessarily cause for withdrawal, but communication has broken down and further representation is not practical. “Standing alone, Mr. Bauer’s motion does not establish good cause for withdrawal. Chapter 13 bankruptcy debtors fail to make payments with regularity. It is a hazard of representing a chapter 13 debtor. The fact that Debtor did not make payments for March and April is not cause for withdrawal. Similarly, it is not surprising that a debtor may incur debt or take action that does not comply with the terms of a chapter 13 plan. A plan is often subject to the personality traits of a debtor, be they recalcitrant, ignorant or indifferent. A debtor’s attorney should expect to navigate occasional missteps by a debtor. Debtor opposed Mr. Bauer’s withdrawal. . . Debtor does not want to be in a chapter 13 case. . . [C]ommunications between the two are unfruitful. [F]urther representation by Mr.Bauer would be unreasonably difficult.”).

5. **Debtor’s Claims Against Counsel:**

In re Jones, No. 18-13425, 2021 WL 4168110 (Bankr. S.D. Ohio Sept. 2, 2021)

(Hopkins) (On show-cause order by bankruptcy court, Chapter 13 debtors are ordered to pay their former attorney \$4,920 as sanctions under Bankruptcy Rule 9011, § 105(a) and the court’s inherent authority based on findings that the debtors made false claims of fraud and incompetence by former counsel, threatened and harassed counsel and his staff, filed motions damning and defaming counsel without factual foundation and made claims of unethical conduct by former counsel that were false and unsupportable.)

6. Chapter 13 debtor’s Bankruptcy Rule 9011 motion for sanctions against prior counsel is denied for lack of merit. Debtor did not substantiate claims that counsel made false statements with respect to services to be provided to the debtor’s business or that schedules—signed by debtor—were prepared by counsel in violation of Bankruptcy Rule 9011
See: **In re Fulayter, No. 19-53196, 2020 WL 3950274 (Bankr. E.D. Mich. July 9, 2020) (J. Shefferly)**

7. Virtual Court Proceedings: Will this continue in the future regardless of COVID post-pandemic?

Law review article by Alicia Bannon and Douglas Keith, Northwestern University Law Review, April 18, 2021:

**“Remote Court: Principles for Virtual Proceedings During the COVID-19
Pandemic and Beyond”**

Abstract-

Across the country, courts at every level have relied on remote technology to adapt the justice system to a once-a-century global pandemic. This Essay describes and assesses this unprecedented journey into virtual justice, paying particular attention to eviction proceedings. While many judges have touted remote court as a revolutionary innovation, the reality is more complex. Remote court has brought substantial time savings and convenience to those who are able to access and use the required technology, but it has also posed hurdles to individuals on the other side of the digital divide, particularly self-represented litigants. The remote court experience has varied substantially depending on the nature of the proceedings, the rules and procedures courts put in place, and the relevant court users’ resources and tech savvy. Critically, the challenges posed by remote court have often been less visible to judges than the efficiency benefits. Drawing on these lessons, this Essay identifies a series of principles that should inform future uses of

remote technology. Ultimately, new technology should be embraced when—and only when—it is consistent with fair proceedings and access to justice for all.

- A. Discovery: Depositions, Rule 2004 Examinations
- B. Section 341 meetings
- B. Trials
- C. Mediations
- D. Oral Arguments
- E. Zoom Oral Opinions and Orders vs. Written
- F. Reaffirmation hearings

8. Debtor's attorney associated with a co-counsel to assist in an adversary proceeding without a separate retention agreement with the debtor or fee disclosures. The adversary was settled with the defendant agreeing to pay counsel fees to be shared with debtor's counsel and the co-counsel pursuant to their private agreement. Violation?

See *In re: Defeo* 627 BR 341 (Bankr. D.S.C. 2021, J. Waites)

The disclosure requirements imposed by § 329 are mandatory, not permissive, and an attorney who fails to comply with the disclosure requirements forfeits any right to receive compensation." *Peugeot v. United States Trustee (In re Crayton)* , [192 B.R. 970, 981](#) (9th Cir. BAP 1996).

9. Filing an unauthorized petition to stop a foreclosure sale

See: *In re Santos*, 616 B.R. 332 (Bankr. N.D. Tex. Mar. 17, 2020 J. Jernigan

The court's opinion lead paragraph:

This is the story of Gabriel Santos's wrongheaded scheme to manipulate the bankruptcy system, of attorney Steve Le's failure to uphold the integrity of his profession, and of the stress they both caused to Cynthia Ramos—Gabriel Santos's ex-wife, an innocent victim, and the Purported Debtor in this case.

10. Filing Chapter 13 petition without reasonable investigation of debtor's claim of ownership of real property. had transferred title before the petition and redemption was not available under state law. Writ of possession had issued.

See: *In re Schemelia*, 607 B.R. 455 (Bankr. D.N.J. Sept. 25, 2019) (Poslusny)

Aside from Rule 9011 there are various sources of authority by which bankruptcy courts may impose sanctions including: (1) the Court's inherent power to sanction; or (2) under [11 U.S.C. § 105](#). *In re Miller*, [730 F.3d 198, 206](#) (3d Cir. 2013). Under section 105(a), a bankruptcy court is authorized, *sua sponte*, to "tak[e] any action or mak[e] any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." *In re Antonelli*, [2012 WL 280722, at *13](#) (Bankr. D.N.J. 2012). Such orders are necessary " 'to protect the integrity of the Bankruptcy Code as well as the judicial process,' " and to enable bankruptcy courts to maintain order and control over the cases before them. *Id.* (quoting *In re Arkansas Communities, Inc.*, [827 F.2d 1219, 1222](#) (8th Cir.1987)).

11. Attorney failed to get wet signature from Chapter 13 debtors, allowed multiple cases to be dismissed for filing deficiencies and made multiple motions to set aside dismissals without correcting deficiencies. Attorney failed to file fee disclosures and rarely completed Chapter 13 cases.

See: *In re Frillman*, No. 3:18-bk-04334-JAF, 2019 WL 4412272 (Bankr. M.D. Fla. Sept. 13, 2019) (Funk)

12. Use of "appearance counsel" in Chapter 13 cases violated bankruptcy rules and state rules of professional responsibility, delayed the cases and disserved the debtors

See: *In re Bennett*, No. 17-31697 (AMN), 2019 WL 3805975, at *2-*3 (Bankr. D. Conn. Aug. 13, 2019) (Nevins)

Bundling and unbundling of services

13. Chapter 7 Trustee and Chapter 13 debtors Litigation/Retention Funding Special Counsel
 - a. Traps for the unwary in retaining and authorizing a 3rd party to pursue unknown litigation claims
 - b. What steps are required at a minimum
 - c. Rule 11 violations implicated?
 - d. Once issues discovered, how to resolve?

See: *In re Decade S.A.C. LLC et al. No 19-50095 (J. Sontchi December 2021)*

Pursuit of problem litigation found to be filed improvidently, not in best interest of the estate.

Also See: *IN THE MATTER OF DEAN*, Court of Appeals, (5th Circuit December 2021)- Debtor does not have standing to appeal Order Approving Litigation Funding Agreement.