TWENTY FOURTH ANNUAL BANKRUPTCY LAW SEMINAR

PRESENTED BY:

THE MIDDLE DISTRICT OF GEORGIA BANKRUPTCY LAW INSTITUTE, INC.

AND

MERCER UNIVERSITY SCHOOL OF LAW

FRIDAY
OCTOBER 14, 2022

ANDERSON CONFERENCE CENTER
5171 EISENHOWER PKWY, SUITE D
MACON, GA 31206
(478) 471-4389

6 TOTAL CONTINUING LEGAL EDUCATION CREDIT HOURS – INCLUDING

2 HOURS TRIAL CREDIT
1 HOUR ETHICS CREDIT
1 HOUR PROFESSIONALISM CREDIT

The Middle District of Georgia Bankruptcy Law Institute
and Mercer University School of Law
present the
ANNUAL BANKRUPTCY SEMINAR
Friday, October 14, 2022
6.0 Total CLE Hours
(Including 2 trial hours, 1 ethics hour, and 1 professionalism hour)
REGISTRATION DEADLINE OCTOBER 2, 2022

Schedule

8:00	-	8:55	Registration – Continental Breakfast
8:55	-	9:00	**Welcome – MDGBLI, Camille Hope**
9:00	-	9:15	**Updates from USTP** Mary Ida Townson, U.S. Trustee, Region 21 Elizabeth Hardy, Assistant U.S. Trustee
9:15		10:15	***How to Lose (Successfully)*** Honorable Paul W. Bonapfel, Bankruptcy Judge Northern District of Georgia Honorable Lisa Ritchey Craig, Bankruptcy Judge Northern District of Georgia Daniel L. Wilder, Law Offices of Emmett L. Goodman, Jr. LLC
10:15		10:30	**BREAK**
10:30	-	12:00	**Chapter 13 Case Update**: Camille Hope, Chapter 13 Trustee Sabrina Byrne, Staff Attorney, Chapter 13 Trustee **Subchapter V Update**: Robert Matson Akin, Webster & Matson P.C. **Chapter 7 and 12 Update**: Walter Kelley, Tom Lovett and Thomas Lovett,III Kelley, Lovett, Blakey & Sanders PC
12:00	-	1:15	**LUNCH**
1:15	-	2:15	**Judges' Forum: Discussion of Hot Topics** Questions & Answers
2:15	-	2:30	**BREAK**
2:30	-	3:30	***Ethical Hypotheticals Part II: A Bankruptcy Lawyer's Journey Through Several Common Scenarios*** Ishaq Kundawala, Professor of Law Mercer University School of Law
3:30	-	4:30	***Professionalism and Practical Wisdom*** Patrick Longan, Professor of Law Mercer University School of Law

THE SPEAKERS

HONORABLE PAUL W. BONAPFEL

Judge Paul W. Bonapfel has been a United States Bankruptcy Judge for the Northern District of Georgia since 2002. Prior to his appointment, he practiced law in Atlanta, Georgia, with Lamberth, Bonapfel, Cifelli & Stokes, P.A., now known as Lamberth, Cifelli, Ellis & Nason, P.A. As an attorney, Judge Bonapfel represented all types of parties in bankruptcy cases, including consumer and business debtors in liquidation cases, business debtors in reorganization cases, chapter 7 and 11 bankruptcy trustees, creditors' committees, and creditors in both consumer and business cases.

Judge Bonapfel is a co-author, with Judge W. Homer Drake, Jr., and Adam M. Goodman, of *Chapter 13 Practice and Procedure* (Thomson Reuters). A fellow of the American College of Bankruptcy, he has served as chairperson of the Bankruptcy Sections of the State Bar of Georgia and the Atlanta Bar Association and was a director and president of the Southeastern Bankruptcy Law Institute, which presents an annual seminar on bankruptcy law and procedure. He teaches a course at Mercer Law School in Macon, Georgia, on consumer bankruptcy practice. Judge Bonapfel received his B.A. *cum laude* from Florida State University in 1972 and his J.D. *magna cum laude* from the University of Georgia School of Law in 1975, where he was Notes Editor of the *Georgia Law Review*. He was a judicial law clerk for United States District Judge Wilbur D. Owens, Jr., in Macon, Georgia.

HONORABLE LISA RITCHEY CRAIG

Judge Lisa Ritchey Craig was appointed a United States Bankruptcy Judge for the Northern District of Georgia on March 24, 2016. She received her J.D. in 1989 from Mercer University, Walter F. George School of Law and her B.A. from Mercer University in 1996. Prior to her appointment, her bankruptcy practice included representation of secured lenders in both consumer and business bankruptcy cases in bankruptcy courts in Georgia, Tennessee, and Florida, as well as in appeals in district courts and the Eleventh Circuit. She represented a Standing Chapter 13 trustee for 12 years. Judge Ritchey Craig was a member and president of the Board of Directors of the Southeastern Bankruptcy Law Institute. As a member of the Northern District of Georgia's Bench and Bar committee, she worked on comments and revisions to the local rules. Judge Ritchey Craig received the Louis C. Brown, Jr. award from the Metro Atlanta Consumer Bankruptcy Attorney Group in 2012 for professionalism and significant contributions to the practice of bankruptcy law in the Northern District of Georgia. She writes and speaks on a national and regional basis.

ROBERT M. MATSON

Robert M. Matson is a partner at the law firm of Akin, Webster & Matson, P.C. in Macon, Georgia. He represents debtors, trustees and creditors in chapter 7, 11 and 13 bankruptcy cases. He is a Chapter 7 panel trustee and a Subchapter V trustee in the Middle District of Georgia. He is board certified by the American Board of Certification as a specialist in consumer bankruptcy. He also is a board member of The Middle District of Georgia Bankruptcy Law Institute, Inc.

He received his A.A. from Oxford College of Emory University in 1991, his B.A. from Emory University in 1993 and his J.D. from Mercer University School of Law in 1997.

WALTER KELLEY

Walter Kelley is a Senior Partner in the firm of Kelley, Lovett, Blakey & Sanders, P.C. located in Albany. Mr. Kelley received his J.D. *magna cum laude* from the Emory University School of Law. Mr. Kelley is the Standing Chapter 12 Trustee for the Middle District of Georgia and is on the Panel of Chapter 7 Trustees for the Middle District of Georgia.

TOM LOVETT

Tom Lovett is the Managing partner for Kelley, Lovett, Blakey & Sanders, P.C. in Valdosta, Georgia. Mr. Lovett received his B.S., M.S. and J.D. from the University of Florida.

THOMAS LOVETT III

Thomas Lovett is an Associate with Kelley, Lovett, Blakey & Sanders, P.C. in Valdosta, Georgia. Mr. Lovett received his B.A. from Valdosta State University and his J.D. from Barry University School of Law.

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Update from the Court

The Clerk of the Court will provide his update separately upon completion of the Judges' meeting September 22, 2022

Kyle George
Clerk of Court
United States Bankruptcy Court
Middle District of Georgia

Update from the USTP

Mary Ida Townson
U.S. Trustee
Region 21

Elizabeth A. Hardy
Assistant U.S. Trustee

How to Lose (Successfully)

Honorable Paul W. Bonapfel
Bankruptcy Judge
Northern District of GA

Honorable Lisa Ritchey Craig
Bankruptcy Judge
Northern District of GA

Daniel L. Wilder
Law Offices of Emmett L. Goodman, Jr., LLC

How to Lose (Successfully)[1]

By
Hon. Diane Finkle, U.S. Bankruptcy Court, D. Rhode Island
Hon. Cynthia A. Norton, U.S. Bankruptcy Court, W.D. Missouri
Hon. Sage Sigler, U.S. Bankruptcy Court, N.D. Georgia, Moderator

Presented to the Southeastern Bankruptcy Law Institute
March 2022

Part I: General Thoughts on Winning & Losing

1. You win some you shouldn't win and lose some you shouldn't lose.

- Manage your client's expectations.

2. You don't always win by default.

- ***FRCP 8(a). General Rules of Pleading*.** "A pleading that states a claim for relief must contain:
  (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
  (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
  (3) a demand for the relief sought, which may include relief in the alternative or different types of relief."
- ***FRCP 8(b)(6). Effect of Failing to Deny***. "An allegation – other than one relating to the damages – is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided."
- ***FRCP 9(b). Pleading Special Matters.*** "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."
- ***FRCP 55(a). Entering a Default.*** "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default."
- ***FRCP 55(b). Entering a Default Judgment.***
  *"**(1) By the Clerk.*** If the plaintiff's claim is for a sum that can be made certain by computation, the clerk – on the plaintiff's request, with an affidavit showing the amount due – must enter judgment for that amount and costs against a defendant who has defaulted for not appearing and who is neither a minor nor incompetent person.
  (2) By the Court. In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has

[1] Originally orally presented by Judges Finkle and Norton on an NCBJ podcast recorded October 2018; written materials presented to the Ross T. Roberts Trial Academy, W.D. MO, Sept. 10, 2019.

appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals – preserving any federal statutory right to a jury trial – when, to enter or effectuate judgment, it needs to:

(A) conduct an accounting;
(B) determine the amount of damages;
(C) establish the truth of any allegation by evidence; or
(D) investigate any other matter."

Selected Case Authorities

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face; claim has facial plausibility when plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

The bankruptcy court has broad discretion to grant a default judgment; the plaintiff is not entitled to such judgment as a matter of right. While the defendant who defaults may be deemed to have admitted facts alleged in the complaint, the default is not an absolute confession of liability, as facts alleged in the complaint may be insufficient to establish liability. Defendant's default establishes the well-pleaded allegations of the complaint, unless they are contrary to facts judicially noticed or to uncontroverted material in the file. *In re McGee*, 359 B.R. 764, 771-72 (B.A.P. 9th Cir. 2006) (cites omitted).

"Even when a defendent is technically in default and all the requirements for a default judgment are satisfied, a plaintiff is not entitled to default judgment as a matter of right." *Berkley Assurance Co. v. BMG Serv. Group LLC*, 2019 WL 861265 at *1 (E.D. Mo. Feb. 22, 2019) (citing 10 James Wm. Moore, et al., Moore's Federal Practice § 55.31[1] (3d ed. 2018); *Taylor v. City of Ballwin, Mo.,* 859 F.2d 1330, 1332 (8th Cir. 1988)). "Prior to the entry of a discretionary default judgment, this Court should satisfy itself that the moving party is entitled to judgment, including by reviewing the sufficiency of the complaint and the substantive merits of the plaintiff's claim." *Id*. (citing 10 Moore's Federal Practice § 55.31[2]). *See also Ramos-Falcon v. Autoridad de Energia Electrica*, 301 F.3d 1, 2 (1st Cir. 2002) (per curiam) (even after entry of default, before entering default judgment, a court "may examine a plaintiff's complaint, taking all well-pleaded factual allegations as true, to determine whether it alleges a cause of action."); *NEPSK, Inc. v. Town of Houlton*, 283 F.3d 1, 7-8 (1st Cir. 2002) (a court "may not automatically grant a motion for summary judgment simply because the opposing party failed [to object]. Rather, the court must determine whether summary judgment is 'appropriate,' which means that it must assure itself that the moving party's submission shows that 'there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'") (quoting Fed. R. Civ. P. 56(c)).

See also In re Davis, 2019 WL 5592577 at *4 (Bankr. N.D. Ill. 2019) (bankruptcy court required to remand the mortgage company's state court foreclosure action that the debtor had removed to bankruptcy court on the theory that the mortgage company was violating the discharge injunction; under the "well-

pleaded complaint" rule recognized by the Seventh Circuit, a defendant "cannot remove a case to federal court unless the plaintiff's complaint demonstrates that the plaintiff's case arises under federal law" and the Seventh Circuit has applied the "well-pleaded complaint rule to bankruptcy cases; since no basis for federal jurisdiction appeared on the face of the mortgage company's complaint, action had to be remanded for lack of federal jurisdiction, given that the mortgage company had withdrawn its proof of claim after it obtained stay relief to pursue its state law remedies).

3. Don't drink the Kool-Aid!

- Put yourself in the judge's shoes.
- Think about next steps if you lose, particularly a Rule 12 or 56 motion.
- Think about partial summary judgment as an alternative.
- Bonus if you have talked to opposing counsel in advance!

4. Argument isn't evidence.

- Evidence generally comes from witnesses or documents or things, such as objects or facts the court takes judicial notice of, admitted in accordance with the FREs. See FRE 201 (judicial notice); FRE 601 et seq. (witnesses); FRE 701 (lay witness opinion); FRE 702 (expert witness); FRE 901 et seq. (authenticating or identifying evidence); FRE 1001 et seq. (contents of writings, recordings, and photographs).
- ***FRCP 43. Taking Testimony***.
- ***FRCP 52(a)(1). Findings and Conclusions In General.*** "In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58."

5. Have a mantra for when you get caught off guard and practice it.

- Your honor, you raise a point I had not thought of – may I ask for leave to brief the issue before you make a final ruling?
- Your honor, I apologize, but I was not prepared for that – may I have a brief recess to discuss this with my client and let you know what our next steps will be?
- Prepare your client for the possibility of losing so that the client doesn't react inappropriately or have an outburst.
- There are ethical considerations: ABA Model Rule 3.5(d), Impartiality and Decorum of the Tribunal, provides that a lawyer shall not "engage in conduct intended to disrupt a tribunal." Many states phrase it as prohibiting "undignified or discourteous conduct degrading to a tribunal," or similar language.
- ABA Model Rule 8.2(a), Judicial and Legal Officials, under the heading of "Maintaining the Integrity of the Profession" also provides:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

Selected Case Authorities

See https://www.law360.com/articles/27556/french-fry-remark-proves-costly-for-mcdermott-head (attorney ordered to take ethics classes for telling a bankruptcy judge she was a few french fries short of a Happy Meal).

Attorney suspended for six months for statements made to judges in open court and for letters written to judges accusing them of unethical conduct, including that one judge was "drunk with power," "you were not faithful to the law," "in your ruthless abuse of power and contempt for the rule of law, you silenced me and ordered me out of your court," and "It is the opinion of attorneys and non-attorneys that you and your 'evil' network will seek vengeance upon me for challenging you in this manner," among other comments. Court notes that the attorney's complaints are with the merits of the judge's ruling and whether another judge acted properly in failing to hear his case when scheduled. "There are established mechanisms for raising such issues. Lawyers concerned with a court's ruling have an appropriate avenue to challenge that ruling through an appeal. Lawyers believing a judge is biased have an appropriate avenue to challenge that judge by seeking recusal. … He is also necessarily aware, as are all lawyers licensed in Missouri, that if he believes an ethical violation has occurred, he is required to file a complaint … [but did not do so against either judge.]" *In re Madison*, 282 S.W.3d 350, 358 (Mo. 2009) (en banc).

Attorney given probation after he told the judge, "It's a good thing you are still wearing that robe – why don't you take it off and step outside and I'll show you," and said "That judge is a poster child for judicial elections." *In re Clothier*, 301 Kan 567 (2015) (a minority of the court would have ordered suspension).

6. When you know you are going to lose.

- Signal to the judge, e.g., "I stand on my papers"; "I have no authority to consent but I don't object," etc.
- But, push back if you need to complete the record and the judge is cutting you off, e.g., "Judge, I know you disagree with my position but may I please finish my argument to complete the record?"
- Arguments not preserved before the trial court will not generally be preserved for appeal.
- Carefully consider whether to file a post-trial motion such as a "motion to reconsider." (Note: such motion is really a misnomer; the motion is actually one to alter or amend a judgment under ***FRCP 59*** or for relief from a judgment or order under ***FRCP 60***, both applicable to bankruptcy proceedings by Bankruptcy Rule 9023 and 9024, respectively. *See In Re Guzman*, 567 B.R. 854, 862 (B.A.P. 1st Cir. 2017)).

7. **Know when to back down.**

8. **Mistakes: Only 2 questions.**

    - How do I fix it?
    - How do I keep it from happening again?

9. **Turn a loss into a win.**

10. **Tips on winning (see attached advocacy tips, Part II).**

Part II: Effective Written and Oral Advocacy Tips[2]

1. ***Advocacy in general.***
   - Essential tool in any lawyer's toolkit, even if not a litigator, since advocacy is about stating an argument clearly and persuasively
   - Hardest for new lawyers to conquer nerves/fears
   - Why do you need to conquer your nerves/fears? Because a nervous/fearful lawyer is not as effective – can't think clearly, may forget an important point, often will exhibit mannerisms that are distracting (such as pen clicking or shuffling papers)
   - Nerves/fear are caused by many factors, but some of the most important are not being in control and not being prepared
2. ***Control: You can't control the courtroom, but control what you can control:***
   - Know your judge -- Starts on time? Will rule from bench? Assigned place to sit/stand? etc.
   - Visit the courtroom or watch another docket in advance if you have not appeared before this judge before
   - Wear something comfortable yet powerful (your best power suit) – remember courtrooms are often cold – don't try out new shoes, a new haircut, or a new suit the day of an important argument
   - Arrive early (go to the bathroom, introduce yourself to courtroom personnel, warm up if you arrived from the cold, pick the best seat with direct line of sight to the judge, unpack and arrange your papers, file, etc.)
   - Put away your phone and pay attention; watch other motions being argued
   - When entering an appearance, say your name slowly and with gravitas (nervous people speak more quickly so it is a reminder to you to slow down). Plus, it is embarrassing if the judge has to ask you to repeat your name in front of your client.
3. ***Being Prepared:***
   - A judge's most common complaint is that lawyers aren't prepared, but many people don't focus on how to prepare to become well-prepared
   - Being prepared (and another thing you can control) starts with your written submission: i.e., preparation starts with a well-drafted, organized motion or brief
   - Think of the written submission as a three-legged stool, which needs all three legs to stand:
     - Predicates (jurisdiction, procedure, venue, authority, notice, due process, etc.)
     - Facts
     - Law
   - For Predicates, ask yourself:
     - Why am I in this court?
     - What relief am I asking for?

[2] Originally orally presented by Judge Norton at Stanford Law School; written materials presented to the Ross T. Roberts Trial Academy, W.D. MO in Summer 2017.

- What jurisdiction/authority is there for the court to do what I'm asking it do to?
- Who am I representing?
- The formula I used to start any motion, which helped me drill down on these questions:

  _____, through counsel, Cynthia A. Norton,

  moves/applies to /notices/certifies

  to the court

  for an order pursuant to _____[statute/rule] and _____[any local rule}

  to _____[state the relief requested, e.g., dismissing plaintiff's complaint for failure to state a claim].

  In support, ____ alleges/states:

- For Facts:
  - Tell the story in the right way, and it will lead the factfinder to the right conclusion
  - Start by reading the entire file and court record (you may have forgotten something important, like an admission from the party opponent!)
  - Tell the story, but not in an argumentative way (no adverbs)
  - Don't present something as a fact when it is not – i.e., it is disputed (then you will need evidence, affidavits, etc.)
  - Cite to the record or source when stating a fact
  - Understand the elements of the claim you are proving or disproving so you can make sure you will have evidence or can address the facts for each element
- For Law:
  - Research from the top/down (federal or state statute, national rule of procedure, local rule of procedure; then Supreme Court case, applicable Circuit Court case, District Court or B.A.P case, etc.)
  - If there is a binding case on point (e.g., Supreme Court, Circuit) you must cite it, particularly before you start relying on cases outside your Circuit)
  - Don't stop when you find the first case
  - If there are no binding cases, state so affirmatively
  - Make sure you understand the elements of the claim you are proving or disproving so you can apply the law regarding those elements to the facts of your case
  - Build your own case before you tear down your opponent's
  - Don't plagiarize (we know your writing!)
  - Make sure the cases you rely on support your proposition
  - Muddled thinking leads to muddled writing – understand your argument and don't start writing until you do

- Use outlines if necessary to map out your argument
- Use headings as roadmaps (for the reader, plus it is easier for you to find a particular argument when you are on your feet in an argument)
- Break up long paragraphs
- Be accurate – every word has meaning (thinking of legal writing like poetry and ask – is there a better word to use?)
- Proofread
- Have a spouse, partner, friend read your argument to see if it makes sense and/or read it out loud
- Always ask: is there a shorter, cleaner way to say what I want to say?
- Improve your writing by following noted writers such as Bryan Garner, Word Rake, Ross Guberman, etc.

4. Some Don'ts

- Recognize that judges are trying hard to get it right and sometimes pause when they are talking – don't assume the judge is finished talking
- Don't interrupt; if you do, apologize
- Don't say: "You can't do this"
- Don't argue to opposing counsel; argue to the judge
- Don't drink the Kool-Aid, i.e., don't believe so strongly that you are going to win that you aren't prepared for losing wholly or in part. Ask what if I win – what happens next? What if I lose, what happens next? Remember that litigation is like a train – it keeps moving forward whether you have thought about what happens next or not
- Don't let the judge know your case better than you do
- Develop some mantras that you have practiced for when (not if) you are caught off guard by something you didn't anticipate, e.g., "You raise an interesting point I had not thought of; May I have some time to discuss it with my client? Brief it?"
- Don't bluff; if you don't know, say so
- If you find a mistake in your written submission, address it on the record or amend

Part III: Thoughts on Trial Preparation Strategies For Bankruptcy Lawyers[3]

Before you file the complaint:

- Interview the client thoroughly; take good notes. Make sure you know who is the real party in interest is who has the standing to bring the action.
- Ask who else has knowledge of the events and who might be a good witness.
- Immediately determine if there is a statute of limitations for filing the complaint and calendar it, along with several pre-deadline reminders (e.g., S/L in Johnson case expires on 4/15 – 90 days to go). Err on the side of caution in calculating the statute of limitations (e.g., if it is a one year statute that begins running on Jan. 17, don't calendar Jan. 17 – the deadline may be Jan. 16, or earlier, depending on how the days are counted.
- Gather all pertinent documents and keep them in one place; make copies of the original documents (so you can make notes on them if you need to) and safeguard the originals in a secure location (firm safe deposit box) so they aren't lost or defaced for the trial. Make sure not to rearrange original documents, such as a file folder. If what is in a file folder and/or the order the documents are in may be important, then make a copy and bate-stamp the pages so you have a record.
- Remember to ask for relevant electronic documents, such as calendars, emails, cell phone records, etc., and remind the client of the duty not to erase, discard, throw away, etc., anything relating to the litigation (explain spoliation and sanctions) until you advise it is OK to do so. Remind the client to let you know immediately if he or she finds other documents that may be pertinent.
- Make an initial timeline of the pertinent events with references to where in the file/record you obtained the date/event.
- Ask the client who he or she has talked to about the case or given a statement to (if so, obtain the statement). Remind the client that he or she should not talk to other people about the case or what you have advised as that may waive the attorney-client privilege.
- Ask the client specifically what his or her goals for the litigation may be and make clear you are sure about the goal and that the goal is something you can legally and ethically accomplish.
- Consider whether there may be other related causes of action and discuss with the client the advantages and disadvantages of including those. For example, do you really need FDCPA and FRCA if you have a strong discharge injunction violation? Do you want a jury trial?
- Decide what court is appropriate to bring the action in. Ask yourself: does this court have the authority to do what I want it to do?
- Research the relevant law to make sure you know all the elements so that you can tailor your factual allegations to make sure all relevant elements have been pled.
- Make sure you understand the nature of the remedies you are seeking (Injunctive relief? Declaratory relief? Money judgment? Attorneys fees? Indemnity? Prejudgment interest? etc.).

[3] Originally presented by Judge Norton as part of the W.D. MO Pro Bono Clinic in January 2017.

- Review Fed. R. Bankr. Proc. 7008, 7009, and 7010, and any local rules implementing Rule 8 pleading requirements.
- Manage the client's expectations, by having an engagement letter that clearly specifies the scope of the engagement (does it include appeals?); how attorneys fees and costs will be dealt with; what decisions you are authorized to make on the client's behalf (e.g., do you have the authority to consent to requests for extensions, whether to depose a witness, what witnesses or evidence to adduce at trial, etc.); that you cannot guarantee a particular result; that the client has the duty to respond timely to discovery requests from the other side and to court orders, among other things.
- If ethically required and otherwise appropriate, send a demand letter to the opposing side. Sometimes it is even better to pick up the phone! Maybe this is something that can be settled without litigation?
- Draft the complaint and send it to the client for review and approval before you file it; consider whether the complaint should be verified by the client.
- Double-check the name and organization type of the defendant(s).
- Double-check Rule 7004 to make sure you know how to obtain good service over the defendant(s).
- As a gut check, ask your client what he or she thinks about what the defendant will say in response to the complaint – sometimes surprising things the client "forgot" to tell you pop out at this stage.
- As a final gut check, ask again how you/your client are going to be able to prove what the complaint alleges.

Before you file the answer (in addition to the relevant steps outlined above):

- Calendar the answer date immediately.
- Review the complaint with the client and keep good notes.
- Review the summons/service to make sure service was good.
- Ask if there is any insurance coverage and obtain any applicable policies immediately; calendar any deadlines for making a claim.
- Review Rule 8 regarding pleading and Rules 9(b) and 12 to see what defenses if any may apply.
- Consider whether there are counterclaims or third parties to add (Rules 13 and 14).
- Consider whether there is a jury trial right.
- Consider whether you have a right to attorney fees.
- Draft answer, answering each paragraph separately, keeping in mind the Rule 8 and 11 duties to answer allegations in good faith.

At the time the complaint is filed:

- If you haven't already, make a trial notebook. It will eventually include the complaint, the answer, the pretrial order, witness outlines, exhibit list, pertinent case law, etc.
- Send a copy of the filed complaint to the client and ask the client to review and let you know if there is anything that needs to be amended.

- Request the alias summons and calendar 7 days to serve along with the dates in the pretrial order you receive from the court.
- Calendar other pertinent procedural dates: 21 days to amend once the complaint is served without leave of court (Rule 7015); 35 days for the answer date; 90 days to achieve service (Rule 4(m)).
- Map out discovery strategy; discuss with client for buy-in (not consent, because client doesn't have to consent); calendar potential dates.
- Once the court has set deadlines, then calendar all dates, starting with the trial date and working backwards, e.g., 30 days till trial -- start witness prep; 20 days till trial – subpoena witnesses; 60 days to discovery cut off – send interrogatories; 30 days till dispositive motions – start summary judgment motion, etc.
- Send all the dates to your client and the witnesses you intend to call well in advance!

General Observations Regarding Litigation Preparation

- You must prepare as though you are really going to have to go to trial.
- Trial preparation should be prospective, which involves a different skill set from being a flat fee consumer lawyer.
- Deadlines are important in litigation! Blown discovery deadlines may result in sanctions.
- Rules of Procedure are important in litigation!
- Rules of Evidence are doubly important in litigation!
- Be prepared at all status conferences with the court – consider how much time you need for discovery, whether you will be filing a dispositive motion, what a deadline for amendments should be, what a deadline for designating experts should be, and discuss these with opposing counsel before the status hearing. And have your calendar open!
- Take the time to write a trial brief at the start of your trial preparation. It will force you to focus on the facts you need to prove and what the law is (and a well-written succinct trial brief will really assist the judge). It will also help you order the exhibits in the order they will naturally come into evidence.
- Make sure your client and all your friendly witnesses know in advance (and in plenty of time) when the trial will be and that you will want time to prepare with them.
- Consider whether you need to subpoena hostile witnesses.
- Consider whether to file motions in limine (such as to address an evidence issue in advance).
- Consider bringing a nervous client to the courtroom in advance (ask the courtroom deputy to open the courtroom for you) to show the client where he or she will sit, get sworn, and testify. Be sure to tell the client what to wear, how to act (no grimacing or making faces at the opposing side), to remember to bring a picture ID, etc.
- If using courtroom technology, make a trial run to make sure everything works.
- Prepare a witness outline that tells the story, incorporates your exhibits, and contains the elements necessary to lay the foundation for each exhibit (even if you anticipate stipulating to them by the date of trial).

- Prepare a separate outline of potential cross-examination points for each witness and important exhibit; include references to the FRE you anticipate using to challenge a witness or exhibit.
- Put the exhibits in a notebook marked on each page (in Adobe Professional, use the footer function which has a built-in numbering mechanism, e.g., EXH A p.1 of 8). Remember to have an original exhibit notebook for the witness for the record, in addition to one for you, the judge, perhaps the law clerk, and the client to follow along with.
- NOTE: Since exhibit tabs and notebooks are expensive, scavenge them from other matters and save them to reuse.
- Draft a short opening (what the case is about; how many witnesses you intend to call and briefly what they will testify about; what relief you will be asking for).
- If appropriate, draft a closing.
- Rehearse, rehearse, rehearse, but don't drink the Kool-Aid so much that you don't focus on what the other side's case is going to be and "how you are going to defeat it."
- At this point, you will be prepared, so you can tell yourself, I'm just going to go have fun!

Chapter 13 Case Update

Camille Hope
Chapter 13 Trustee
Middle District of Georgia

Sabrina Byrne
Staff Attorney, Chapter 13 Trustee
Middle District of Georgia

CH 13 UPDATE[1]

Camille Hope
Sabrina Byrne

I. 11TH CIRCUIT

Langley v. Waage (In re Langley), No. 21-12002 (11th Cir. Feb. 7, 2022). [2]
In a Chapter 13 case intended to be a litigation vehicle for the debtor to challenge a residential mortgage, court of appeals affirms denial of confirmation and dismissal of case based on pro se debtor's failure to challenge any of the reasons given by the district court for affirming the bankruptcy court orders.

Zalloum v. River Oaks Cmty. Servs. Ass'n, Inc. (In re Zalloum), No. 20-11483 (11th Cir. Nov. 3, 2021). [3]
Eleventh Circuit disagrees with district court with respect to the finality and appealability of multiple orders addressing claims objections and dismissal when the various orders were based on a single memorandum by the bankruptcy court; dismissal of appeals is vacated and remanded to sort out which orders the Chapter 13 debtor timely appealed and whether additional filing fees are due.

Liebman v. Ocwen Loan Servicing, LLC (In re Liebman), No. 20-14872 (11th Cir. Nov. 2, 2021). [4]
Chapter 13 debtor's second pro se appellate challenges to bankruptcy court orders that refused to reinstate dismissed case and refused to retroactively impose stay are rejected. Order by bankruptcy court that no stay was in effect did not implicate Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano, ___ U.S. ___, 140 S. Ct. 696, 206 L. Ed. 2d 1 (Feb. 24, 2020).

[1] This is a non-exhaustive compilation of significant consumer bankruptcy decisions in Chapter 13 cases decided between Sept. 1, 2021, and August 31, 2022.
**Many summaries have been copied verbatim from Recent Developments in Chapter 13, selected Cases from LundinOnChapter13.com, 57th Annual NACTT Seminar, July 5-9, 2022. When this has been done, the following citation has been added after the case name: LundinOnChapter13.com {#}., where # is the case number from the Recent Developments in Chapter 13 document.
[2] LundinOnChapter13.com {896}.
[3] LundinOnChapter13.com {1039}
[4] LundinOnChapter13.com {1158}.

Eldridge v. TitleMax of Ala., Inc. (In re Eldridge), No. 21-11457 (11th Cir. Sept. 10, 2021). [5]

Applying Title Max v. Northington (In re Northington), 876 F.3d 1302 (11th Cir. Dec. 11, 2017) (Wilson, Newsom, Moreno), Chapter 13 debtor had no interest in pawned car when petition was filed after expiration of redemption period under contract and Alabama law; that Title Max allowed debtor to keep the car and renewed the pawn contract after it had expired and after ownership had passed to Title Max does not change result that no property interest remained in debtor at time of petition.

Ford v. Waage (In re Ford), No. 20-13977 (11th Cir. Sept. 10, 2021). [6]

Bankruptcy court appropriately dismissed Chapter 13 case filed by an experienced bankruptcy attorney/debtor after three years without a confirmed plan when debtor failed to resolve domestic relations debts that had to be resolved before any plan could be confirmed and debtor's failure to resolve the DSO issues appeared to be a delaying tactic by the debtor.), aff'g No. 8:19-cv-02724-Mss, 2020 WL 6281356 (M.D. Fla. Oct. 8, 2020) (Scriven) (District court denies reconsideration of its conclusion that bankruptcy court appropriately dismissed Chapter 13 case when debtor failed to meet court-ordered deadlines to file amended plans after three years of no progress toward confirmation.).

II. UNITED STATES DISTRICT COURT

James v. SWH, No. 1:21-cv-4380-MLB, ___ B.R. ___ (N.D. Ga. May 5, 2022).

Bankruptcy court granted stay relief to the residential lease creditor. Debtor, acting pro se, appealed and argued that the bankruptcy court's decision should be reversed because her attorney was incompetent. In affirming the bankruptcy court's decision, the court, stated that

> This argument does not merit reversal as "there is no constitutional or statutory right to effective assistance of counsel on a civil case." Mekdeci ex rel. Mekdeci v. Merrell Nat'l Labs., a Div. of Richardson-Merrell, Inc., 711 F.2d 1510, 1521 (11th Cir. 1983) (quoting Watson v. Moss, 619 F.2d 775, 776 (8th Cir. 1981)). In civil cases, attorneys act as the agents of their clients, and a party cannot "avoid the consequences of the acts or omissions of this freely selected agent." Link v. Wabash R.R. Co., 370 U.S. 626, 634-35 (1962); accord Shuler v. Ingram & Assocs., 441 Fed.Appx. 712, 719 (11th Cir. 2011) (per curiam) ("[A] litigant is generally bound by all acts and omissions of his attorney."). "Because of this relationship, a party who feels his attorney's conduct has fallen below an acceptable standard may pursue an action for malpractice, but he [or she] cannot seek to alter or amend a court's judgment." Matter of Fuller, 560 B.R. 876, 880 (Bankr. N.D.Ga. 2016).

[5] LundinOnChapter13.com {436}

[6] LundinOnChapter13.com {1070}

III. UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF GEORGIA

Flag Boy Props., LLC v Merriell (In re Merriel), Adversary P. No. 21-05113-LRC, ___ B.R. ___ (Bankr. N.D. Ga. Aug. 18, 2022).
Automatic Stay annulled where "[Debtor] did not sign the petition or authorize its filing and took no actions to ratify the … Chapter 13 Case."

****As of August 1, 2022, Administrative Order #129 (allowing the filing of petition, pleadings, documents, and other papers without an original signature so long as one is obtained within 60 days of the filing of the digitally signed document) has been rescinded pursuant to Administrative Order #145. Therefore, as of August 1, 2022, the Debtor's attorney must have the original signature before filing these documents. One question that will be posed to the judges panel later today is: **What constitutes an original signature?**

In re Spann, No. 19-61872-JRS (Bankr. N.D. Ga. Nov. 2, 2021). [7]
Chapter 13 debtor's motion to voluntarily dismiss is denied when debtor violated court order by absconding with proceeds from sale of residence, debtor lied to closing attorney to obtain sale proceeds and only by retaining jurisdiction can bankruptcy court recover money stolen from the estate. Court acknowledges cases sustaining absolute right to dismiss notwithstanding misconduct by the debtor but concludes that remedies under § 349 would not be adequate to address what debtor did here. "The Eleventh Circuit has not taken a position on whether a Chapter 13 debtor has an absolute right to dismissal . . . . The Court is aware of cases . . . that hold that a debtor has the absolute right to dismiss a case and this Court understands that a debtor cannot be compelled to continue to make monthly payments from his or her disposable income. But when there has been an abuse of the process such as what we have in this case, where we have a debtor who sought and received the protection of this Court, and benefited from that protection, and then knowingly violated a court order and absconded with assets of the estate to the detriment of creditors, the Bankruptcy Code does not prohibit this Court from protecting creditors and the integrity of the bankruptcy process by denying a request to voluntarily dismiss a case.").

[7] LundinOnChapter13.com {1033}

MIDDLE DISTRICT OF GEORGIA

Jenkins v. TitleMax of Ga., Inc. (In re Jenkins), No. 20-10350-AEC (Bankr. M.D. Ga. June 10, 2022).

Debtor's motion for turnover of a vehicle was denied under the following fact scenario:

01/28/2019:	Redemption period for title pawn on vehicle expired.
03/26/2020:	Debtor filed bankruptcy petition–schedules listed vehicle as inoperable and surrendered the asset in the plan.
08/10/2020:	Plan confirmed – TitleMax did not repossess the vehicle.
01/ /2021:	Debtor paid over $2,000.00 to repair the vehicle.
11/02/2021:	Case dismissed due to miscommunication; motion to modify plan after-confirmation filed by Debtor--vehicle surrendered, and collateral described as non-operable.
12/08/2021:	Motion to modify withdrawn; 2nd motion to modify plan after-confirmation filed by Debtor--vehicle surrendered, and collateral described as non-operable.
12/10/2021:	Dismissal vacated.
12/29/2021:	Creditor repossessed the vehicle.
12/30/2021:	2nd motion to modify withdrawn; 3rd motion to modify plan after-confirmation filed by Debtor—vehicle treated in section 3.5 and valued at $3,683.00.
01/25/2022:	Motion to modify plan granted.
01/28/2022:	Motion for turnover filed by Debtor.

Debtor proposed many alternate theories to support turnover: res judicata (based on the terms of the approved after-confirmation plan modification), abandonment, unjust enrichment, quantum meruit, mechanic's lien, equitable lien, and that the parts used in repairs still belonged to her. In denying Debtor's motion, the court held that since the redemption period had expired before the debtor filed bankruptcy the vehicle did not become property of the estate when the case was filed. The fact that Debtor unilaterally chose to pay to repair the vehicle did not change the outcome--TitleMax did not ask Debtor to make the repairs and Debtor received a benefit as she was able to use the vehicle for 11 months before the vehicle was repossessed.

McBride v. Wells Fargo Bank (In re McBride), Adversary P. No. 20-04007-JTL (Bankr. M.D. Ga. May 13, 2022).

CARES Act did not prohibit recording a foreclosure deed where the deed was executed before the Act was passed because "Georgia law only requires the execution of the deed, not the recordation of the deed, to extinguish the debtor's right to the property." Furthermore, "[t]he plain language of the CARES Act does not support the Plaintiff's interpretation that Congress intended a blanket ban on all foreclosure-related activities."

In re Miller, 634 B.R. 641 (Bankr. M.D. Ga. 2021). [8]
Shared responsibility payment was not entitled to priority and full payment in a Chapter 13 case under § 507(a)(8)(E) because there is no transaction upon which an excise tax could apply; but the SRP is a tax measured by income for purposes of § 507(a)(8)(A) that is entitled to priority and full payment in a Chapter 13 case.

SOUTHERN DISTRICT OF GEORGIA

In re Smith, 637 B.R. 758 (Bankr. S.D. Ga. 2022). [9]
Motion to approve $45,000 settlement of Chapter 13 debtor's postpetition personal injury accident—filed three years after settlement was consummated and proceeds disbursed to debtor and attorney—is denied as moot. Although Chapter 13 debtor does not need court approval to hire a PI attorney because § 327 applies to trustees but not to debtors, PI attorney did need court approval of fees under § 329 and Bankruptcy Rule 2016. PI counsel's failure to comply requires counsel to disgorge $11,414 fees paid from the settlement proceeds. Court denies Chapter 13 trustee's motion for turnover of the $32,500 paid to debtor without prejudice to trustee's potential adversary proceeding against debtors and/or their PI attorney to recover some or all of the settlement funds that were property of the estate. Court declines to sanction PI counsel beyond disgorgement of fees. "[T]he settlement has already taken place, and thus the Motion to Approve Settlement is moot. . . . [N]othing in the Bankruptcy Code requires the Court's approval of Mrs. Smith's hiring of Mr. Heitmann in this case. . . . Although nunc pro tunc retention of special counsel is permissible in some circumstances, the Debtors have not carried their burden in establishing that such relief is warranted in this case. . . . [T]he Supreme Court has cast doubt on the validity of nunc pro tunc orders. In Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano, ___ U.S. ___, 140 S. Ct. 696, 206 L. Ed. 2d 1 (2020) . . . .Notwithstanding the Supreme Court's holding in Acevedo, many bankruptcy courts continue to grant nunc pro tunc employment applications. . . . [T]he instant Application to Employ does not run afoul of Acevedo. . . . The Application to Employ does not, however, satisfy the second . . . showing of excusable neglect. . . . Even if the Court were to approve retroactively Mrs. Smith's employment of Mr. Heitmann, the Court will grant the Trustee's request to disallow Mr. Heitmann's fees and expenses in the amount of $11,414.71. . . . Mr. Heitmann must disgorge these fees and expenses in consequence of his failure to comply with . . . § 329(a) and Rule 2016(b). . . . [T]he non-exempt proceeds of Mrs. Smith's personal injury settlement were property of the bankruptcy estate. . . . [S]hould the Trustee elect to file an adversary proceeding against Mr. Heitmman [sic], the Debtors may be jointly and severally liable with Mr. Heitmann under § 542(a)."

[8] LundinOnChapter13.com {760}
[9] LundinOnChapter13.com {769}

TitleMax of Ga., Inc. v. Hamilton (In re Hamilton), 635 B.R. 877 (Bankr. S.D. Ga. 2022).
TitleMax of Ga., Inc. v. Snyder (In re Snyder), 635 B.R. 901 (Bankr. S.D. Ga. 2022).
Companion cases decided on the same date. Each respective debtor had filed a petition before the redemption period expired. The bankruptcy court, rejecting TitleMax of Ala., Inc. v. Womack (In re Womack), No. 21-11476 (11th Cir. Aug. 30, 2021), and following TitleMax v. Northington (In re Northington), 876 F.3d 1302 (11th Cir. 2017), granted the title pawn creditor's motion for stay relief.

IV. SUPREME COURT OF GEORGIA

In re Roberts, Nos. S22Y0665, S22Y0666, S22Y0667, S22Y06668., ___ S.E. 2d ___ (Ga. Aug. 9, 2022).
Attorney disbarred for, among other things, failing to pay his client's bankruptcy filing fee. Client paid filing fee to attorney's office, but later discovered that her case was dismissed for failure to pay the fee.

****LBR 5080-1. states that "Attorneys who receive filing fees from the debtor shall pay such funds over to the Court at the time of the filing of the petition or, if the petition has already been filed, within fourteen (14) business days from the receipt of the payment from the debtor."

Subchapter V Update

Robert M. Matson
Akin, Webster & Matson PC

SUBCHAPTER V UPDATE

I. STATUTORY UPDATE

On 6/21/2022 the Bankruptcy Threshold Adjustment and Technical Corrections Act ("Act") went into effect.

The biggest takeaway from the Act is that debt limits in Sub V cases are back up to $7.5 million. However, there is a 2 year sunset provision (6/21/2024). Hopefully, the increased debt limits become permanent at a later date. There is also a push to increase the debt limits to $10 million. We'll see what happens.

Other technical changes in the Act include:

A) Eligibility - There were some decisions stating that some debtors were prohibited from qualifying for Sub V if they had an affiliate that qualified as an "issuer" of securities under the Securities Exchange Act of 1934 regardless if the company was public or non-public. The Act fixes the overly broad exclusion by amending § 1182(1)(B)(iii) to only exclude debtors with an affiliate that is subject to the reporting requirements under § 13 or 15(d) of the Securities Exchange Act.

B) Cramdown - The Act also added a minor change to cramdown under § 1191(c)(3). It changes the appropriate remedies with respect to the liquidation of non-exempt assets as a default remedy to only when the debtor is relying on § 1191(c)(3)(B) for cramdown (there is a reasonable likelihood that the debtor will be able to make all payments under the plan).

II. CASELAW UPDATE

A) **ELEVENTH CIRCUIT** - no important cases to date. There are several cases decided in Florida where most Sub V cases are filed in the country, but no substantive issues have been decided by the Eleventh Circuit to date.

B) **DISCHARGE**

Although it is not binding precedent in the Eleventh Circuit, the Fourth Circuit recently decided that debts that are non-dischargeable as to individuals under § 523(a) are also non-dischargeable as to corporate debtors in a Sub V case. *In re Cleary Packaging, LLC*, 36 F.4th 509 (4th Cir. 2022). The gist of the decision is below, but see Judge Bonapfel's *A Guide to the Small Business Reorganization Act of 2019* for an extremely detailed analysis of the decision.

"We now turn to the text of § 1192(2), which specifically governs Cleary Packaging's discharge, to determine the debts dischargeable under Subchapter V. First, we point out that § 1192(2) provides for granting *debtors* a discharge

of all debts, subject to stated exceptions. For the purpose of Subchapter V, the term "debtor" was defined during the relevant time period to mean "a *person* engaged in commercial or business activities" that has debt of not more than $7.5 million. 11 U.S.C. § 1182(1) (2020) (emphasis added). "[P]erson" is in turn defined to include both individuals and corporations, *see id.* § 101(41), and "corporation[s]" include limited liability companies, *id.* § 101(9)(A). We thus conclude that § 1192(2) provides for the discharge of debts for *both* individual and corporate debtors."

"In short, while § 523(a) does provide that discharges under various sections, including § 1192 discharges, do not "discharge *an individual debtor* from any debt" of the kind listed, § 1192(2)'s cross-reference to § 523(a) does not refer to any *kind of debtor* addressed by § 523(a) but rather to a *kind of debt* listed in § 523(a). By referring to the *kind of debt* listed in § 523(a), Congress used a shorthand to avoid listing all 21 types of debts, which would indeed have expanded the one-page section to add several additional pages to the U.S. Code. Thus, we conclude that *the debtors* covered by the discharge language of § 1192(2) — i.e., both individual and corporate debtors — remain subject to the 21 *kinds of debt* listed in § 523(a)."

C) **CONFIRMATION - PLAN TERMS**

Most opinions so far have addressed eligibility. Cases are now coming down addressing various confirmation issues including length of the plan and projected disposable income.

In chapter 12 and 13, plan terms are explicitly set by statute. 11 U.S.C. § 1325(b)(4); 11 U.S.C. § 1225(b)(1)(B) and § 1222(c).

In Sub V, the Court has flexibility in determining the length of the plan. For a non-consensual plan to be fair and equitable under 11 U.S.C. § 1191(c)(2), the plan must provide for submission of the Debtor's projected disposable income for three years, "or such longer period not to exceed five years **as the court may fix**…" 11 U.S.C. § 1191(c)(2)(A). In the alternative, the plan can be fair and equitable if the value to be distributed under the plan in the three year period, or such longer period not to exceed five years **as the Court may fix**...is not less than the projected disposable income of the Debtor. 11 U.S.C. § 1191(c)(2)(B).

Early decisions indicate Courts are reluctant to extend plan terms for the full five year period, and it will be difficult to overturn a Bankruptcy Court's decision on what plan term is appropriate under 11 U.S.C. § 1191(c)(2).

In re Urgent Care Physicians, Ltd., 2021 Bankr. Lexis 3466 | 2021 WL 6090985 (Bankr. E.D. Wis. 2021). Unsecured creditors and the OUST objected to the three year plan term arguing a five year plan term should be

required to pay a higher dividend to unsecured creditors. The Court rejected these arguments and confirmed a three year plan. Noting a lack of statutory guidance on plan terms, the Court looked to the legislative history of Sub V (purpose of SBRA was to streamline the bankruptcy process by which small business debtors reorganize and rehabilitate their financial affairs) and anecdotal evidence regarding the shorter life span of small businesses to decide that a three plan term was appropriate in the case.

In re Orange Cnty. Bail Bonds, Inc., 638 B.R. 137 (9th Cir B.A.P. 2022). Bankruptcy Court did not abuse its discretion in confirming a non-consensual plan where Debtor proposed a lump sum payment of $432,972.95 (3 year projection) to satisfy the fair and equitable requirement under 11 U.S.C. § 1191(c)(2)(B). The BAP noted that Congress enacted Sub V as an expedited process for small businesses to reorganize quickly, inexpensively and efficiently. As part of that streamlined, flexible process, the Code sets a three year baseline requirement for projected disposable income. The BAP also noted there was no standard by which a Bankruptcy Court should fix a longer period, and the Bankruptcy Court has the sole authority to require a longer commitment period. As such, the BAP applied the abuse of discretion standard and affirmed the Bankruptcy Court's decision.

III. OTHER ISSUES FROM THE TRENCHES

A) STATUS CONFERENCE REPORTS

A Debtor is required to file a status report 14 days before the status conference that details the efforts the debtor has undertaken and will undertake to attain a consensual plan. 11 U.S.C. § 1188(c).

Some of the status reports that I see look like the Debtor's attorney took 4.38 minutes to prepare them. The status report should not be a long-winded manifesto, but please put some thought and effort into the status report. This is the first time a Judge sees any details about the case if there has not been a hearing on first day motions. Use the status report to educate the Judge as to the Debtor's history and where the Debtor is going in the case. The status report should include key events in the case to date along with other information including:

1) The efforts the debtor has undertaken or will undertake to attain a consensual plan of reorganization.
2) Any complications the debtor perceives in promptly proposing and confirming a plan, including any need for discovery, valuation adjudication, motion practice, claim adjudication, or adversary proceeding litigation.
3) The nature of the debtor's business or occupation and the goals of the reorganization plan.

4) Any motions the debtor contemplates filing or expects to file before confirmation.
5) Any objections to claims or interests the debtor expects to file before plan confirmation and any potential need to estimate claims for voting purposes.
6) Estimated time by which the debtor expects to file and serve their plan of reorganization.
7) Other matters that the debtor expects the Court will need to address before confirmation.
8) Other issues that the debtor contends could have an effect on the efficient administration of the case.

B) **TRUSTEE FEES**

The Sub V Trustee's fees are based on hourly rates and subject to Court approval pursuant to 11 U.S.C. § 330. Trustees are very mindful of the fact Congress wanted to reduce administrative expenses associated with Sub V cases. Nevertheless, Trustees have statutory duties to fulfill under 11 U.S.C. § 1183 and should be paid to do so. The United States Bankruptcy Court for the Middle District of Georgia has not entered an administrative order with respect to Sub V Trustee fees. To ensure that Sub V Trustees are paid, do not be surprised if Sub V Trustees take the following actions to ensure payment of awarded fees:

1) Objections to cash collateral motions if Trustee fees are not included in any proposed budget.
2) Objections to motions to voluntarily dismiss a case if Trustee fees have not been paid.
3) Motions seeking the approval of compensation procedures that require the Debtor to make monthly escrow deposits for Trustee fees.

Finally, please educate your client at the outset of the case to budget and set aside funds for Trustee fees.

Chapter 7 & Chapter 12

Case Updates

Walter Kelley
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Chapter 7 & Chapter 12 Case Update

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Thomas Lovett

11th Circuit Court of Appeals

Spring Valley Produce, Inc. v. Forrest (In re Forrest)
2022 U.S. App. LEXIS 24627, 2022 WL 3908803 (11th Cir. August 31, 2022) [No. 21-12133]
Chapter 7

Debtors' produce business and one of its vendors (SVP) were both licensed under Perishable Agricultural Commodities Act (PACA). Under PACA Debtor produce buyer became trustee upon receipt of the produce, and produce seller became trust beneficiary. Debtors' business did not pay SVP for produce, and Debtors' business chapter 7 sought to discharge that debt. SVP filed an adversary proceeding seeking to have that debt declared nondischargeable under 11 U.S.C. § 523(a)(4) "Fiduciary Capacity Exception."

What is "fiduciary capacity" for purposes of § 523(a)(4)?

Two most important trust-like duties: 1) duty to segregate trust assets, and 2) duty to refrain from using trust assets for a non-trust purpose.

3 part test:

1) A fiduciary relationship consisting of:
    a. A trustee who holds
    b. An identifiable trust property, for the benefit of
    c. An identifiable beneficiary or beneficiaries
2) A fiduciary relationship that defines sufficient trust-like duties on the trustee with respect to the trust property and beneficiaries, and
3) Debtor must be acting in a fiduciary capacity before the act of fraud or defalcation creating the debt

Held: PACA creates a trust, but does not impose sufficient trust-like duties to give rise to the "fiduciary exception" to discharge.

Calderon v. U.S. Bank Nat'l Ass'n,
860 Fed. Appx. 686 (11th Cir. July 9, 2021)
Chapter 7

Debtor filed a Chapter 7 petition in 2009. Earlier that same year, Debtor made demand on U.S. Bank for recission of his mortgage loan. The Chapter 7 petition listed the mortgage loan but did

not mention claim for recission. Debtor received his discharge in 2010. Over 9 years later, Debtor filed a petition to enforce recission of the 2006 mortgage loan.

Held: Debtor's recission claim was a pre-petitoin claim that became part of bankruptcy estate. Because there is no evidence the Chapter 7 Trustee ever abandoned the claim, the Debtors lack standing to bring the recission claim.

Cutuli v. Elie (In re Cutuli)
13 F.4th 1342 (11th Cir. September 23, 2021)
Chapter 7

Bankruptcy Court's denial of a mtion to dismiss adversary proceeding because of the fact that dismissal would amount to dismissal with prejudice because the statute of limitations had expired is proper discretion.

Also, the Eleventh Circuit is not aware of any "time limit on the bankruptcy court's extension discretion[.]"

State Farm Fla. Ins. Co. v. Carapella (In re Gaime)
17 F.4th 1349 (11th Cir. November 16, 2021)
INVOLUNTARY Chapter 7

11 U.S.C. § 362 automatic stay applies to State Farm (as insurer of the Debtor) effort to file a motion to intervene in an underlying state court wrongful-death suit against Debtor because:

1) State Farm is an "entity,"
2) State Farm's motion to intervene qualifies as a "judicial, administrative, or other action or proceeding against that debtor[]" because the "action" into which State Farm wants to intervene (the wrongful-death suit) is an action against the Debtor,
3) State Farms' interventions in the state court action would "continue" that action on the basis it would result in another docket entry and require an additional court order in the state court action, and
4) The wrongful-death suit was commenced before the bankruptcy petition.

Application of § 362 to State Farm's motion to intervene does not deprive it of due process because due process only requires the "opportunity to be heard … at a meaningful time and in a meaningful manner." State Farm was heard twice on the underlying issues in the State Court.

Bankruptcy Court erred in "plac[ing] the burden on [State Farm] to show cause [for lifting the stay], rather than on the trustee to show the absence of cause." However, error was harmless because 1) State Farm had already been a party in the state court action, but by its own effort had been withdrawn; 2) allowing State Farm to intervene in that same state court action would unduly increase the bankruptcy trustee's administrative expenses; and 3) there is no grave unfairness to State Farm.

U.S. District Court

Gordon v. McConnell (In re McConnell)
641 B.R. 261, 2022 U.S. Dist. LEXIS 86521 (N.D. Ga. 2022)
Chapter 7

Debtor filed Chapter 7. Chapter 7 Trustee began work to sell estate property pursuant to an order approving employment of the Trustee's law firm. Trustee then filed an application to sell real estate, along with a listing agreement and a request to employ a real estate agent, but no order on that application had been entered by the time the Debtor filed a motion to convert his case to Chapter 13. Trustee objected to conversion, but the parties reached a consent order granting conversion to Chapter 13.

After conversion, Trustee filed a $15,000 fee application for professional services performed pursuant to the order granting application to employ Trustee's law firm prior to conversion. No objection was filed, but the Bankruptcy Court indicated concern and scheduled a hearing on the fee application. After the hearing, but on the same day, Trustee filed a supplement to his fee application offering to reduce his fees to $10,000. The Bankruptcy Court entered an order denying Trustee's requested compensation on the basis that 1) the services on which the fee application was based did not qualify as trustee work and were therefore not compensable as legal services, and 2) to the extent any of the Trustee's work did qualify as legal services, it still was not compensable because they were not necessary or beneficial to the estate. The Bankruptcy Court's order limited Trustee's compensation to a $406 commission on his disbursements and compensation to his firm of $210.50 administrative costs.

Trustee appealed. The District Court found it was "clear error" for the Bankruptcy Court to deny compensation for Trustee's application to employ his law firm and it was an "abuse of discretion" to deny Trustee compensation for his opposition to the Debtor's motion to convert, but that it was not an "clearly erroneous" for the Bankruptcy Court to find the trustee work associated with employing a real estate agent did not warrant compensation.

U.S. Bankruptcy Court

Commercial Cap. Bank v. Lee (In re Lee)
640 B.R. 943 (Bankr. M.D. Ga. 2022)
Judge Laney – May 10, 2022
Chapter 7

Commercial Capital Bank ("CBC") filed a motion to dismiss the Debtors' chapter 7 case under 11 U.S.C. §§ 707(a), 707(b)(2) and 707(b)(3).

Court denied motion as to § 707(b)(2) after comparing the "snapshot" approach and the "forward-looking" approach of evaluating expenses for a presumption of abuse.

Following the precedential "snapshot" approach, the Court found no abuse under § 707(b)(2).

However, as to § 707(b)(3), the "totality of the circumstances – "[t]he Debtors' failure to comport their lifestyle to their financial situation, their suspicious house purchase while considering bankruptcy, and their lack of consideration for creditors" – favor dismissal of the chapter 7 case.

Held: Chapter 7 case dismissal appropriate because the facts support conclusion that Debtors attempted to use the bankruptcy system to avoid paying CBC's debt.

In re Heard
2021 Bankr. LEXIS 3006, 2021 WL 4997625 (Bankr. M.D. Ga. 2021)
Judge Carter – October 12, 2021
Chapter 12

Debtor requested to continue confirmation hearing – creditor bank objected and filed motion to dismiss case.

11 U.S.C. § 1224 requires hearing on confirmation of plan conclude not later than 45 days after the plan was filed, except for cause.

"For Cause" exception is limited and usually reserved for unusual circumstances and for the convenience of the court in addressing things such as case backlogs.

Debtor's desire to revisit valuation of property was not sufficient cause for an extension of time where Debtor had failed to act promptly in a variety of related matters such as contacting appraiser, filing application to employ appraiser and the filing of the motion to continue the confirmation hearing.

A determination of value from confirmation in a previous case is not res judicata to value in a subsequent confirmation hearing.

11 U.S.C. § 1208 permits dismissal of case for cause.

"Cause" for dismissal under 11 U.S.C. §1208(c)(5) also includes "denial of confirmation of a plan under section 1225" and "denial of a request made for additional time for filing another plan or a modification of a plan."

Bad faith filing constitutes cause for dismissal under § 1208.

> **Test** = Under the totality of the circumstances present in the case, whether there had been an abuse of the provision, purpose or spirit of the Bankruptcy Code."

Determination of "bad faith" is necessarily based on circumstances at the time the petition is filed – later events should not be considered.

The Court dismissed the case based on several factors indicating bad faith under the circumstances, including:

1) The first bankruptcy case bound the debtor to a collateral valuation he considered unfavorable
2) The debtor dismissed his first case to attempt to re-valuate the collateral in the new case
3) The debtor dismissed his first case hoping to avoid potential enforcement of a settlement agreement with creditor
4) 2 month delay between case filing and contacting appraiser
5) Case was filed 13 days before a foreclosure sale for which creditor had given notice

Held: Motion to dismiss granted because totality of circumstances showed bad faith.

In re Daniels

"Order Granting Trustee's Motion to Compel Debtor to Cooperate With Trustee and Trustee's Realtors"

[Docket 171, Chapter 7 Case No.: 19-50178-JPS] (Bankr. M.D. Ga. 2022)

Judge Smith – January 28, 2022

Chapter 7

Trustee filed a motion to sell real estate as property of bankruptcy estate. After orders were entered approving Trustee's applications to employ realtors, Trustee instructed his realtors to market and sell the real estate. Trustee's realtors required access to the properties to examine and document them for marketing and showing to prospective buyers. The Debtor failed to respond to multiple requests from the Trustee's realtors for access to the properties.

Held: Based on the Debtor's lack of cooperation to allow Trustee's realtors access to the properties, the Court found good cause existed to grant the Trustee's motion to compel.

Other Chapter 7 & Chapter 12 Cases of Interest

Dean v. Seidel (In re Dean), 18 F.4th 842, 2021 U.S. App. LEXIS 36022 (5th Cir. 2021)

Debtors lack standing to appeal bankruptcy court order where such order would not have a direct, adverse, financial effect on the debtor. "Person Aggrieved Test" – more stringent than ordinary constitutional standing analysis.

In re Castleman, 631 B.R. 914, 2021 Bankr. LEXIS 1517 (Bankr. W.D. Wash. 2021)

Post-petition appreciation in home belongs to chapter 7 estate upon conversion from chapter 13.

In re Weber, "Order Overruling Trustee's Objection to Claim of Exemption" [Docket 27, Chapter 7 Case No.: 2:22-bk-00191-FMD] (Bankr. M.D. Fla. 2022)

Social Security benefits withheld to pay income taxes do not lose exempt status when refunded by IRS.

Williamson v. Smith (In re Smith), 2022 Bankr. LEXIS 1533, 2022 WL 1814415 (Bankr. D. Kan. 2022)

Defendants were not entitled to dismiss a Chapter 7 trustee's fraudulent transfer claims against them on statute of limitation grounds because the trustee was stepping into the shoes of the IRS to avoid defendants' allegedly fraudulent transfers under the Kansas Uniform Fraudulent Transfer Act, so under 11 U.S.C.S. § 544(b), the state law four year look back period did not apply and 26 U.S.C.S. § 6502 operated as a 10 year look back period.

Under § 544(b), when stepping into the shoes of the IRS, the trustee could also proceed under the Fair Debt Collection Practices Act's six year look back period because § 544(b) placed no limitation on the applicable law relied on by a trustee, allowing the trustee to avoid transfers avoidable by the triggering creditor under the law applicable to avoidance actions by that creditor.

Shuford v. Mullady (In re JTR1, LLC), "Order Granting Defendant's Motions to Dismiss" [Docket 26, A.P. Case No.: 22-03008] (Bankr. W.D. N.C. 2022)

Pension Benefit Guaranty Corp. is generally does not qualify as a "triggering creditor" that a trustee may use for bring a claim under 11 U.S.C. §544(b).

If the government is not suing on a claim originally owed to the United States, a trustee cannot use the 6-year statute of limitations under Fair Debt Collection Practices Act.

****Supplemental materials****

U.S. Supreme Court

Siegel v. Fitzgerald
142 S. Ct. 1770, 2022 WL 1914098 (U.S. June 6, 2022) [No. 21-441]
Chapter 11

Congress 2017 amendment to 28 U.S.C. § 1930(a)(6) raised quarterly fees in U.S. Trustee districts (*not Bankruptcy Administrator districts*) from a max of $30,000 to $250,000 (per quarter per debtor). Fee increase took effect for both new and pending UST district chapter 11 cases on January 1, 2018.

Fee increase was only imposed in BA districts on new cases filed after October 1, 2018.

Group of debtors in UST districts who were required to pay the higher fees while similar debtors in BA districts were not sought challenge to the 2017 amendment. Circuit split resulted.

Although "[t]he Bankruptcy Clause affords Congress flexibility to 'fashion legislation to resolve geographically isolated problems,' … the [Bankruptcy] Clause does not permit Congress to treat identical debtors differently based on an artificial funding distinction that Congress itself created."

Held: the amendment resulted in different treatment of similarly situated debtors, and therefore violates the Bankruptcy Clause to establish uniform laws on the subject of Bankruptcies throughout the United States.

***Compare with earlier contrary ruling from 11th Cir. in United States Trustee Region 21 v. Bast Amron LLP (In re Mosaic Mgmt. Grp.), 22 F.4th 1291 (11th Cir. January 14, 2022).

Cutuli v. Elie (extended summary)

Creditor attempted mail service of an adversary proceeding to Debtor's address, but Debtor incarcerated at the time and did not receive service. Creditor learned of defect, requested new summons and Debtor was personally served in prison.

Debtor failed to respond to complaint. When Creditor moved for default judgment, Debtor's counsel (who had disclosed in the Chapter 7 filing that the scope of his representation was limited and did not include defense of an adversary proceeding) objected on basis he had not been served as required by Bankruptcy Rule 7004(g).

After hearing on Debtor's objection to entry of default judgment, Creditor served summons on Debtor's attorney in December 2017, but summons was issued in September and therefore stale under Bankruptcy Rule 7004(e).

(Cont'd on next page)

Debtor, through counsel, filed a motion to dismiss for insufficient process and service of process. Bankruptcy Court denied Debtor's motion to dismiss citing Debtor's counsel's limited scope of representation as an apparent approval of failure to serve both Debtor and Debtor's counsel. Having found service effective, the Bankruptcy Court entered default judgment against Debtor.

Debtor appealed. District Court reversed the default judgment on basis that creditor's failure to serve Debtor's counsel rendered service defective and deprived Bankruptcy Court of personal jurisdiction. District Court remanded proceedings to Bankruptcy Court to "determine whether to extend the time within which [Creditor] must effect service of process." Debtor appealed, but Court of Appeals dismissed for lack of appellate jurisdiction because District Court's order was not final.

On remand, Bankruptcy Court, for good cause and in its discretion, ordered Creditor to effect service within 21 days.

Ethical Hypotheticals

Part II: A Bankruptcy Lawyer's Journey through Several Common Scenarios

Ishaq Kundawala
Professor of Law
Mercer University School of Law

Ethical Hypotheticals – Part II: A Bankruptcy Lawyer's Journey Through Several Common Scenarios

Presented to the Attendees of the Annual Bankruptcy Seminar on Friday, October 14, 2022 in Macon, Georgia

By:

Ishaq Kundawala
Professor of Law & Southeastern Bankruptcy Law Institute and W. Homer Drake Jr. Endowed Chair in Bankruptcy Law
Mercer University School of Law

Professor Ishaq Kundawala – Speaker's Biography

Ishaq Kundawala joined Mercer Law in the Fall 2021 as a tenured Professor of Law and as the Southeastern Bankruptcy Law Institute & W. Homer Drake Jr. Endowed Chair in Bankruptcy Law.

Professor Kundawala earned a Juris Doctor from Tulane Law School (New Orleans, Louisiana) and a Bachelor of Arts from Austin College (Sherman, Texas).

Prior to beginning his teaching career, Professor Kundawala was in private practice in Dallas, Texas for over five years working at some of the most respected law firms in the country. While he was an Associate at the international law firm of Baker Botts L.L.P., he handled the estimation and ultimate resolution of approximately $1.5 billion of toxic tort related bankruptcy claims against one of the nation's largest copper producers. He has a diverse practice background representing complex chapter 11 debtors, secured and unsecured creditors, trustees and creditor committees in a variety of bankruptcy cases. He also clerked for the Chief Bankruptcy Judge of the United States Bankruptcy Court for the Northern District of Texas.

Professor Kundawala has extensive experience participating in court hearings, depositions, and mediations. During his years in practice, he was named a "Rising Star" by Texas Monthly and Law & Politics. He was also active in the Dallas Volunteer Attorney Program representing distressed women in divorce matters on a pro bono basis.

Professor Kundawala began his teaching career in 2008 at Nova Southeastern University's Shepard Broad College of Law in Fort Lauderdale, Florida ("NSU Law"). Over the past thirteen years, he has taught Bankruptcy, Contracts, Secured Transactions, and Legal Ethics. At NSU Law, he created an innovative consumer bankruptcy externship program that enabled students to gain practical experience representing consumer debtors in bankruptcy proceedings on a pro bono basis. He will bring the same type of program to Mercer Law in the Spring of 2022.

Professor Kundawala's research interests include Bankruptcy Reform and Legal Ethics. He has also discussed bankruptcy and contract-related issues on national and local radio and television stations. He enjoys writing and speaking about areas of the law that will enable scholars and practitioners to better understand some of the more complex areas of law.

Professor Kundawala is licensed to practice law in both Texas and Georgia. He enjoys living in Macon with his wife Joy (also an attorney), daughter Jasmine and their two dogs.

Hypothetical #1 – Firm Departure/Advertising/Startup Issues: Austin and Jim are attorneys, long-time friends, and colleagues at one of the top business law firms in Macon. They would like to hang out their own shingle and establish a niche family farmer bankruptcy practice. They both aspire to one day serve on the bankruptcy bench, so their hope is to build a practice they can sell in the future. They don't want to use their last names in the firm name because that might detract from the future value of the practice to a buyer. On that note, they've begun pondering names for the law firm. Here are some of the names they've considered:

Macon's Specialty Family Farmer Bankruptcy Center

Only the Best Bankruptcy Lawyers

Good Guys and a Code Bankruptcy Law Group

They've also begun preparations for launching a website and targeted advertisements. Their boss, Warren, found out about their plans and has expressed some concerns. In particular, Warren wants to make sure Austin and Jim have no intention of taking his law firm's existing clients, some of whom are family farmers who may be experiencing financial distress. Warren has recently asked Austin and Jim to sign non-competes. Austin and Jim are sticklers for ethics and have come to you for advice.

Attendee's Notes:

Hypothetical #2 – Extension of Deadline/Autonomy Issues: You represent the largest creditor in a very contentious chapter 11 case. The debtor has sued your client to recover a substantial preference. You are currently in the discovery phase of the preference litigation. The debtor's lawyer called you and asked for a one-week extension to respond to your client's interrogatories. Opposing counsel said he got COVID and was laid out for a week and got behind on everything. You call your client about this and he says, "do not give them an inch, do not agree to the extension." You immediately regret calling your client. You fear that you may need an extension down the road for your client's discovery responses and you are concerned about refusing to give a one-week extension to opposing counsel. What should you do?

Attendee's Notes:

Hypothetical #3 – Confidentiality and the Organization as a Client: Your law firm has been retained by Ford Motor Company to handle its chapter 11 reorganization. You are an associate at the law firm who has begun a diligent review of important documents necessary to start drafting the petition, schedules, statement of financial affairs and first-day motions. In your review of documents, you came across a confidential internal memorandum written by an attorney at another law firm addressed to the Chief Executive Officer of Ford. The memorandum claims that, upon an investigation, this attorney reasonably believes that Ford could be liable for a serious product defect regarding a defective master brake cylinder in certain models of Ford's F-150 truck line. This particular item could cause the truck's brakes to fail. A brake failure could obviously lead to an accident which may cause serious bodily injury or death. You find this memorandum to be relevant to Ford's potential liabilities in the chapter 11 case. You bring it to the CEO's attention, and he immediately takes the memorandum away from you and tells you to ignore it and he says the issue is being addressed by other attorneys at another law firm. He tells you to get back to work on what he hired you for and to quit sticking your nose where it doesn't belong. What should you do?

Attendee's Notes:

Hypothetical #4 – Inadvertent Disclosure Issues/Attorney Billing Issues: You are still an associate with the law firm that represents Ford Motor Company in its chapter 11 reorganization. Ford filed its voluntary chapter 11 petition a few months ago and you are very busy working up potential preference lawsuits. In your very rare moments of free time, you are thinking about different legal issues related to Ford's chapter 11 case. This is great for your billable hours bonus at the end of the year - you're already at 1,900 billable hours and it's only month 9 of the fiscal year! Before filing preference complaints, you begin sending demand letters to unsecured and undersecured creditors who received payments from Ford during the preference period to see if you can resolve them without costly litigation. In your letters, you are seeking information to support the creditors' claimed defenses.

One such creditor is Renasant Bank who is an undersecured creditor who received a $1 million dollar payment 30 days prior to Ford's petition date. You informally requested information from Renasant to support Renasant's claim that the payment in question was made in the ordinary course of business. You received a stack of documents from Renasant containing the loan agreement, security agreement, collateral history, payment history, etc. Buried in that stack of documents is a confidential memorandum from Renasant's outside lawyer to Renasant's in-house counsel recommending that Renasant promptly settle the preferential payment from Ford for up to 75% of value to avoid litigation. The memorandum claims that Renasant's defenses are very weak, since Ford made that large payment only after some heavy pressure from Renasant's loan officer in charge of Ford's file. Apparently, the loan officer was concerned about Ford's deteriorating financial condition after some late payments and he wanted to reduce the bank's unsecured exposure on the loan. What should you do about the inadvertently received memorandum? What are your thoughts on the associate's billing patterns?

Attendee's Notes:

Hypothetical #5 – Mental Health Issues: Annie Attorney graduated law school in May of 2020 and was admitted to the Georgia Bar later that year. She joined a prominent local bankruptcy law firm specializing in business bankruptcies. Due to the pandemic, she had been working remotely for all of 2020 and for the majority of 2021. She had received some praise for her work early on, but more recently, her supervising partner accused her of slacking off and doing sloppy work. Annie had been berated on more than one zoom call where all the attorneys from the firm would attend. Annie was experiencing stress, isolation and confusion of her role as a new attorney. She eventually became very depressed and was contemplating taking her own life. What should Annie do? What should the legal profession do?

Attendee's Notes:

Library of Applicable Rules & Authorities

Georgia Rules of Professional Conduct

RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

a. Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the scope and objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
b. A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
c. A lawyer may limit the scope and objectives of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
d. A lawyer shall not counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent, nor knowingly assist a client in such conduct, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

RULE 1.3 DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client. Reasonable diligence as used in this rule means that a lawyer shall not without just cause to the detriment of the client in effect willfully abandon or willfully disregard a legal matter entrusted to the lawyer.

The maximum penalty for a violation of this rule is disbarment.

RULE 1.4. COMMUNICATION.

a. A lawyer shall:
    1. promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0 (h), is required by these rules;
    2. reasonably consult with the client about the means by which the client's objectives are to be accomplished;
    3. keep the client reasonably informed about the status of the matter;
    4. promptly comply with reasonable requests for information; and
    5. consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Georgia Rules of Professional Conduct or other law.

b. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RULE 1.5 FEES

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:
    1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
    2. the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
    3. the fee customarily charged in the locality for similar legal services;
    4. the amount involved and the results obtained;
    5. the time limitations imposed by the client or by the circumstances;
    6. the nature and length of the professional relationship with the client;
    7. the experience, reputation, and ability of the lawyer or lawyers performing the services; and
    8. whether the fee is fixed or contingent.
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.
c.
    1. 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 writing 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.
    2. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the following:
        i. the outcome of the matter; and,
        ii. if there is a recovery showing:
            A. the remittance to the client;
            B. the method of its determination;
            C. the amount of the attorney fee; and
            D. if the attorney's fee is divided with another lawyer who is not a partner in or an associate of the lawyer's firm or law office, the amount of fee received by each and the manner in which the division is determined.
d. A lawyer shall not enter into an arrangement for, charge, or collect:

1. 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
2. a contingent fee for representing a defendant in a criminal case.

e. A division of a fee between lawyers who are not in the same firm may be made only if:
   1. the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
   2. the client is advised of the share that each lawyer is to receive and does not object to the participation of all the lawyers involved; and
   3. the total fee is reasonable.

The maximum penalty for a violation of this rule is a public reprimand.

RULE 1.6 CONFIDENTIALITY OF INFORMATION

a. A lawyer shall maintain in confidence all information gained in the professional relationship with a client, including information which the client has requested to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client, unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, or are required by these rules or other law, or by order of the court.

b.
   1. A lawyer may reveal information covered by paragraph (a) which the lawyer reasonably believes necessary:
      i. to avoid or prevent harm or substantial financial loss to another as a result of client criminal conduct or third party criminal conduct clearly in violation of the law;
      ii. to prevent serious injury or death not otherwise covered by subparagraph (i) above;
      iii. 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;
      iv. to secure legal advice about the lawyer's compliance with these rules.
      v. to detect and resolve conflicts of interest arising from the lawyer's change of employment or changes in the composition or ownership or a firm, but only if the revealved information would not compromise the attorney-client privilege or otherwise prejudice the client.
   2. In a situation described in paragraph (b) (1), if the client has acted at the time the lawyer learns of the threat of harm or loss to a victim, use or disclosure is permissible only if the harm or loss has not yet occurred.

3. Before using or disclosing information pursuant to paragraph (b) (1) (i) or (ii), if feasible, the lawyer must make a good faith effort to persuade the client either not to act or, if the client has already acted, to warn the victim.

c. The duty of confidentiality shall continue after the client-lawyer relationship has terminated.

RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

a. A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client, except as permitted in (b).
b. If client informed consent is permissible a lawyer may represent a client notwithstanding a significant risk of material and adverse effect if each affected client or former client gives informed consent, confirmed in writing, to the representation after:
    1. consultation with the lawyer, pursuant to Rule 1.0 (c);
    2. having received in writing reasonable and adequate information about the material risks of and reasonable available alternatives to the representation, and
    3. having been given the opportunity to consult with independent counsel.
c. Client informed consent is not permissible if the representation:
    1. is prohibited by law or these rules;
    2. includes the assertion of a claim by one client against another client represented by the lawyer in the same or substantially related proceeding; or
    3. involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients.
d. Though otherwise subject to the provisions of this rule, a part-time prosecutor who engages in the private practice of law may represent a private client adverse to the state or other political subdivision that the lawyer represents as a part-time prosecutor, except with regard to matters for which the part-time prosecutor had or has prosecutorial authority or responsibility.

RULE 1.10 IMPUTED DISQUALIFICATION: GENERAL RULE

a. While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7: Conflict of Interest: General Rule, 1.8 (c): Conflict of Interest: Prohibited Transactions, 1.9: Former Client or 2.2: Intermediary.
b. When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:
    1. the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
    2. any lawyer remaining in the firm has information protected by Rules 1.6: Confidentiality of Information and 1.9 (c): Conflict of Interest: Former Client that is material to the matter.
c. A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7: Conflict of Interest: General Rule.

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

a. Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
    1. the representation will result in violation of the Georgia Rules of Professional Conduct or other law;
    2. the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
    3. the lawyer is discharged.
b. except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:
    1. the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
    2. the client has used the lawyer's services to perpetrate a crime or fraud;
    3. the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
    4. the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
    5. the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
    6. other good cause for withdrawal exists.
c. When a lawyer withdraws it shall be done in compliance with applicable laws and rules. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
d. Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned.

RULE 2.1 ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. A lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

In the representation of a client, a lawyer shall not:

a. file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another;

b. knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law.

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

a. A lawyer shall not knowingly:
    1. make a false statement of material fact or law to a tribunal;
    2. fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
    3. 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
    4. offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
b. The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
c. A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
d. In an ex parte proceeding, other than grand jury proceedings, a lawyer shall inform the tribunal of all material facts known to the lawyer that the lawyer reasonably believes are necessary to enable the tribunal to make an informed decision, whether or not the facts are adverse.

RULE 5.6 RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer shall not participate in offering or making:

a. a partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
b. an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

The maximum penalty for a violation of this Rule is a public reprimand.

RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

a. A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. By way of illustration, but not limitation, a communication is false or misleading if it:
    1. contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading;

2. is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Georgia Rules of Professional Conduct or other law;
3. compares the lawyer's services with other lawyers' services unless the comparison can be factually substantiated;
4. fails to include the name of at least one lawyer responsible for its content; or
5. contains any information regarding contingent fees, and fails to conspicuously present the following disclaimer:

   "Contingent attorneys' fees refers only to those fees charged by attorneys for their legal services. Such fees are not permitted in all types of cases. Court costs and other additional expenses of legal action usually must be paid by the client."
6. contains the language "no fee unless you win or collect" or any similar phrase and fails to conspicuously present the following disclaimer:

   "No fee unless you win or collect" [or insert the similar language used in the communication] refers only to fees charged by the attorney. Court costs and other additional expenses of legal action usually must be paid by the client. Contingent fees are not permitted in all types of cases.

b. A public communication for which a lawyer has given value must be identified as such unless it is apparent from the context that it is such a communication.
c. A lawyer retains ultimate responsibility to insure that all communications concerning the lawyer or the lawyer's services comply with the Georgia Rules of Professional Conduct.

The maximum penalty for a violation of this rule is disbarment.

RULE 7.2 ADVERTISING

a. Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through:
   1. public media, such as a telephone directory, legal directory, newspaper or other periodical;
   2. outdoor advertising;
   3. radio or television;
   4. written, electronic or recorded communication.
b. A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used.
c. Prominent disclosures. Any advertisement for legal services directed to potential clients in Georgia, or intended to solicit employment for delivery of any legal services in Georgia, must include prominent disclosures, clearly legible and capable of being read by the average person, if written, and clearly intelligible by an average person, if spoken aloud, of the following:

   1. Disclosure of identity and physical location of attorney. Any advertisement shall include the name, physical location and telephone number of each lawyer or law firm who paid for the advertisement and who takes full personal responsibility for

the advertisement. In disclosing the physical location, the responsible lawyer shall state the full address of the location of the principal bona fide office of each lawyer who is prominently identified pursuant to this paragraph. For the purposes of this Rule, a bona fide office is defined as a physical location maintained by the lawyer or law firm from which the lawyer or law firm furnishes legal services on a regular and continuing basis. In the absence of a bona fide physical office, the lawyer shall prominently disclose the full address listed with the State Bar of Georgia or other Bar to which the lawyer is admitted. A lawyer who uses a referral service shall ensure that the service discloses the location of the lawyer's bona fide office, or the registered bar address, when a referral is made.

2. Disclosure of referral practice. If the lawyer or law firm will refer the majority of callers to other attorneys, that fact must be disclosed and the lawyer or law firm must comply with the provisions of Rule 7.3(c) regarding referral services.
3. Disclosure of spokespersons and portrayals. Any advertisement that includes a non-attorney spokesperson, portrayal of a lawyer by a non-lawyer, portrayal of a client by a non-client, or any paid testimonial or endorsement, shall include prominent disclosure of the use of a non-attorney spokesperson, portrayal of a lawyer by a non-lawyer, or of a client by a non-client.
4. Disclosures regarding fees. A lawyer or law firm advertising any fixed fee for specified legal services shall, at the time of fee publication, have available to the public a written statement clearly describing the scope of each advertised service, which statement shall be available to the client at the time of retainer for any such service.
5. Appearance of legal notices or pleadings. Any advertisement that includes any representation that resembles a legal pleading, notice, contract or other legal document shall include prominent disclosure that the document is an advertisement rather than a legal document.

The maximum penalty for a violation of this Rule is a public reprimand.

RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer who is a specialist in a particular field of law by experience, specialized training or education, or is certified by a recognized and bona fide professional entity, may communicate such specialty or certification so long as the statement is not false or misleading.

The maximum penalty for a violation of this Rule is a public reprimand.

RULE 7.5 FIRM NAMES AND LETTERHEADS

a. A lawyer shall not use a firm name, trade name, letterhead, or other professional designation that is false or misleading.
b. A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

c. The name of a lawyer holding public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.
d. Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

The maximum penalty for a violation of this rule is a public reprimand.

RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

a. A lawyer having knowledge that another lawyer has committed a violation of the Georgia Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, should inform the appropriate professional authority.
b. A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office should inform the appropriate authority.

Rule 4-104. Mental Incapacity and Substance Abuse

1. Mental illness, cognitive impairment, alcohol abuse, or substance abuse, to the extent of impairing competency as a lawyer, shall constitute grounds for removing a lawyer from the practice of law.
2. Upon a determination by the State Disciplinary Board that a lawyer may be impaired or incapacitated to practice law as a result of one of the conditions described in paragraph (a) above, the Board may, in its sole discretion, make a confidential referral of the matter to an appropriate medical or mental health professional for the purposes of evaluation and possible referral to treatment and/or peer support groups. The Board may, in its discretion, defer disciplinary findings and proceedings based upon the impairment or incapacity of a lawyer to afford the lawyer an opportunity to be evaluated and, if necessary, to begin recovery. In such situations the medical or mental health professional shall report to the State Disciplinary Board and the Office of the General Counsel concerning the lawyer's progress toward recovery. A lawyer's refusal to cooperate with the medical or mental health professional or to participate in the evaluation or recommended treatment may be grounds for further proceedings under these Rules, including emergency suspension proceedings pursuant to Rule 4-108.

Bankruptcy Code & Bankruptcy Rules

11 U.S.C. § 327 – Employment of professional persons

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

(b) If the trustee is authorized to operate the business of the debtor under section 721, 1202, or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business.

(c) In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

(d) The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.

(e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

(f) The trustee may not employ a person that has served as an examiner in the case.

11 U.S.C. § 526 – Restrictions on debt relief agencies

(a) A debt relief agency shall not--

(1) fail to perform any service that such agency informed an assisted person or prospective assisted person it would provide in connection with a case or proceeding under this title;

(2) make any statement, or counsel or advise any assisted person or prospective assisted person to make a statement in a document filed in a case or proceeding under this title, that is untrue or misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue or misleading;

(3) misrepresent to any assisted person or prospective assisted person, directly or indirectly, affirmatively or by material omission, with respect to--

(A) the services that such agency will provide to such person; or

(B) the benefits and risks that may result if such person becomes a debtor in a case under this title; or

(4) advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer a fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

(b) Any waiver by any assisted person of any protection or right provided under this section shall not be enforceable against the debtor by any Federal or State court or any other person, but may be enforced against a debt relief agency.

(c)(1) Any contract for bankruptcy assistance between a debt relief agency and an assisted person that does not comply with the material requirements of this section, section 527, or section 528 shall be void and may not be enforced by any Federal or State court or by any other person, other than such assisted person.

(2) Any debt relief agency shall be liable to an assisted person in the amount of any fees or charges in connection with providing bankruptcy assistance to such person that such debt relief agency has received, for actual damages, and for reasonable attorneys' fees and costs if such agency is found, after notice and a hearing, to have--

(A) intentionally or negligently failed to comply with any provision of this section, section 527, or section 528 with respect to a case or proceeding under this title for such assisted person;

(B) provided bankruptcy assistance to an assisted person in a case or proceeding under this title that is dismissed or converted to a case under another chapter of this title because of such agency's intentional or negligent failure to file any required document including those specified in section 521; or

(C) intentionally or negligently disregarded the material requirements of this title or the Federal Rules of Bankruptcy Procedure applicable to such agency.

(3) In addition to such other remedies as are provided under State law, whenever the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this section, the State--

(A) may bring an action to enjoin such violation;

(B) may bring an action on behalf of its residents to recover the actual damages of assisted persons arising from such violation, including any liability under paragraph (2); and

(C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorneys' fees as determined by the court.

(4) The district courts of the United States for districts located in the State shall have concurrent jurisdiction of any action under subparagraph (A) or (B) of paragraph (3).

(5) Notwithstanding any other provision of Federal law and in addition to any other remedy provided under Federal or State law, if the court, on its own motion or on the motion of the United States trustee or the debtor, finds that a person intentionally violated this section, or engaged in a clear and consistent pattern or practice of violating this section, the court may--

(A) enjoin the violation of such section; or

(B) impose an appropriate civil penalty against such person.

(d) No provision of this section, section 527, or section 528 shall--

(1) annul, alter, affect, or exempt any person subject to such sections from complying with any law of any State except to the extent that such law is inconsistent with those sections, and then only to the extent of the inconsistency; or

(2) be deemed to limit or curtail the authority or ability--

(A) of a State or subdivision or instrumentality thereof, to determine and enforce qualifications for the practice of law under the laws of that State; or

(B) of a Federal court to determine and enforce the qualifications for the practice of law before that court.

Rule 9011(b). Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers …

(b) Representations to the court

By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

…

Community Resources

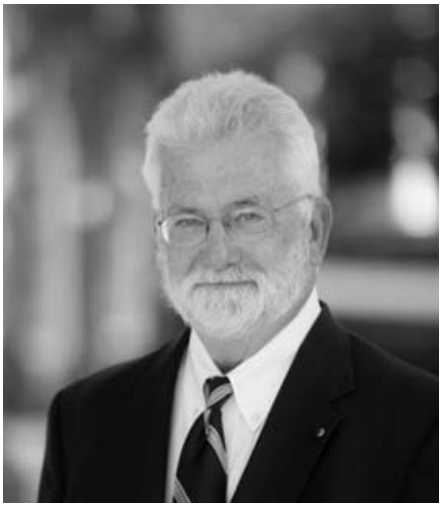
State Bar of Georgia – The Lawyer Assistance Program (LAP) – https://www.gabar.org/committeesprogramssections/programs/lap/ - The LAP provides a broad range of helping services to members seeking assistance with depression, stress, alcohol/drug abuse, family problems, workplace conflicts, psychological and other issues. You can contact the LAP by calling 800-327-9631, or by emailing Lisa Hardy, vice president, CorpCare Associates, Inc., at lisa@corpcareeap.com.

Georgia Lawyers Helping Lawyers - https://georgialhl.org/ - Lawyers Helping Lawyers is a volunteer peer support program created by the Lawyer Assistance Committee of the State Bar of Georgia to give additional tools to members who might benefit from a peer to talk to about the difficulties in their lives.

Professionalism:

Professionalism and Practical Wisdom

Patrick Longan
Professor of Law
Mercer University School of Law



Patrick Longan Bio

Professor Patrick E. Longan holds the William Augustus Bootle Chair in Ethics and Professionalism at the Mercer University School of Law, where he has taught since 2000. Professor Longan also serves as the Director of the Mercer Center for Legal Ethics and Professionalism, as a Special Master for disciplinary cases, and as a member of the State Bar of Georgia Disciplinary Rules and Procedures Committee and Formal Advisory Opinion Board. He has been a member of the Georgia Chief Justice's Commission on Professionalism since 2000.

Professor Longan is the author, coauthor, or editor of more than 60 publications and has given more than 150 lectures, speeches, or panel presentations regarding legal ethics and professionalism. Professor Longan was the second recipient of the National Award for Innovation and Excellence in Teaching Professionalism from the American Bar Association Standing Committee on Professionalism, the Conference of Chief Justices, and the Burge Endowment for Legal Ethics. In 2014, Mercer Law School received the E. Smythe Gambrell Professionalism Award from the ABA Standing Committee on Professionalism for one of Professor Longan's programs.

Professor Longan served on the faculty of Stetson University College of Law from 1991 – 2000. Before entering law teaching, Professor Longan served as a law clerk to Senior United States District Judge Bernard M. Decker in Chicago and practiced law with the firm of Andrews & Kurth in Dallas, Texas. Professor Longan is a 1983 graduate of the University of Chicago Law School.

Professionalism and Practical Wisdom

Middle District of Georgia
Bankruptcy Law Institute

October 14, 2022

Patrick E. Longan
W.A. Bootle Chair in Ethics and Professionalism
Mercer University School of Law

Professionalism learning objectives:

The first objective of this program is to help the participants learn that "professionalism" has a definite meaning for lawyers. It means the cultivation of six virtues: competence, fidelity to the client, fidelity to the law, public spiritedness, civility, and practical wisdom. The second objective of the program is to take that structure and apply it to several hypothetical problems, so that the participants can learn a methodology for the wise resolution of complex problems of professionalism. The content and pedagogy of the program will track Mercer University's award-winning first-year course on professionalism.

PAPER

This paper is adapted from Chapter 1 of Patrick Emery Longan, Daisy Hurst Floyd, and Timothy Floyd, The Formation of Professional Identity: The Path From Student to Lawyer (Routledge Press 2019).

Note that the book is directed to entering law students. It sets forth the framework we use to teach professionalism and professional identity. Following the paper, you will find several of our "practical wisdom problems" we use with our first-year students.

1 Introduction and Overview

Law School and the Traditional Values of the Legal Profession

Law school changes you. You learn things that lawyers need to know. You learn how to do some of the things that lawyers need to know how to do. But the changes you are experiencing are more fundamental and subtler than just the acquisition of knowledge and skill. You are also, intentionally or not, absorbing lessons about the professional values that are supposed to guide the deployment of your new-found knowledge and skill.

This part of your education goes by various names. The Carnegie Foundation's study of legal education used an analogy to apprenticeship and described law school as involving three apprenticeships (Sullivan et al. 2007). The first two apprenticeships concern knowledge and skill respectively. Education about professional values is the so-called "third apprenticeship." Others use a different and more general term, "socialization," to refer to the process by which individuals learn and internalize the values of a particular group (Cruess and Cruess 2016). Whether you call the process apprenticeship or socialization, the fact is that law school seeks to instill in you the traditional values of the legal profession.

That notion might at first rankle you. You came to law school as an adult with well-developed personal values. You may be one of the many law students who have rebellious and nonconformist streaks and bridle at the notion of absorbing any "traditional" values. These

concerns are common among law students, but we will be making the case that these understandable concerns are misplaced. The professional values we are talking about will not displace your personal values. Rather, the personal and the professional will need to be integrated. And the traditional values of the legal profession do not forbid all forms of rebellion and nonconformity. Far from it – lawyers are expected to challenge authority and the status quo. But one thing you need to accept at this early stage is that by choosing to enter the legal profession you have submitted yourself, to some extent, to the authority of the profession. There is plenty of room for individuality in the law, but there are certain non-negotiable values that lawyers must have in order to do the jobs that society demands of them. Part of the good news that comes with that, as you will see, is that the internalization and deployment of these values will make it more likely that you will find deep meaning in your work.

This book is about teaching you what those values are, convincing you to incorporate them into your sense of self as a lawyer, and helping you to live up to them when you become a lawyer.

Law Schools and the Transmission of Values

Law school historically has not been as good about transmitting the values of the profession as it has been about teaching knowledge and, to a lesser extent, skill.

Socialization by Fear of Discipline

The accreditation standards for U.S. law schools mandate that every school must require all of its students "to satisfactorily complete … one course of at least two credit hours that included substantial instruction in rules of professional conduct…" (American Bar Association Section of Legal Education and Admission to the Bar 2018, 16). Fulfillment of this Standard usually comes in the form of a required upper-level course (often called Professional Responsibility or "PR") that focuses on the American Bar Association Model Rules of Professional Conduct. Every state has rules of conduct that are based, to a greater or lesser degree, on the Model Rules. Study of the Model Rules provides some guidance to students about the values of the profession and motivates conduct that lives up to these values primarily by the fear of discipline such as disbarment.

As a way of transmitting the values of the legal profession and motivating you to live up to them, the PR course is important but incomplete. Not all of the values of the profession are reflected in the rules. For example, as you will see, civility is a core value of the legal profession. Yet there is no "civility rule" in the Model Rules. Furthermore, many kinds of misconduct are difficult to detect and therefore difficult to punish. For example, another core value is fidelity to the law, and one of the Model Rules requires lawyers not to assist witnesses in testifying falsely. But how would the bar ever detect such coaching in the privacy of the lawyer's office? Finally, deploying the values of the profession in complex circumstances requires much more than knowledge of the "do's and don'ts." Often the value-laden decision for the lawyer is about what you *should* do, among multiple permissible actions. Knowing the rules of conduct and the possible consequences of violating them is important, but the socialization process requires more.

Socialization by Aspiration: The Modern Professionalism Movement

More recently, some law schools have exhorted students to "aim higher" than the rules and aspire to act with "professionalism." This movement, of which we have been a part, broadens the conception of a lawyer's professional responsibilities in important ways. In 1986, the American Bar Association Commission on Professionalism issued a report, a "Blueprint for the Rekindling of Lawyer Professionalism." That report resulted from calls from Chief Justice Warren Burger and bar leaders for the ABA to study professionalism in light of widespread perception that the bar "might be moving away from the principles of professionalism…" (American Bar Association Commission on Professionalism 1986, v). The ABA Blueprint was the beginning of the modern professionalism movement, which has now spawned numerous codes, creeds and statements of professionalism as well as more than a dozen state commissions on professionalism and mandatory professionalism continuing legal education in a handful of states. Dozens of law schools now have programs or courses that concern professionalism in some way. Some of these courses are explicitly designed to expose first-year students to the values of the profession and begin the socialization process.

Professionalism training is a useful supplement to learning about the rules of conduct because it conveys the values of the profession more broadly that the PR course does. One of the early proponents of professionalism, Chief Justice Harold Clarke of the Supreme Court of Georgia, once famously wrote that "ethics is a minimum standard which is *required* of all lawyers while professionalism is a higher standard *expected* of all lawyers" (Clarke 1989, 173). Such

expectations do not fit comfortably into a regulatory framework such as a rule of conduct but can find useful expression in an aspirational statement on professionalism.

One shortcoming of professionalism training is motivation. The underlying theme of the professionalism movement is to inspire students and lawyers, to convince them that they *should* conduct themselves in particular ways, even when no rule requires them to do so and they need not fear any punishment. That is why we call this type of training "socialization by aspiration." Some students respond to this type of appeal, but many resist. Part of the problem is that, frankly, professionalism teaching can sound a little preachy. The teacher quotes from the holy writ of the professionalism creed, or the civility guidelines, or some other such pronouncement, and exhorts the students to live up to the Word and sin no more. Maybe it is generational, but our experience has been that most law students do not respond to preaching. You are in the midst of rigorous training to be critical thinkers, and you are understandably skeptical of received wisdom. It is also important to realize that most of you are in your mid-twenties. We offer no scientific studies to back this up, but our experience has been that many of our students are in the early stages of evolving from a self-centered orientation to an other-centered view of the world. Our students almost never have a true appreciation for what it means to be a fiduciary. You may not yet have such an appreciation. Telling you that one of the core values of the legal profession is fidelity to the client, which may involve self-sacrifice, may therefore strike a discordant note.

Another problem with professionalism teaching is that it does not provide any guidance on how to turn noble aspirations into action in particular situations. Being able to recite professionalism verses does not solve real-world problems. It is like telling a pianist about all the beautiful notes

but providing no guidance about which notes to play in which order. The beautiful notes are no practical good at concert time.

Courses and programs on professionalism have been an important step in the right direction of a more comprehensive process of socializing law students into the values of the profession. However, now that the shortcomings in such training are clear, another approach is needed. That is where "professional identity" come in.

A Third Way: The Cultivation of Professional Identity

We advocate a third way of socializing you into the values of the profession: the acquisition and cultivation of a "professional identity" that internalizes the values of the profession and thereby disposes you to practice in accordance with them. Professional identity formation, as a means of socialization into a profession, is not original with us, nor is it new. But we offer our own specifics about the components of the right kind of professional identity for lawyers and, based upon our experience in teaching legal ethics and professionalism, how you can best begin the process of professional identity formation and continue that process after you graduate.

An identity, as we define it, is a deep sense of self in a particular role. Whether or not you have thought about it deeply, you had several such identities when you started law school. You may have had identities as a son or daughter, as a sibling, as a friend, as a student, or as an employee. In each such role, you could describe what kind of person you are or hope to be, such as the kind of friend who can be relied upon in times of need. As you go through life, you will form other

identities. If you have not done so already, you likely will form identities as a spouse and maybe as a parent. Probably without realizing it, you have formed an identity as a law student. You might try the exercise of completing the sentence, "I am the kind of law student who ____." Your overall sense of self evolves and grows in complexity as you undertake and integrate the various roles you play in your life.

Professional identity is a piece of this evolving sense of self. Once you are in practice, you will have a deep sense of yourself *as a lawyer*. You will be able to fill in the blanks of the sentence, "I am the kind of lawyer who ___." Your previous identities – as a friend, spouse, etc. – will not work as your identity as a lawyer. Put simply, you have never been a lawyer and thus could not come to law school with any deep sense of yourself in this new role.

Your development of a professional identity as a lawyer does not mean the disappearance of your other identities. As we have said, we all live our lives every day with multiple senses of ourselves in our different roles. As you navigate the various roles you have or acquire in life, you may act simultaneously as a lawyer *and* a spouse, or as a lawyer *and* a person of faith, or as a lawyer *and* a parent, and so on. You will never be *just* a lawyer. Although you are not *replacing* your existing identities, you will need to find a way to *integrate* them. For your own psychological health, your senses of yourself in your different roles should not conflict with each other in fundamental ways – they should cohere in integrated, mutually enforcing ways. It is unhealthy to be "one person at home" and "another person at the office." Psychological research makes it clear that such a lack of integrity (in the sense of "wholeness") among your various roles is a formula for distress and anxiety.

It is crucial at the outset to see two things. First, professional identity formation is inevitable. You will form a sense of yourself as a lawyer, but it can happen by design or by drift. You can be active or passive about what kind of lawyer you become. Second, the content of your professional identity is not pre-determined. Not all lawyers see themselves as lawyers in the same way. There are lawyers who would describe their senses of self in their roles as lawyers by saying, "I am the kind of lawyer who wins at all costs," or "I am the kind of lawyer who is a pit bull in trial or deposition," or "I am the kind of lawyer who makes the most money." Those are professional identities. Other lawyers might define themselves as "the kind of lawyer who is faithful to my clients" or "the kind of lawyer who serves the public interest." Those, too, are professional identities. Within the limits of what might get you disbarred, you have the power to shape your own professional identity. But not all professional identities are created equal.

We contend that you should be intentional about the formation of your professional identity and that your professional identity should take a particular form, one that incorporates the traditional core values of the legal profession. There are two prongs to our argument. The prongs happily converge. The first is that, with the right kind of professional identity, you are more likely to serve your clients well and fulfill the public purposes of lawyers. Your work will matter to others. The other is that with such a professional identity you are more likely to find your work meaningful and thereby to derive a sense of well-being and satisfaction. Your work will matter to you. We turn now to an overview of what we mean by "the right kind of professional identity."

The Six Virtues of the Professional Lawyer

Identity is a matter of character. If you take a moment to define your identity in a role that you already have, you will discover that almost certainly you define yourself not by how you behave in particular situations but rather by character traits that help you fulfill that role. For example, you probably would say that your identity as a friend includes being loyal. As a son or daughter, you might say that part of your deep sense of self in that role is that you are respectful. Your identity as a spouse probably includes being attentive to the feelings of your spouse.

In classical terms, character traits that form a healthy identity are *virtues*. They are capacities or dispositions that bring you closer to an ideal. Without the capacity to be loyal, you would be less of a friend. Because you are respectful, you are a better son or daughter. And so on. We will have more to say about virtue and professional identity for lawyers – particularly about the insights of modern "virtue ethics" – but for now it suffices if you see that the "right kind of professional identity" is one that incorporates whatever virtues are needed for the particular role of being a professional lawyer.

There is remarkable consensus in the legal profession about the virtues necessary to be the kind of lawyer who serves clients well and helps to fulfill the public purposes of the profession. The "traditional values" of the profession, stated broadly, are not controversial (although application of those values to particular situations may spark intense disagreement). As we have noted, the ABA Model Rules are a partial expression of those values, and the various codes and creeds that emerged from the professionalism movement contain more expansive and detailed expressions

of those values. These documents reflect substantial consistency about what the profession values in a lawyer.

From our study of the Model Rules and the various professional codes and creeds, we have concluded that there are six virtues that should become parts of your professional identity. We will discuss each of these six virtues in detail in later chapters. For now, we will briefly explain what each virtue includes and why it matters, both to individuals and more broadly to society. Note particularly how we present the virtues. We name them, but we then express them in the first person, as a lawyer's sense of self. We phrase them in this way to help you see the virtues as components of professional identity.

The Virtue of Competence

"I am an excellent lawyer, one who has the knowledge, skill, diligence and judgment to assist my clients."

Competence matters. It is obvious why individual clients need competent lawyers. Clients seek legal help in times of conflict and stress, when they face problems that they cannot solve on their own. At best, an incompetent lawyer will do the client no good. At worst, an incompetent lawyer will make matters worse. Good office lawyers help clients avoid disputes, but incompetent ones fail to prevent disputes or, worse, foment them. Good courtroom lawyers provide effective and efficient representation for clients. Incompetent ones can cost a client his or her money, freedom, or life.

Lawyer competence is also crucial for broader social purposes. Every avoidable conflict that an office lawyer does not foresee or prevent leaves the doors open for later litigation. The public bears much of the cost of such avoidable conflicts. Courtroom lawyers who do not know what they are doing multiply and delay proceedings, with the result that the courts are unnecessarily congested. Others who need resolution of their disputes must wait. Every unjust result allowed by an incompetent lawyer also has a public cost. Such results, if they become known, undermine faith in the judicial process and invite people to seek other, possibly more destructive, ways of resolving their disputes.

It is important to note here at the outset that "competence" for a lawyer is a broader and more complex concept than you might think. In Chapter 3, we will explore in depth the various components of what we mean by lawyer competence.

The Virtue of Fidelity to the Client

"I am a lawyer who fulfills my duties of utmost good faith and devotion to my client, and I do not permit my personal interests or the interests of others to interfere with those duties."

Fidelity to the client matters to individual clients. Clients often come to lawyers at time of great vulnerability, and lawyers are in positions to take advantage. A lawyer who lacks the virtue of fidelity to the client might charge the client too much, use the client's confidential information to the lawyer's advantage, or sell out the client to benefit the lawyer or another client. Often clients

are not in a position to observe such acts of disloyalty. A lawyer who does not have the virtue of fidelity to the client can harm clients and sometimes get away with doing so.

Fidelity to the client is also crucial for lawyers to serve their broader purposes. Lawyers cannot help to avoid disputes or secure fair and efficient resolution of disputes if clients do not trust them enough to consult them. If someone is sick but does not trust doctors, he may ignore his illness or self-medicate and thereby create public health dangers. Someone who has a legal problem but does not trust lawyers –because she believes that she cannot trust lawyers to be faithful – may either ignore the problem or represent herself. Either option is likely to impose public costs, either by an unnecessary dispute or the grinding inefficiencies of pro se representation in court.

The Virtue of Fidelity to the Law

"I am a lawyer who is faithful to and upholds the law and the institutions of the law."

The virtue of fidelity to the law serves client interests and helps to fulfill the public purposes of lawyers. Most clients want to comply with the law. Lawyers, as experts in the boundaries of the law, serve those clients well when they dissuade the clients from illegal activity. Even clients more disposed to law-breaking are well-served by lawyers who not only refuse to help them but advise them of the consequences of the proposed course of action.

Fidelity to the law and its institutions is critical for fulfillment of the public purposes of the legal profession. Society has an interest in seeing that its laws are obeyed. Lawyers serve the rule of law, and promote compliance with the law, when they persuade clients not to engage in illegal activities and refuse to assist. Fidelity to the law is also crucial in judicial proceedings. There are opportunities for lawyers to cheat for their clients. The lawyer might, for example, hide evidence, suborn perjury, or bribe the judge. But cheating is a form of corruption, and a system that is perceived to be corrupt will not be seen as legitimate. Our judicial process depends mostly on voluntary obedience to its dictates, and that voluntary obedience erodes once the process is perceived as illegitimate. The peaceful resolution of disputes through the judicial system is possible, therefore, only if lawyers exercise the virtue of fidelity to the law and its institutions and refuse to cheat.

The Virtue of Public-Spiritedness

I am a lawyer who practices in a spirit of public service. I seek to ensure access to justice and to regulate the legal profession for the benefit of the public. I do my share to represent unpopular people and causes, and I seek to improve the law."

We need lawyers who see themselves as public servants. At the individual level, there are many people in our society who cannot afford lawyers even in times of desperate need. Every time a lawyer represents a client pro bono in resisting eviction, or obtaining public benefits, or securing a writ of habeas corpus, or in any number of other contexts, that lawyer is rendering a great

service to that individual. Individual clients who face public scorn or prejudice against them also benefit when a lawyer with the virtue of public service has the courage to step in to protect them.

Society more broadly needs such lawyers. Proceedings that would otherwise involve pro se parties are fairer and more efficient when lawyers get involved. The parties and the public will accept the results of such proceedings more readily because the results are more legitimate. Regulation of the legal profession in ways that prevent misconduct, or otherwise promote the public interest rather than the profession's interest, protects every client and potential client. When a lawyer steps forward to protect an unpopular client or cause, the public benefits (whether it realizes it or not) because the protection of the worst preserves the protection of all. Improvement of the law benefits everyone.

The Virtue of Civility

"I am a lawyer who is civil to everyone with whom I come in contact as a lawyer. I am courteous, cooperative, and honest, and I do not engage in abusive tactics."

Clients sometimes think they want lawyers who are rude and otherwise uncivil. The clients respond to advertisements in which lawyers promise to be nasty and uncooperative with opposing parties. Lawyers who internalize the virtue of civility serve those clients well by not succumbing to such understandable temptations of the clients or the selfish desire to attract clients by promising uncivil conduct. Incivility is expensive. It drives up the costs of litigation, both financial and psychological, and it feeds on itself. Incivility begets more incivility. It

prevents compromise or reconciliation. Clients may not realize it at first, but they are ill-served by lawyers who are rude, uncooperative, dishonest, and abusive. The lawyer who displays civility better serves the long-term interests of individual clients.

Civility is essential if our dispute resolution systems are to perform efficiently. Our judicial system is utterly dependent upon the cooperation of counsel. Although there are rules of procedure that one can invoke for virtually every contingency, the system would fail of its own weight if everything had to be done "by the book." Such conduct would hobble the ability of the judicial system to render just or efficient results. There are not enough judges in the country to referee every dispute among contentious counsel. Every minute of judicial time devoted to petty disputes that flow from discourtesy, lack of cooperation, lack of trust, or abusive litigation tactics is time away from deciding the merits of other disputes. It is also likely that rampant incivility may drive out of the profession individuals who have low tolerance for such conduct, with the result that the profession could enter a spiral of more and more inefficient and destructive incivility.

The "Master Virtue" of Practical Wisdom

"I am a lawyer who cultivates the practical wisdom that I need in order to deploy my other virtues, both personal and professional, in particular situations in the right amounts, in the right way, and for the right reasons."

As a lawyer, you will not act in the abstract. You will have to take action in particular circumstances. We hope you will approach each such occasion with a deep sense of your own personal identity and of yourself as a lawyer who is competent, faithful to your clients, faithful to the law, public-spirited, and civil. But particular circumstances may bring these parts of your personal and professional identities into tension with each other. You might best serve your client by engaging in a discourteous cross-examination of an untruthful opposing party. You may need to interpret a document request from an opposing party knowing that, under one interpretation, you will have to turn over a "smoking gun" to the opposition. Or perhaps you could take advantage of another lawyer's mistake and obtain a result that, as a matter of your personal values, you may consider to be fundamentally unfair. And so on. To make matters worse, you might have to make such decisions under conditions of high stakes and irreducible uncertainty.

Practical wisdom is the "master virtue" that enables you to chart a course in such difficult moments of professional practice. It presupposes that you have internalized the other five virtues and recognized their importance for individual clients and for society more generally. Your job in these moments is the hardest and most satisfying job you will ever have as a lawyer: to decide on what the right thing is to do, to make sure you are choosing that action for the right reasons, and to implement that action in the right way. By definition, because practical wisdom requires the possession of the other virtues, practical wisdom serves both individual and societal interests.

The Conditions Necessary for Professional Identity Development

We said earlier in this chapter that the purposes of this book are to teach you the traditional values of the legal profession, to convince you to incorporate those values into your sense of self as a lawyer, and to help you to live up to those values when you become a lawyer. In other words, for you to possess and deploy the right kind of professional identity you must be *sensitized* to what that means and what may impede you, you must be *motivated* to make the effort to do so, and you must have the skill to *reason* to and *implement* a decision in particular circumstances. We did not choose these goals, or this terminology, idly. We have borrowed them from moral psychology, particularly the Four Component Model of Morality (FCM) (Bebeau and Monson 2008). We are not psychologists, but we believe that the FCM provides powerful insights into the conditions necessary for the cultivation of your professional identity and a useful structure for understanding the process. The rest of this book is organized around those insights. Here we provide a short summary of the FCM.

The FCM posits that there are four distinct but interactive components to moral action. All must be present for an individual to act morally in a particular circumstance. The four components are moral sensitivity, moral motivation, moral reasoning and moral implementation.

Moral *sensitivity* involves a deep awareness of various factors at play in a situation, including: recognition that there is an issue that must be dealt with; the likely reactions and feelings of others; knowledge of alternative courses of action, including the possible consequences and their effects on multiple parties; the ability to see things from the perspectives of other individuals and groups and from legal and institutional perspectives; and knowledge of the regulations, codes,

and norms of one's profession and when they apply. In terms specifically of your professional identity development as a lawyer, sensitivity includes an ability to detect when a situation calls for one or more of the six virtues and recognition of any obstacles to their deployment.

Moral *reasoning* refers to formulating and evaluating possible solutions to the moral issue. This step in the process requires reasoning through the possible choices and potential consequences to determine which are ethically sound. Moral reasoning is a skill that will enable you in particular circumstances to think through the applicability of each of the six virtues and to evaluate how proposed courses of action implicate the virtues.

Moral *motivation* has to do with the importance given to moral values in competition with other values. At a macro level, the lawyer must find motivation to undertake the effort to develop the right kind of professional identity. In a specific situation, a lawyer might be tempted by values such as self-interest not to be faithful to a client or to the lawyer's responsibilities to the court or opposing lawyers and parties. The lawyer must find a reason to act in accordance with the six virtues. We will explore this question of motivation in detail in the next chapter.

Moral *implementation* focuses on whether a person has sufficient pertinacity, toughness, ego strength, judgment, and courage to implement a course of action that emerges from his or her moral reasoning. A person may be morally sensitive, may make good moral judgments, and may place a high priority on moral values, but if the person wilts under pressure, or is easily distracted or discouraged, then moral failure occurs because of deficiency in this component. As

part of a lawyer's professional identity, one can view moral implementation as an advanced and complex form of competence, one that often requires the master virtue of practical wisdom.

We believe the FCM is a helpful way to structure your thinking on professional identity, and the organization of this book reflects that. Chapter Two addresses the issue of *motivation* and discusses why you should make the internalized commitment to develop your professional identity in accordance with the six traditional values of the profession. Chapters Three through Eight focus on each of the six lawyer virtues in isolation, with the purposes of *sensitizing* at greater depth regarding what each virtue means, why it matters, and what obstacles there are to its deployment, and each of these chapters also provides some guidance on how to *implement* a commitment to deployment of that virtue. In particular, Chapter Eight on practical wisdom takes the questions of *reasoning* and *implementation* to a deeper level of complexity and explores how to deploy the traditional virtues of the legal profession in circumstances of conflict and uncertainty. We conclude with Chapter Nine, which confronts directly the issue of the enduring importance of the six virtues as the legal profession changes in the decades to come.

Conclusion

You almost certainly made the decision to come to law school because you intend to make the practice of law your vocation. Author Frederick Buechner once wrote that vocation is where "the world's deep need" meets your "deep gladness" (Buechner 1973, 118). The world has a deep need for lawyers who choose to internalize a professional identity that enables them to deploy the six virtues. The good news for you, and the subject of the next chapter, is why such a choice

is likely to lead to your “deep gladness.” Remember that one of the four necessary conditions for professional identity acquisition and deployment is motivation. As you will see, the motive for you to work on the right kind of professional development is that this is a path to satisfaction in your chosen profession and well-being in your life.

Practical Wisdom Problems

Problem #1: The Billing Partner and the Associate

You are an associate at a law firm and have been assigned to work on a multi-million-dollar case in which your firm is defending a Fortune 500 corporation. There are three lawyers in your firm working on the case. The Senior Partner has overall "big-picture" strategic responsibility for the matter but is not deeply involved on a daily basis. The Junior Partner makes the tactical decisions day-to-day. Your role as the Associate is to implement the decisions that the more senior lawyers make.

A crucial part of the case is the testimony that the plaintiff's expert witness will give. You are assigned to take the deposition of the expert. A deposition is sworn testimony under oath, usually given in a lawyer's conference room. You prepare diligently for the deposition, spending 40 hours studying the documents produced in the case and getting up to speed on the expert's field of expertise. The deposition goes well, and you obtain admissions from the expert that enable your firm to have the judge exclude the expert's testimony. Because the expert's testimony is excluded, your client obtains a summary judgment, which is victory in the case by order of the judge without a trial.

Several weeks after the judge renders the summary judgment, you are walking down a hallway in your firm's offices. An administrative assistant calls you over to his desk and shows you the bill that has been prepared for your Fortune 500 client. As an associate, you are not typically involved in billing clients, but the administrative assistant points out that the client is to be billed for 100 hours of your time in preparation for the expert's deposition. You know you only spent 40 hours, and you quickly go to your office and confirm from your records that you reported those 40 hours accurately to the Senior Partner, who oversees billing the client.

What should you do? Be sure to think through various scenarios about what may be happening and why and anticipate what reactions there may be to whatever course of action you take.

Problem #2: Just a Small Favor for an Old Friend

You represent a client in a civil case in which the other party is represented by Jay Lillard, a friend and law school classmate. You know that Jay has been in recovery from alcoholism for several years, and he has shared with you some of his experiences with rehab and Alcoholics Anonymous. He had been doing well, but over the last several months you noticed that the quality of his work deteriorated. For example, he showed up for a court hearing late, looking disheveled. Another time, he missed a deadline to respond to some written discovery you had served on him; when you reminded him, he was apologetic and asked for an extension. You gave him the extension, but his responses came in after the extended deadline and were incomplete.

Your trial in Jay's case is on the docket two weeks from today. The judge has already entered the pretrial order, which specifies who the witnesses will be. You know that under the law the pretrial order can only be amended by consent of all parties or on a showing of "manifest injustice." That prohibition specifically includes the identification of expert witnesses. Jay calls you to say that he wants to amend the pretrial order by agreement to add an expert witness that he had not disclosed before. He tells you, "My case is basically over without this witness." You agree – you were surprised that he had not named an expert before. When you press him, Jay finally tearfully admits that he relapsed some months ago and that as a result of his drinking he forgot to disclose his expert. "I forgot" will not convince the judge to allow the expert. Jay asks you to agree to amend the pretrial order "as a favor to an old friend who's fallen on hard times." Sad to say, Jay's speech on this call is slurred. It is 10:00 a.m., and your friend is drunk.

What should you do?

Problem #3: The Scrivener's Error

You have been representing Mr. Smith in a contentious divorce case for several years. Mrs. Smith is represented by counsel. You have had many dealings with this attorney over the years, and frankly you do not like him. You also have a low opinion of his competence and his professionalism.

The clients have agreed to split their property 50/50, with your client Mr. Smith "buying out" Mrs. Smith for her half of the property. The parties have not, however, been able to agree on the valuation of certain real estate that is jointly owned. Mrs. Smith has developed a strong view, without much evidence, that one particular property (the so-called Holt Property) is worth $550,000. You and your client have an appraisal of the Holt Property that shows its value as $425,000.

You receive from the attorney for Mrs. Smith a document entitled "Second Proposal For A Basis of Settlement -- Smith v. Smith" which, among other things, shows a suggested figure of $70,081.85 for the value of Mrs. Smith's share in the Holt property. This value was calculated by a computation set forth in the proposal. This is the computation:

Value	$550,000.00
Less encumbrance	-308,362.99
Net Value	$141,637.01
Mrs. Smith's 50% share	$70,081.85

You note the arithmetical errors in this computation. You also note that, if instead the parties used the appraisal you and your client obtained, Mrs. Smith's share would be:

Value	$425,000.00
Less encumbrance	-308,362.99
Net Value	$116,637.01
Mrs. Smith's 50% share	$58,318.51

You share Mrs. Smith's offer with Mr. Smith. He says that he wants to accept the $70,081.85 figure. It is more than he thinks he should have to pay, but he is willing to pay the difference to be done with the divorce. He would not agree to pay the amount that Mrs. Smith would be demanding if her attorney had done the math correctly. Mr. Smith says, "accept the offer – and say nothing about the error." Assume it would not be fraud to accept the offer. What should you do?