

## **21st Century Law Practice**

# **You are a Lawyer-Geek and a Master of the Cyber Universe: How This Can be Either a Good or Bad Thing for your Clients**

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- I. Use of Technology in Your Practice: My How Life Has Changed!
- II. Virtual Practices.
- III. What are the New Trends?
- IV. Unbundled Services? Ghostwriting? Is this Zealous and Competent Representation? In a Bankruptcy Case in Particular?
- V. Is the “Bloom Off the Rose” of Bankruptcy Practice? Have Technology, Experience, and Various Market Factors Changed a Practice that Once Required Great Expertise and Creativity to Now More of a Commodity Practice?
- VI. The New Generation of Law Students and Lawyers; Law School in the 21<sup>st</sup> Century: They are Different from You and Me.
- VII. Bitcoin–Are You Kidding Me?

## **I. Use of Technology in Your Practice: My How Life Has Changed!**

- \* From typewriters and carbon paper and liquid paper, to word processors.
- \* From dictaphones and dictation, and one-secretary-per-lawyer, to desktop and laptop computers and one-secretary-per-floor and giant IT departments.
- \* From cables, to telex, to fax machines, to emails.
- \* From xeroxing documents and stuffing copies in your briefcase, to pulling documents up on your laptop.
- \* From desk phone land lines, to 10-pound mobile phones in a bag, to iPhones and iPads and texting.
- \* From law libraries and books, and “Shepardizing,” to Lexis, Westlaw, and Google searches.
- \* From running over to courthouse to file something at the Clerk’s Office before 4:00 pm, to electronic filing on CM/ECF on a 24-7 basis.
- \* From asking your paralegal to go retrieve hard copies of old case files at the courthouse, to pulling up dockets and pleadings on PACER 24-7.
- \* From going to court for a hearing, to calling into “Court Call” and participating in hearings telephonically.
- \* From handing out business cards to prospective clients and contacts, and getting listed in phone books and Martindale Hubble, to “advertising” on the Internet, creating websites, blogs, Linked In, Facebook, and other forms of social media.

## II. Virtual Practices.

By “virtual practice,” the presenters are generically assuming a practice where a lawyer works and communicates mostly over the internet, through email, texts, websites, or otherwise electronically, and perhaps does not even have a brick-and-mortar office. This can be with or without colleagues.

*A. Ethical consideration #1: Is it hard to fulfill all your duties to a client when you are not sitting across a table advising him or otherwise having face-to-face meetings? On the other hand, have we entered into a world where clients don't want face-time too much—just want an email or text? Does it depend on the sophistication of the client or type of representation (debtor, creditor, other)?*

The ethical rules and comments thereto stress:

**The Importance of Being a “Counselor” or Trusted Advisor to Debtor-Clients, in addition to being an Attorney-at-Law.** This arguably suggests lawyers should have “face time” with clients. Is physical face time necessary? The ethical rules also contemplate that a lawyer is more than a practitioner who simply fills out forms and acts as a hired gun to accomplish a task; a lawyer needs to counsel the client about what strategies make sense and are likely to work and be in his or her best interest. Need to be a counselor; trusted advisor. See, e.g., TX Rules of Professional Responsibility 2.01; 1.03; 5.01; 5.03.

### \* Rule 2.01 Advisor

In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

### \*Rule 1.03 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

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

*B. Ethical consideration #2: Is it hard to fulfill all your ethical duties when your colleagues and people you are supervising are not down the hall from you?*

Applicable ethical rules:

### \* Rule 5.01 Responsibilities of a Partner or Supervisory Lawyer

A lawyer shall be subject to discipline because of another lawyer's violation of these rules of professional conduct if:

(a) The lawyer is a partner or supervising lawyer and orders, encourages, or knowingly permits the conduct involved; or

(b) The lawyer is a partner in the law firm in which the other lawyer practices, . . . or has direct supervisory authority over the other lawyer, and with knowledge of the other lawyer's violation of these rules knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of the other lawyer's violation.

**\* Rule 5.03 Responsibilities Regarding Nonlawyer Assistants**

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(b) a lawyer shall be subject to discipline for the conduct of such a person that would be a violation of these rules if engaged in by a lawyer if:

(1) the lawyer orders, encourages, or permits the conduct involved; or

(2) the lawyer:

(i) is a partner in the law firm in which the person is employed, retained by, or associated with . . . or has direct supervisory authority over such person; and

(ii) with knowledge of such misconduct by the nonlawyer knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of that person's misconduct.

***C. Ethical Consideration #3: Have jurisdictional boundaries disappeared in an Internet driven world, in which everyone is a one-second click away from everyone else and from the courthouse?***

*See L. Ryan, Attorneys Can Use Remote Office as Primary Residence: NY Bar, LAW 360 (June 6, 2014).*

### III. What are the New Trends?

*Advertising on the Internet?*

*Pay-per-click advertising on search engines*

*Pay-per-lead*

*Q&A Sites such as “AVVO”*

*Blogging*

*LegalZoom or other online legal services*

*Groupon*

**A. Ethical Consideration #1: What about all those pesky ethical rules about advertising, solicitation, and licensure to practice law in a particular state? How do they apply as technology and globalization impact our law practices?**

See, e.g., W. Hornsby, *Lawyer Advertising and Marketing Ethics Today: An Overview*, <http://www.attorneyatwork.com> (Jan. 23, 2013) (for a good discussion of these issues).

**B. Ethical Consideration #2: What about client confidentiality considerations? Is a lawyer risking waiver of attorney-client privilege (or breaching client confidentiality) by sending messages through cyber space? By storing information on the “cloud”? By floating a legal question out to the blogosphere or ListServe?**

See, e.g., D. Jordan, *Cloud Nine: How Operating a Paperless Law Office Can Save Money and Increase Efficiency*, TEX. B.J., p. 394 (May 2014); P. Vogel, *Attack Plan: What are You Doing to Protect Yourself and Your Clients from Cybercriminals?* TEX. B.J., p. 390 (May 2014).

**C. Practice pointers:** The rules of professional responsibility, comments thereto, and ethics opinions are still catching up with reality and some states have made certain pronouncements, while others have not addressed these areas. So proceed with caution.

In 2009, the ABA launched an initiative known as Ethics 20/20 that was charged with a reconsideration of all the Model Rules of Professional Conduct in light of globalization and technological developments.

Pay-per-Lead Guidance. At the ABA 2012 Annual Meeting, the House of Delegates adopted certain changes to certain comments to the Rules, accomplishing such things as clarifying that *pay-per-lead* is permissible in a Comment to Model Rule 7.2 (“a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator’s communications are consistent with Rule 7.1 (communications concerning a lawyer’s services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person’s legal problems when determining which lawyer should receive the referral”).

Solicitation Guidance. Additionally, the Comment to Model Rule 7.3 was amended in a way to address what is or is not *solicitation*: “A solicitation is a targeted communication initiated by the lawyer that is directed to

a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.”

Daily Deals Guidance. Various states have issued ethics opinions regarding “daily deal” programs such as Groupon (more concluding participation is ethical than not, although caution is suggested on matters such as client confidentiality, conflicts of interest, and division of fees with corporate sponsors of the program).

Q&A Sites. The ethics opinions that have addressed Q&A sites seem to focus on the dangers of inadvertently entering into attorney-client relationships.

Blogs. Note that there was a disciplinary case brought against a criminal defense lawyer in the Commonwealth of Virginia a couple of years ago that resulted in a ruling that his blog was, in essence, an advertisement that was required to meet with the states Rules of Professional Responsibility pertaining to advertising.

Again, see *W. Hornsby, Lawyer Advertising and Marketing Ethics Today: An Overview*, <http://www.attorneyatwork.com> (Jan. 23, 2013) (for a good discussion of these issues).

#### **IV. Unbundled Services? Ghostwriting? Is this Zealous and Competent Representation? In a Bankruptcy Case in Particular?**

How common is the trend of unbundling (*i.e.*, essentially agreeing to represent a client in a limited fashion—in some case matters but not all)? What are the possible applicable ethical considerations and rules?

**A. Defining the Scope of the Debtor’s Attorney’s Representation.** If an attorney does not plan to represent the client in certain case matters, he or she (1) should be very clear with the client; and (2) should make every effort to identify any such problem. *See, e.g.*, TX Rules of Professional Responsibility 1.01; 1.15.

**B. The Duty to Zealously Represent Your Client.** But how does this reconcile with a lawyer’s responsibility to not neglect responding to motions that affect the client and to provide vigorous defenses and objections where warranted? *See, e.g.*, TX Rules of Professional Responsibility 1.01; 3.01.

**C. Communication Issues/Responding to Client’s Information Requests.** And what about the duty to keep a client apprised of what is going on with their case or what an order or notice means—can you really pick and choose? *See, e.g.*, TX Rules of Professional Responsibility 1.03.

#### **\* Rule 1.01 Competent and Diligent Representation**

(b) In representing a client, a lawyer shall not: (1) neglect a legal matter entrusted to the lawyer; or (2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.

(c) As used in this Rule, ‘neglect’ signifies inattentiveness involving conscious disregard for the responsibilities owed to client or clients.

Comments to this rule refer to the duty of “zeal in advocacy.”

#### **\*Rule 1.03 Communication**

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

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

#### **\* Rule 1.15 Declining or Terminating Representation**

(b) Except as required by paragraph (a), a lawyer shall not withdraw from representing a client unless: (1) withdrawal can be accomplished without material adverse effect on the interests of the client; . . . (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services, including an obligation to pay the lawyer’s fee as agreed, and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or (7) other good cause for withdrawal exist.

(c) 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 payments of fee that has not been earned.

**D. Remember, the court has the ultimate "say"** with regard to withdrawal and scope of an attorney's representation, at least when it comes to an estate professional. *S. Jernigan, Motions to Withdraw as Attorney: Why Breaking Up is Sometimes Hard to Do*, XXXI ABI JOURNAL 8, 50-51, 100 (Sept. 2013).

**E. Useful Cases/Articles Regarding Unbundled Services.**

- 1.) *In re Seare*, 493 B.R. 158 (Bankr. D. Nev. 2013) (Judge Bruce Markell) (in an 88-page opinion, court held that (1) attorney did not fulfill his professional duty of "competence" under Nevada law in simply assuming that his client's debt to hospital was generic debt for medical services and therefore dischargeable, without conducting adequate investigation; (2) attorney's "unbundling" of legal services to exclude representation in adversary proceedings, when, had he conducted adequate initial consultation, he would have known that the filing of fraud-based nondischargeability was a near certainty, was "unreasonable" and violative of Nevada Rule of Professional Conduct; (3) attorney did not perform "reasonable investigation" into circumstances that gave rise to filing of bankruptcy petition, in violation of bankruptcy statute; (4) attorney also violated Code provisions regulating conduct of "debt relief agencies"; and (5) appropriate sanction for attorney's misconduct was disgorgement of all fees received, publication of bankruptcy court's opinion, and requirement that attorney take continuing legal education classes).
- 2.) *In re Basham*, 208 B.R. 926 (9th Cir. B.A.P. 1997) (affirmed by 9th Circuit in an unpublished opinion found at 152 F.3d 924). This involved a consolidation of two motions by the U.S. Trustee to disgorge an attorney's fees against the same attorney in two separate cases (a chapter 7 and a chapter 13). The attorney charged debtors a flat fee of \$390 for chapter 13 cases and \$190 for chapter 7 cases (remember this was in the 1990s). The fees only covered prepetition services (consultation, preparation of the petition, schedules and statement of financial affairs). If the debtor wanted representation at the section 341 meeting or any other hearing, the attorney charged an additional \$150 fee per appearance and \$100 per hour for additional work not related to the prepetition services. The debtors in these two cases had opted for the flat fee arrangement and opted to forego representation at the section 341 meeting. Suffice it to say that there were numerous problems in the debtors' two cases. The court granted the U.S. Trustee's motion to disgorge the attorney's fees. Fees not reasonable, given numerous problems. Higher courts affirmed. The BAP repeated the bankruptcy court's words that the attorney: "had an obligation to either handle the case from the beginning to end and [to] perform the services for whatever amounts the clients could afford, or refer the case to another attorney." 208 B.R. at 932-933. The attorney had created a situation where he would have no responsibility for the outcome of the debtor's case but could still receive some compensation for his services. Note that the attorney had also not filed a Rule 2016 statement.
- 3.) *In re Egwim*, 291 B.R. 559 (Bankr. N.D. Ga. 2003) (Attorney in a chapter 7 case charged \$475 per case and included representation at the section 341 meeting and any reaffirmation agreements but nothing further. The court held that attorneys may not limit the scope of their representation in chapter 7 cases, but imposed no sanctions or other discipline).

- 4.) *In re Perez*, 2010 Bankr. LEXIS 2229 (Bankr. D. N. M. July 12, 2010) (Court held that exclusion of representation for reaffirmation hearing by bankruptcy counsel for a chapter 7 consumer debtor would be an impermissible limitation on counsel's representation of the debtor and that "assistance with the decision must be counted among the necessary services that make up competent representation of a chapter 7 debtor").
- 5.) *In re Castorena*, 270 B.R. 504 (Bankr. D. Id. 2001) (in addressing a chapter 7 debtor's counsel attempt to limit the scope of his representation, court stated: "To send a debtor into a bankruptcy *pro se*, on the theory that he has had 'enough' advice and counseling in the document preparation stage to safely represent himself is except in the extraordinary case so fundamentally unfair as to amount to misrepresentation").
- 6.) Hon. Thomas F. Waldron, *Undulations in Unbundling—Is a Ripple Running Through the Rocks of Resistance in Bankruptcy Courts?*, 2013 No. 6 NRTN-BLA-NL 1 (containing a very detailed analysis of *In re Seare* (noted above), describing it as the "the most comprehensive examination to date of the issues involved in Unbundling"; also discusses a recently published Final Report of the ABI National Ethics Task Force, which discusses Limited Services Representation (LRS) and Limited Scope Representation (a/k/a unbundling of services)).
- 7.) Carrie A. Zuniga, *The Ethics of Unbundling Legal Services in Consumer Cases*, 32-OCT Am. Bankr. Inst. J. 14 (drawing heavily from the ABI's Ethics Task Force Final Report, which discusses unbundling issues, competency, conflicts and many other ethical issues facing bankruptcy attorneys).

#### ***F. Ghostwriting: An Emerging Subset of Unbundled Services.***

##### **The following is a list of federal cases examining the ethical implications of ghostwriting.**

- 1.) *In re Cash Sys., Inc.*, 326 B.R. 655, 673-74 (Bankr. S.D. Tex. 2005) (quoting *In re Merriam*, 250 B.R. 724, 733 (Bankr. D. Colo. 2000)) ("When an attorney has the client sign a pleading that the attorney prepared, the attorney creates the impression that the client drafted the pleading. This violates both Rule 11 and the duty of honesty and candor to the court").
- 2.) *Auto Parts Mfg. Mississippi Inc. v. King Constr. of Houston, LLC*, 2014 WL 1217766, \*7 (N.D. Miss. March 24, 2014) (cautioning "that an attorney who ghostwrites motions, briefs, and pleadings is acting unethically and is subject to sanctions").
- 3.) *Falconer v. Lehigh Hanson, Inc.*, 2013 WL 3480382, \*6 (S.D. Tex. July 9, 2013) (cautioning that ghostwriting "exposes both litigants and counsel to the possibility of sanctions including fines, contempt, and professional discipline.").
- 4.) *Nelson v. Lake Charles Stevedores, L.L.C.*, 2012 WL 4960919, \*5 (W.D. La. Oct. 17, 2012) (advising "any counsel who 'ghost -writes' pleadings is treading on dangerously thin ice").
- 5.) *Duran v. Carris*, 238 F.3d 1268, 1271-72 (10th Cir. 2001) (courts have generally expressed concerns about the practice as it relates to the ethical requirement of candor to the tribunal, the danger of circumvention of the requirement of Fed.R.Civ.P. 11, and the effect of applying more generous interpretive standards to apparent, but not actual, *pro se* pleadings).

- 6.) *Ellis v. Maine*, 448 F.2d 1325, 1328 (1st Cir. 1971) (lamenting the practice where attorneys represent parties "informally or otherwise, and prepare briefs for them which the assisting lawyers do not sign, and thus escape the obligation imposed on members of the bar").
- 7.) *In re Fengling Liu*, 664 F.3d 367, 369 (2d Cir. 2011) (concluding that attorney who had ghostwritten brief had not engaged in sanctionable conduct).
- 8.) *In re West*, 338 B.R. 906, 916–17 (Bankr. N.D. Okla. 2006) (court found an attorney who coached his client to file a motion *pro se* because the attorney had not obtained electronic filing privileges violated the Federal Rules of Civil Procedure and his ethical obligations).

### **Interesting Articles Addressing Ghostwriting.**

- 9.) John C. Rothermich, *Ethical and Procedural Implications of “Ghostwriting” for Pro Se Litigants: Toward Increased Access to Civil Justice*, 67 Fordham L. Rev. 2687, 2697 (1999).
  - “The duty of candor toward the court mandated by Model Rule 3.3 is particularly significant to ghostwritten pleadings. If neither a ghostwriting attorney nor her *pro se* litigant client disclose the fact that any pleadings ostensibly filed by a self-represented litigant were actually drafted by the attorney, this could itself violate the duty of candor. The practice of undisclosed ghostwriting might be particularly problematic in light of the special leniency afforded *pro se* pleadings in the courts. This leniency is designed to compensate for *pro se* litigants' lack of legal assistance. Thus, if courts mistakenly believe that the ghostwritten pleading was drafted without legal assistance, they might apply an unwarranted degree of leniency to a pleading that was actually drafted with the assistance of counsel. This situation might create confusion for the court and unfairness toward opposing parties. It is therefore likely that the failure to disclose ghostwriting assistance to courts and opposing parties amounts to a failure to “disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client,” which is prohibited by Model Rule 3.3. Undisclosed ghostwriting would also likely qualify as professional misconduct under Model Rules 8.4(c) and (d), prohibiting conduct involving a misrepresentation, and conduct that is prejudicial to the administration of justice, respectively.”
- 10.) Ira. P. Robins, *Ghostwriting: Filing in the Gaps of Pro Se Prisoners’ Access to the Courts*, 23 GEOJLE 271, 285 (2010)
  - The federal courts have almost universally condemned ghostwriting. *See, e.g., Duran v. Carris*, 238 F.3d 1268, 1272-73 (10th Cir. 2001) (finding that ghostwriting constitutes a “misrepresentation to this court”); *Ellis v. Maine*, 448 F.2d 1325, 1328 (1st Cir. 1971) (“If a brief is prepared in any substantial part by a member of the bar, it must be signed by him.”); *Delso v. Trs. for the Ret. Plan for the Hourly Employees of Merck & Co.*, 2007 U.S. Dist. LEXIS 16643, at \*50 (D.N.J. Mar. 5, 2007) (holding that undisclosed ghostwriting violates several ethics rules and the spirit of Fed. R. Civ. P. 11 and should not be permitted in the District of New Jersey); *Wesley v. Don Stein Buick, Inc.*, 987 F. Supp. 884, 887 (D. Kan. 1997) (requiring *pro se* defendant to disclose whether she was represented by attorney); *Laremont-Lopez v. Se. Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1077 (E.D. Va. 1997) (“[T]he Court considers it improper for lawyers to draft or assist in drafting complaints or other documents submitted to the Court on behalf of litigants designated as *pro se*.”); *United States v. Eleven Vehicles*, 966 F. Supp. 361, 367 (E.D. Pa. 1997) (“Important policy considerations militate against validating an arrangement wherein a party appears *pro se*”).

while in reality the party is receiving legal assistance from a licensed attorney.”); *Johnson v. Bd. of County Comm'rs*, 868 F. Supp. 1226, 1232 (D. Colo. 1994) (“Having a litigant appear to be pro se when in truth an attorney is authoring pleadings and necessarily guiding the course of the litigation with an unseen hand is ingenuous to say the least; it is far below the level of candor which must be met by members of the bar.”); *In re Brown*, 354 B.R. 535, 545 (Bankr. N.D. Okla. 2006) (“[I]f an attorney writes a pleading, he or she has a duty to make sure that the Court knows he or she wrote it. The Court is not required to play a game of ‘catch-me-if-you-can’ with a ghostwriter. All counsel owe a duty of candor to every court in which they appear. Inherent in that duty is the requirement that counsel disclose his or her involvement in the case.”); *In re Mungo*, 305 B.R. 762, 767 (Bankr. D.S.C. 2003) (“The act of anonymously drafting pleadings for which a client appears and signs pro se is often termed ‘ghost-writing.’ ... [T]he Court recognizes the act of ghost-writing as a violation of Local Rule 9010-1(d) and in contravention of the policies and procedures set forth in the South Carolina Rules of Professional Conduct and the Federal Rules of Civil Procedure.”); *Ostrovsky v. Monroe (In re Ellingson)*, 230 B.R. 426, 435 n.12 (Bankr. D. Mont. 1999) (holding that court rules, particularly Fed. R. Civ. P. 11, as well as ABA Standing Committee Opinion 1414, prohibit ghostwriting).

- 11.) Salman Bhojani, *Attorney Ghostwriting for Pro Se Litigants—A Practical and Bright-Line Solution to Resolve the Split in Authority Among Federal Circuits and State Bar Associations*, 65 SMU L. Rev. 653 (2012).

**V. Is the “Bloom Off the Rose” of Bankruptcy Practice? Have Technology, Experience, and Various Market Factors Changed a Practice that Once Required Great Expertise and Creativity to Now More of a Commodity Practice?**

**A. Query #1: Has business bankruptcy (except for the rarest giant restructurings, such as an American Airlines or Energy Future Holdings) become a commodity practice (similar to much of consumer bankruptcy work)?**

Some legal practice experts say that there are four types of legal work (with rates/fees escalating in each):

1. Standardized/Routine (high volume/efficient processes)
2. Customized Work (e.g., wills/estates)
3. Expert Work (e.g., tax/regulatory)
4. Innovation Work (e.g., IP litigation; cross-border)

*J. Hsu, Business and Ethics of Managing a 21<sup>st</sup> Century Law Firm: Lessons Learned and Reflections of the State of “Big Law” in 2013, FORDHAM CORPORATE LAW FORUM (Jan. 29, 2013).*

Was business bankruptcy once in Category 3 or 4, but now maybe 1 or 2?

**B. Query #2: Is the Golden Age of both Bankruptcy Practice Area Growth, as Well as Big Law Firm Growth, Over?**

It seems quite possible that the golden age of bankruptcy practice area growth is over. Twenty-five years ago, the Bankruptcy Code was new and untested. People had to ask courts for interpretations of the Bankruptcy Code. People had to be innovative and creative. Pleadings and plans of reorganization from every case filed all over the country were not easily accessible 24/7. Research took longer. Document drafting took longer. Communicating took longer. Is it possible that—now that we are all experts and have great technology at our fingertips—we have priced ourselves out of the market?

Additionally, as stated in the FORDHAM CORPORATE LAW FORUM cited above:

The second half of the 20<sup>th</sup> Century witnessed the explosion and proliferation of large, very large and mega law firms. Headcounts, billing rates, associate salaries, demand for new law school graduates, demands for legal services, partners’ salaries were all on head spinning upward arc. Law firms, perhaps like real estate prices, rose 5% annually, and law firms assumed that rate of annual growth would continue inexorably.

As the second half of the 20<sup>th</sup> century began, virtually all firms were based in a single city. By 1980, 87% of the country’s largest firms had branch offices. In 1968, the largest law firm in the United States had 168 lawyers. By 2008, 23 law firms had over 1,000 lawyers. In 1975, an elite miniscule number of firms had profits per partner edging up to \$100,000. By 2007, 100 of the most profitable firms had PPP averaging \$1,300,000.

Since January, 2008, AmLaw 200 firms acknowledged laying off nearly 15,000 personnel, including 5,632 lawyers. These figures are likely grossly understated. They do not include hundreds of ‘stealth’ layoffs, in which firms purported to dismiss lawyers for inadequate performance, nor thousands of layoffs in middle market and mid-size firms falling below the AmLaw 200 metric.

Seems that large firms are seeking to maintain high profitability by stripping out lower margin work and cyclical work.

*Is there a perception now that bankruptcy is becoming a more routine, lower-expertise work—and cyclical at that—and we are seeing significant changes in legal markets due to that? Are there more changes in store (or needed)?*

*Alternative Fee Trends?*

*Flat Fees?*

*Value billing?*

**VI. The New Generation of Law Students and Lawyers; Law School in the 21<sup>st</sup> Century: They are Different from You and Me.**

*Query #1: Are the young lawyers and law students “deep thinking” and “deep reading” like they need to, with their life-long experience of having instantaneous access to information on the Internet and reading from a screen?*

*Query #2: What will be some of the innovative approaches the UNT Dallas Law School will employ for teaching law school in the 21<sup>st</sup> century? Do law schools need to rethink the way they teach and be open to different approaches for the 21<sup>st</sup> century law student and future lawyers?*

*Query #3: What else are you seeing?*

## VII. Bitcoin—Are You Kidding Me?

Bitcoin is often described as electronic money, cryptographic currency, or digital currency. To be specific, Bitcoin is a piece of digital property. It is a like digital bearer instrument. A string of numbers is sent over an email or text message in the simplest case. It is transferred from digital device to digital device, over the Internet, rather than by hand. The IRS has defined it as property, not currency. There are a lot of lesser known crypto-currencies emerging. Most of the exchanges at which the currency is traded are offshore.

Creation and Mining of Bitcoin. Bitcoin was first “created/conceived” in 2008, allegedly by an anonymous person or group of persons using the name Satoshi Nakamoto. In 2009, the first Bitcoin started being “mined.” To be more specific, Satoshi Nakamoto began communicating computer puzzles or algorithms to be solved, out over the Internet, and whomever solved them first earned (or “mined”) a Bitcoin. It was essentially a worldwide math competition. There are allegedly a finite number of Bitcoin that will ever be issued: 21 million and the influx of it into commerce is gradual, in that the maximum number of mineable Bitcoin worldwide has been about 25 every ten minutes. It became a gold rush, with people (many in the Silicon Valley) buying large quantities of hardware and software (“Bitcoin rigs”), sometimes financed by private equity, to increase their computer power and speed, so as to solve the algorithms and mine more Bitcoin. See A. Vance and B. Stone, *Bitcoin Rush*, BLOOMBERG BUSINESS WEEK (Jan. 9, 2014).

Creation of Bitcoin Website/Exchanges. Eventually, there were a lot of Bitcoin in existence, creating the next question of how to get them into the stream of commerce and make them usable. So websites or “Bitcoin Exchanges” such as MtGox (now in a bankruptcy case in Tokyo, Japan and in a companion Chapter 15 in the Northern District of Texas, Dallas) were created where people could go to the website, create an account, and then, once registered, users/members could trade Bitcoin online (for “fiat” currency such as U.S. Dollars or Euros or Yen) using what was supposed to be a secure online trading platform. People could also store Bitcoin in a virtual vault for safekeeping or wallets (a wallet is a Bitcoin address or set of addresses that can be used to store or transfer user Bitcoins). How does this all work? Allegedly, only the owner of the asset can send it, only the intended recipient can receive it, the asset can only exist in one place at one time, and everyone can validate transactions and ownership of assets anytime they want. There is an Internet-wide distributed ledger called the “Block Chain” (*i.e.*, the so-called public record of all Bitcoin transactions; it can be viewed at [www.blockchain.info](http://www.blockchain.info)). One buys into the ledger by purchasing one of a fixed number of slots, either with cash, or by selling a good or service for Bitcoin. One sells out of the ledger by trading his Bitcoin to someone else who wants to buy into the ledger. There are very low or sometimes no fees. The coins themselves are merely slots in the ledger.

Although it has been hyped as having less potential for fraud than credit card use, in the case of MtGox (the biggest Bitcoin exchange site, at one time), 844,408 Bitcoin, collectively valued at \$473 Million (U.S. Dollars), went missing, prompting the bankruptcy filing. Hacking was said, by former management, to be suspected. Pleadings in the MtGox case have stated that MtGox had 120,000 customers in 175 countries with balances on the MtGox website exchange as of Petition Date.

Fitch recently reported that about \$6.75B worth of Bitcoin are currently in circulation. *Bitcoin Boosters Struggle to Shore Up Confidence*, WALL STREET JOURNAL (April 4, 2014). More and more businesses have announced they will accept Bitcoin, and Fitch analysts believe that, in February 2014 (notably, before the MtGox bankruptcy), Bitcoin were used in about \$68 million of transactions per day on average, compared with eBay Inc.’s payment service PayPal at \$492 million in average daily transaction volume in 2013, while Visa processed about \$19 billion per day. *Id.*

It appears that almost no country’s regulatory framework for banking and payment systems anticipated a technology like Bitcoin. Thus, Bitcoin is largely unregulated—not to mention uninsured. “Bitcoin is neither



legal tender nor endorsed by central banks, and the technological spine of the virtual currency's infrastructure is maintained mostly by volunteers. There are no large, publicly traded Bitcoin companies, no bureaucracy, no headquarters and no code of conduct." *Id.* The Treasury Department's Financial Crimes Enforcement Network (FinCEN) is slowly getting up to speed and at last issued a set of guidelines for virtual currencies in Spring 2013.

While some prominent economists are deeply skeptical of Bitcoin, describing it as a libertarian fairy tale or just the latest fad that is the subject of Silicon Valley hype, others such as Ben Bernanke, the former Federal Reserve Chairman, and Milton Friedman have suggested that e-money provides great promise for the future. Ben Bernanke recently said that digital currencies "may hold long term promise, particularly if they promote a faster, more secure and more efficient payment system." In 1999, Milton Friedman said: "One thing that's missing but will soon be developed is a reliable e-cash, a method whereby on the internet you can transfer funds from A to B without A knowing B or B knowing A—the way I can take a \$20 bill and hand it over to you, and you may get that without knowing who I am." See *M. Andreessen, Why Bitcoin Matters*, NYTIMES (Jan. 21, 2014).

In any event, the theory is, we have digital signatures, digital contracts, digital keys (to physical locks or online lockers), digital stocks and bonds, Netflix versus DVDs at the old Blockbuster, so why not digital money?

In late 2013, one Bitcoin was trading for over \$1,100 U.S. dollars. *M. Casey & T. Mochizuki, Investor Group Seeks Court Okay to Buy, Revive Bankruptcy Bitcoin Exchange MtGox*, WALL STREET J (Apr. 11, 2014). That trading price has dropped significantly since the MtGox bankruptcy.

***Is this the wave of the future? Are we going to start seeing more and more litigation involving issues like Bitcoin or electronic currency? Would you take a Bitcoin as a retainer?***

***The Late Harold Abramson was known for saying in connection with auctions: "I'll take cash, gold, or sweet Texas crude?" Would he now say, "I'll take cash, gold, sweet Texas crude, or Bitcoin?"***

## **APPENDIX: RELEVANT TEXAS RULES OF PROFESSIONAL RESPONSIBILITY**

### **\* Rule 1.01 Competent and Diligent Representation**

(b) In representing a client, a lawyer shall not: (1) neglect a legal matter entrusted to the lawyer; or (2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.

(c) As used in this Rule, 'neglect' signifies inattentiveness involving conscious disregard for the responsibilities owed to client or clients.

Comments to this rule refer to the duty of "zeal in advocacy."

### **\*Rule 1.03 Communication**

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

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

### **\* Rule 1.15 Declining or Terminating Representation**

(b) Except as required by paragraph (a), a lawyer shall not withdraw from representing a client unless: (1) withdrawal can be accomplished without material adverse effect on the interests of the client; . . . (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services, including an obligation to pay the lawyer's fee as agreed, and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or (7) other good cause for withdrawal exist.

(c) 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 payments of fee that has not been earned.

**\* Rule 2.01 Advisor**

In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

**\* Rule 3.01 Meritorious Claims and Contentions**

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous.

**\* Rule 3.03 Candor to the Tribunal**

(a) A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal . . . (4) fail to disclose to the tribunal 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 . . .

**\* Rule 4.03 Dealing with Unrepresented Persons**

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

**\* Rule 5.01 Responsibilities of a Partner or Supervisory Lawyer**

A lawyer shall be subject to discipline because of another lawyer's violation of these rules of professional conduct if:

(a) The lawyer is a partner or supervising lawyer and orders, encourages, or knowingly permits the conduct involved; or

(b) The lawyer is a partner in the law firm in which the other lawyer practices, . . . or has direct supervisory authority over the other lawyer, and with knowledge of the other lawyer's violation of these rules knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of the other lawyer's violation.

**\* Rule 5.03 Responsibilities Regarding Nonlawyer Assistants**

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(b) a lawyer shall be subject to discipline for the conduct of such a person that would be a violation of these rules if engaged in by a lawyer if:

(1) the lawyer orders, encourages, or permits the conduct involved; or

(2) the lawyer:

(i) is a partner in the law firm in which the person is employed, retained by, or associated with . . . or has direct supervisory authority over such person; and

(ii) with knowledge of such misconduct by the nonlawyer knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of that person's misconduct.

## HONORABLE STACEY G. C. JERNIGAN

United States Bankruptcy Judge  
1100 Commerce St., Room 1254  
Dallas, TX 75242-1496  
214-753-2040

Judicial History: Appointed to the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, on May 12, 2006.

Private Practice Experience: Practiced for 17 years in the Business Reorganization and Bankruptcy Practice Group of the international law firm of Haynes and Boone, LLP (Dallas, Texas office), 1989-2006. Head of Bankruptcy Practice Group (2000-2006); Partner (1997-2006); Associate (1989-1996). Represented mostly debtors, committees, and purchasers in large, complex Chapter 11 cases and out-of-court workouts. Specific industry expertise: energy companies; regulated entities; real estate businesses; public companies.

Miscellaneous Experience: Adviser to the California Legislature, Sacramento, California, in connection with the California utility financial crisis in 2001.

Professional Memberships and Honors: Board Certified in Business Bankruptcy Law by the American Board of Certification; Fellow, American College of Bankruptcy; Fellow, Texas Bar Foundation; Fellow, Dallas Bar Foundation; Master, Board Member, Serjeant of the Inn, and occasional Bankruptcy Course Instructor for John C. Ford American Inn of Court; Member, American Bankruptcy Institute (including membership on Avoidance Actions Advisory Committee to the National Commission Studying Reform to Chapter 11); Member, State Bar of Texas Bankruptcy Section; Member, Dallas Bar Association Bankruptcy and Commercial Law Section. Selected by *D Magazine* in 2002 as one of Dallas' "Best Lawyers Under 40"; by *Texas Monthly Law & Politics* as one of the "Texas Super Lawyers" in various years; and named in the 2005 and 2006 editions of *Chambers USA America's Leading Lawyers for Business* as one of the leading lawyers in the bankruptcy practice field in Texas.

Miscellaneous Publications: Contributing author to BLOOMBERG ON BANKRUPTCY treatise. Also: *Mass Preference Litigation: Proper Exercise of Fiduciary Duties or Perversion of "Equality of Distribution" Policy (and What Impact Will the 2005 Bankruptcy Code Amendments Have)?*, 24<sup>th</sup> Annual Bankruptcy Conference, University of Texas School of Law (Nov. 2005) (co-authored with Francis Smith); *Bringing Home the Bacon, or Just Being a Hog? Employee and Executive Compensation Issues in Chapter 11*, 22<sup>nd</sup> Annual Bankruptcy Conference, The University of Texas School of Law (Nov. 2003) (co-authored with Frances Smith); *The Insolvency Expert*, Chapter 28, Advanced Expert Witness II Course, State Bar of Texas (Feb. 2002) (co-authored with Eric Terry); *Tax Attributes of a Debtor as "Property of the Estate": When the Tax Planning and Bankruptcy Worlds Collide*, 17<sup>th</sup> Annual Advanced Business Bankruptcy Course, State Bar of Texas (May 1999); *1994 Consumer Bankruptcy Developments: The Bankruptcy Reform Act of 1994*, 50 BUSINESS LAWYER 1193 (May 1995).

Education: J.D., University of Texas School of Law, 1989; B.B.A., *magna cum laude*, Southern Methodist University, 1986. During law school, served as Technical Editor of THE REVIEW OF LITIGATION at the University of Texas.

Personal: Married to Jack Jernigan, a Dallas Police Officer, and mother to two teenagers. The family enjoys Texas high school football, cycling, and traveling.

Cheryl Brown Wattley is currently a tenured faculty member and Director of Experiential Education at the UNT Dallas College of Law. She graduated from Smith College, *cum laude*, with high honors in Sociology. She received her Juris Doctorate degree from Boston University College of Law, where she was a Martin Luther King, Jr. fellow and recipient of the Community Service Award. She also served as a summer intern for the General Counsel's Office of the National Association for the Advancement of Colored People.

Professor Wattley began her legal career as an Assistant United States Attorney in the District of Connecticut representing the United States in civil litigation. Through her actions, the United States participated as litigating amicus curiae in *Connecticut ARC v. Thorne*, the lawsuit that led to the entry of a consent decree overhauling the system for serving persons with mental retardation in Connecticut.

She later transferred to the United States Attorney's Office for the Northern District of Texas, located in Dallas, where she focused on the prosecution of white collar crime and served as Chief of the Economic Crime Unit. During her service as a prosecutor, she received two Department of Justice Special Achievement Awards, the United States Postal Inspection Service National Award, and commendations from the Department of Treasury, the Immigration and Naturalization Service, and the Customs Department.

Professor Wattley then went into private litigation practice, where her work included white-collar criminal defense, civil rights litigation, federal and state criminal defense, and post-conviction proceedings. After joining the OU College of Law faculty in 2007, Professor Wattley continued to represent clients on a pro bono basis, primarily involving post-conviction relief.

Professor Wattley continues to work with Centurion Ministries, a non-profit organization based in Princeton, New Jersey, devoted to the vindication and liberation of persons wrongfully convicted and imprisoned. Through Centurion, she served as one of the attorneys for Kerry Max Cook, a former Texas death row inmate. In 2009, Professor Wattley represented Richard Miles in his release from the Texas Department of Criminal Justice.

Professor Wattley has served on a variety of civic and professional boards and committees, including the State Bar of Texas Board of Disciplinary Appeals; District 6 Grievance Committee; Dallas Bar Foundation; and the Board of Regents for Texas Woman's University. She was appointed to serve on "Dallas Together," a mayoral committee appointed to address racial issues within the City of Dallas, and also was appointed Vice Chairperson for the 1990 and 2000 City of Dallas Redistricting Commissions. She has been an instructor for National Institute of Trial Advocacy programs and recently authored a case file which has been published by NITA.

Professor Wattley received the Dallas Bar Association's Dr. Martin Luther King, Jr. Award in 1994. She is also the recipient of the DaVinci Institute Fellow Award for Innovative Teaching (2013), the Oklahoma Bar Association's Ada Lois Sipuel Fisher Diversity Award (2012), the Association of Black Lawyers' Ada Lois Sipuel Fisher Award (2012), and the University of Oklahoma Regents' Award for Superior Professional and University Service and Public Outreach (2011).



# LYNNETTE R. WARMAN

*A seasoned business attorney who combines experience in negotiating, litigating and mediating to provide exceptional results in all aspects of creditor's rights matters, including contracts, commercial disputes and insolvency.*

**PARTNER | BANKRUPTCY, DALLAS**

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Ms. Warman concentrates her practice in various areas of business law, including general business advice, creditors' rights matters such as corporate restructuring and insolvency issues, litigation, appeals, and mediation. She takes a practical approach to legal matters and strives for solutions that are timely and cost effective.

Ms. Warman has represented numerous secured creditors, creditor and equity committees, unsecured creditors, equity holders, debtors, and distressed asset purchasers in matters both within and outside of the bankruptcy arena. Over the years Ms. Warman has participated in a wide range of matters, ranging from small two party disputes and small chapter 11 reorganizations to some of the largest corporate bankruptcies and litigation filed during that time. The cases ran the gamut of issues, but often included contract disputes, real estate issues, health care claims, product liability and environmental claims, and various matters relating to the retail industry and the financial services industry.

Ms. Warman is active in many local and national professional organizations. She is a member of the Board of Directors of the American Bankruptcy Institute (ABI), and immediate past Vice President of Publication. Ms. Warman is also a member of NAMS, where she is the chairman of the Board of Directors. She frequently speaks at local, regional and national events held by the ABI, NACM and other organizations, serves on the faculty at the ABI Litigation Symposium and is a prolific author on creditors' rights issues.

#### **AWARDS & RECOGNITIONS**

Chambers USA 2014 Notable Practitioner for Bankruptcy/Restructuring  
AV Preeminent® Rating in the Martindale Hubbell Legal Directory  
Named a "Texas Super Lawyer" (a Thomson Reuters Service) from 2003-05 and 2011-14, as published in *Super Lawyers Magazine* and *Texas Monthly*  
John C. Ford American Inn of Court, Former Master

#### **SELECTED PRESENTATIONS & PUBLICATIONS**

Webinar panelist for 'Basics of Bankruptcy Litigation for Non-Bankruptcy Litigators', produced by the ChamberWise Education Consortium, AIMkts, and Financial Poise, May 2014

Presented 'Back to the Bankruptcy Basics' Seminar May 9, 2014 in Irving, TX  
Moderator of panel of experts on the Chapter 11 Process at the NACMSW annual meeting held in Las Colinas, TX, January 17, 2014

Litigation Skills: Mock Expert Examination, 24<sup>th</sup> Annual Winter Leadership Conference, Tucson, AZ, December 2012

Editor, 105<sup>th</sup> Edition of Manual of Credit and Commercial Laws

Contributing author, Commercial Bankruptcy Litigation (2013-15 Editions)

#### **PRACTICE AREAS**

- Alternative Dispute Resolution
- Appeals
- Collection issues
- Commercial Transactions
- Corporate Restructuring
- Creditors' Rights
- Litigation,
- Commercial Transactions,
- Distressed Assets
- Private Equity
- Real Estate

#### **EDUCATION**

- Creighton University School of Law, J.D.
- University of Nebraska, B.A.

#### **PROFESSIONAL EXPERIENCE**

- Hunton & Williams LLP
- Jenkens & Gilchrist, PC

#### **BAR ADMISSIONS**

- Texas
- U.S. Fifth and Second Cir. Courts of Appeals
- U.S. District and Bankruptcy Courts for Northern, Southern, Eastern and Western Districts of Texas

#### **MEMBERSHIPS**

- American Bankruptcy Institute
- American Bankruptcy College
- Dallas Bar Foundation
- State Bar College of Texas

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MEADOWS** PLLC