

**PRESENTED AT**

**12<sup>th</sup> Annual Consumer Bankruptcy Practice**

July 14-15, 2016  
Galveston, Texas

## **Final Report of the American Bankruptcy Institute National Ethics Task Force**

**Published by the American Bankruptcy Institute**

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# FINAL REPORT OF THE ABI NATIONAL ETHICS TASK FORCE

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April 21, 2013

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## Introduction

In 2011, then-American Bankruptcy Institute President Geoffrey L. Berman established the ABI's National Ethics Task Force<sup>1</sup> to address a problem familiar to all bankruptcy professionals and judges: state ethics rules do not always “fit” with the realities of bankruptcy practice. State ethics rules may also not be a perfect fit in the context of other types of practice, either—for example, states may not yet know how best to handle the increasingly interconnected digital and virtual world—but it is clear that the Model Rules do not fit neatly with the realities of a bankruptcy practice that involves numerous parties with changing allegiances, often departing from the classic two-party adversarial proceeding.<sup>2</sup>

Shortly after President Berman appointed the Task Force's members, the Task Force met to discuss the best way to approach its assignment. At its first meeting, the Task Force promulgated its mission statement:

*The ABI National Ethics Task Force will consider ethics issues in bankruptcy practice and will make recommendations for uniform standards, where appropriate.*

In essence, the Task Force was charged with answering the question of whether there is a need for national ethics rules, standards, and general practice guidance in the bankruptcy context.<sup>3</sup>

As the Task Force considered the various topics and issues that could potentially be addressed, a few “jumped out.”<sup>4</sup> These included the conflicts-related issues that result from the shifting allegiances that can arise during the life of a bankruptcy case, the complexity of disclosure of “connections” when seeking approval of employment, the fleshing out of the duties of counsel for a debtor in possession, and the role of conflicts counsel in business reorganization cases. Other issues implicated in the context of bankruptcy practice, while not specifically at odds with state ethics rules—for example, the concept of attorney competency and the pressing question of how to balance the need for a capable and skilled bar with the need to provide consumers in financial distress access to the bankruptcy system—were addressed in order to provide needed guidance to bankruptcy attorneys.

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<sup>1</sup> Past-President Berman and current President James Markus—with the help of the ABI's Anthony H. N. Schnelling Endowment Fund—have provided significant support for the Task Force's work.

<sup>2</sup> *Cf. In re Nguyen*, 447 B.R. 268, 277 (9<sup>th</sup> Cir. Bankr. 2011) (“[T]he ABA Standards, which were developed primarily for nonfederal, nonbankruptcy courts by unelected and nonjudicial parties, are ill-adapted to federal bankruptcy proceedings. The ABA Standards were not drafted to address the distinctive context of bankruptcy where, as here, administrative matters rather than litigation may be the focus of an attorney's work.”) (referring to the American Bar Association Standards for Imposing Lawyer Sanctions and citing *In re Brooks-Hamilton*, 400 B.R. 238 (9<sup>th</sup> Cir. Bankr. 2009) (citation omitted)).

<sup>3</sup> The ABI has established a separate Civility Task Force, chaired by James Patrick Shea of Shea & Carlyon.

<sup>4</sup> The Task Force also adopted a set of bylaws.

The Task Force began its work by forming several committees, each focused by topic. Each committee developed initial memoranda on issues that fell within the purview of its subject area. The committees' topics included (1) conflicts of interest, (2) disclosure, retention, and fee issues, (3) consumer issues, (4) committee solicitation issues, and (5) discipline, sanctions, competence, and multi-jurisdictional practice issues. Each committee member attended regular committee meetings, in addition to teleconferences and quarterly meetings of the entire Task Force. The Reporters also held quarterly retreats at which the Reports were researched and drafted.<sup>5</sup> Each Task Force member had the opportunity to comment on the Reporters' draft Reports, and each draft Report was ultimately voted on and approved by the entire Task Force. Although, in its work, the Task Force reviewed several 50-state surveys of particular state ethics rules,<sup>6</sup> it used the American Bar Association's MODEL RULES OF PROFESSIONAL CONDUCT in addressing the issues discussed in this Final Report.<sup>7</sup>

The Task Force also found several worthy topics—including the issue of retainers and employment, standards for practice competency for creditors' counsel, and the issue of ghostwriting a debtor's petition and schedules as a way of addressing bankruptcy access—that the constraints of this Task Force prevented it from fully developing. It is our expectation that these important issues will be taken up in the near future by another ABI working group or committee.

All of the Reporters' White Papers and Proposals are compiled within this Final Report. They are as follows:

1. Proposed Amendments to Rule 2014.<sup>8</sup>
2. Duties of Counsel for a DIP as Fiduciary and Responsibilities to the Estate.
3. A Framework for Pre-Approval of Terms for Retention and Compensation Under 11 U.S.C. § 328.
4. The Use of Conflicts Counsel in Business Reorganization Cases.
5. Best Practices for Limited Services Representation in Consumer Bankruptcy Cases.
6. Competency for Debtors' Counsel in Business and Consumer Cases.
7. Report on Best Practices on Creditors' Committee Solicitation.

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<sup>5</sup> The Reporters were ably assisted by Research Assistants Bridget McMahon, University of Maine School of Law, Class of 2014, and by David Rothenberg and Nicole Scott, William S. Boyd School of Law, UNLV, Class of 2014. The Reporters would also like to thank Heidi Gage for her excellent research and administrative assistance.

<sup>6</sup> The Task Force gratefully acknowledges the research support provided by the reference librarians of the Wiener-Rogers Law Library at the William S. Boyd School of Law.

<sup>7</sup> The Task Force recognizes that the Model Rules do not have the force of law; however, so many states have adopted the Model Rules in part or in whole that the Task Force determined that the discussion of the Model Rules, rather than state ethics rules, would be more useful to most ABI members.

<sup>8</sup> One of the Task Force's Reports—the Report on Proposed Amendments to Rule 2014—has been transmitted to the Advisory Committee on Bankruptcy Rules, which will be reviewing the Report before its Fall meeting.

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