

**Standards Governing
Attorney Conduct in the Bankruptcy Courts**

Report to the Judicial Conference
Advisory Committee on Bankruptcy Rules

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Summary

The Judicial Conference Committee on Rules of Practice and Procedure in conjunction with the Advisory Committee on Bankruptcy Rules requested the Federal Judicial Center to conduct a study of attorney conduct issues in the bankruptcy courts. In December 1998, the Center sent 317 questionnaires to all chief bankruptcy judges (including bankruptcy judges in districts with only one bankruptcy judge) and to all other bankruptcy judges.*

1. Sources of Standards Governing Attorney Conduct

a. Source of Standards and the Impact of Changing District Court Rules

VIII. Forty-seven (61%) of the 77 responding chief bankruptcy judges said that their courts follow the local rules of attorney conduct of their respective federal district courts. Most bankruptcy courts do not have their own independently developed set of local rules governing attorney conduct (only 7% of bankruptcy courts indicated that they do). Thus, proposed changes or uniformity in district court attorney conduct rules could carry over to most of the bankruptcy courts, even if the proposed changes are not directly aimed at or applied to the bankruptcy courts. Nine percent of chief judge respondents indicated that their courts have a local bankruptcy rule that adopts standards other than those in the district court's local rules, and 12% said they have no local district or bankruptcy rule governing attorney conduct.

b. Bankruptcy Courts' Use of Standards Other than Those in Local Rules

- (1) Of the 53 responding chief bankruptcy judges in districts with some form of attorney conduct standards, 60% (32) said they never use attorney conduct standards other than the Bankruptcy Code, the Federal Rules of Bankruptcy Practice, or the formal standards referred to in their local bankruptcy rules or district court rules; 40% (21) indicated they did.
- (2) When bankruptcy courts look outside their local rules and outside the Bankruptcy Code and Federal Rules of Bankruptcy Procedure for guidance, most turn to state ethics rules.

2. Type and Frequency of Attorney Conduct Issues in Bankruptcy

- a. Looking at responses to questions posed to all responding bankruptcy judges (chief and non-chief), the majority of responding judges reported the occurrence one or more times within the past two years of the five following types of attorney conduct issues: (1) 11 U.S.C. § 327 or § 1103 governing representation of an adverse interest or conflicts of interest (80% of 249 respondents); (2) other rules

* We received responses to 251 of the 317 questionnaires mailed to all bankruptcy judges (excluding recalled bankruptcy judges) (an overall response rate of 79%).

- regarding conflicts of interest (70% of 249 respondents); (3) disclosure standards regarding employment of attorneys (71% of 247 respondents); (4) rules regarding attorneys' fees (62% of 244 respondents); and (5) candor towards a tribunal (57% of 248 responding judges).
- b. The majority of responding judges indicated that each of the five following types of attorney conduct issues had never arisen in the past two years. They are worth noting, however, since the numbers of judges reporting one or more incidences were not insignificant: (1) truthfulness in statements to others (45% of 247 respondents); (2) lawyer as a witness (37%); (3) communication with represented person (30%); (4) confidentiality (19%); and (5) safekeeping of client property (27%).
- c. Other findings include:
- Only a very small group of attorney conduct issues arise in bankruptcy courts with notable frequency.
 - Responding bankruptcy judges were confronted with attorney conduct issues involving statutory or bankruptcy-related standards more often than other types of standards.
 - The other types of attorney conduct issues prevalent in bankruptcy courts, which may also arise in district court practice, often involve different concerns in the context of bankruptcy court practice due to the unique characteristics of such practice. These issues include conflict of interest issues analogous to those covered by ABA Model Rules 1.7 through 1.11, attorneys' fees, and candor towards a tribunal.
 - Thus, one can conclude from questionnaire responses that, if a set of core national attorney conduct rules are drafted for use in district courts and are carried over to bankruptcy courts without taking into consideration the separate types of attorney conduct issues bankruptcy courts must decide upon, bankruptcy courts will still look elsewhere for guidance on these issues.

3. Adequacy of Standards Governing Attorney Conduct

- a. The majority of bankruptcy judges (75%) were satisfied with the statutory standards that they use to resolve attorney conduct issues.
- b. The majority of bankruptcy judges (88%) were satisfied with the non-statutory standards that they use to resolve attorney conduct issues.
- c. The majority of bankruptcy judges (88%) did not find any problematic inconsistencies between their district's statutory and non-statutory attorney conduct standards.
- d. The majority of bankruptcy judges (72%) said they had never encountered attorney conduct issues that arose only in bankruptcy courts that were not covered adequately by existing statutory or non-statutory standards.

4. Adequacy of Disclosure Standards Regarding Employment of Attorneys

- a. Among 250 responding bankruptcy judges, 62% said they had experienced problems with the adequacy of disclosure by attorneys seeking employment in bankruptcy cases; 38% said they never experienced such problems.
- b. Among the 153 responding bankruptcy judges who said they had experienced such problems, 75% said that none of these problems were caused by inadequate requirements for disclosure in Bankruptcy Rule 2014; 26% said the problems were so caused.

5. National Uniform Attorney Conduct Standards in Bankruptcy Courts

- a. Among 248 responding bankruptcy judges, 52% stated that attorney conduct in bankruptcy courts should be governed by uniform standards; 27% said there should not be uniform standards, while 21% answered they “can’t say.”
- b. Assuming uniform standards are adopted by all district and bankruptcy courts, among the 248 responding bankruptcy judges, 52% stated that the standards applied in bankruptcy courts should be the same as those applied in district courts, 28% said they should not be, while 20% said they “can’t say.”

6. Specific Suggestions For National Uniform Attorney Conduct Standards in Bankruptcy Courts

- a. For each of nine specified types of attorney conduct, the majority (ranging from 60% to 64%) of responding judges said there should be a national uniform standard in the bankruptcy courts, and the majority (ranging from 58% to 97%) of respondents who said there should be such a national uniform standard also said the standard should be the same in bankruptcy and district courts. The nine specified types are: confidentiality of information, general rule on conflicts of interest, conflict of interest concerning prohibited transactions, conflict of interest concerning former client, rule on imputed disqualification, rule on candor towards the tribunal, rule on lawyer as witness, rule on truthfulness in statements to others, and rule on communications with person represented by counsel.
- b. The majority of judges who indicated that the national uniform standard should be the same for all bankruptcy and district courts said the national uniform standard should be based on the corresponding ABA Model Rule.
- c. Among 198 responding bankruptcy judges, 84% said that no additional attorney conduct issues other than those already mentioned in the questionnaire should be drafted as national uniform rules for use in all bankruptcy courts.

I. Introduction¹

The Judicial Conference's Committee on Rules of Practice and Procedure [the Standing Committee] is studying the current nonuniformity in rules governing the professional conduct of attorneys practicing in the federal district courts. To coordinate this study, the Standing Committee has formed a Special Committee on Rules Governing Attorney Conduct consisting of members from each of the rules advisory committees in addition to representatives from other relevant groups. This Special Committee will meet in the spring and fall of 1999 and representatives from the advisory committees will make recommendations back to their respective advisory committees.

As part of the Standing Committee's efforts in this area, in June 1997, the Federal Judicial Center gave the Standing Committee a report describing (1) the experiences of federal district courts with local rules that govern attorney conduct, and (2) procedures used by the courts to address alleged misconduct [hereinafter the FJC District Court Study].² Bankruptcy courts were not included in that study.

The Standing Committee currently has several specific proposals before it to address the current nonuniformity in rules governing attorney conduct in the district courts. One proposal is to adopt a general default provision that requires all district courts to adopt the attorney conduct rules currently in place in the state wherein the district is located. The other proposal is to combine this default provision with a set of "core" national rules. These national rules would apply to specific core areas where problems frequently arise in federal district courts, leaving all other areas to be governed by state standards.

Bankruptcy courts are different from the district courts in the attorney conduct area in that attorneys who practice in bankruptcy courts are subject to a complex statutory system, which includes bankruptcy-specific conflict of interest criteria and other standards directly governing attorney conduct. The Standing Committee has already given attorney conduct in the bankruptcy context some attention through a study report issued in June 1997.³ That study [hereinafter Study of Bankruptcy Cases], which examined reported bankruptcy opinions involving rules of attorney conduct, demonstrated that the proposals being considered by the Standing Committee for the federal district courts raise many additional issues for bankruptcy courts.

¹ Special acknowledgments are made to Donna Stienstra, Joe Cecil, Carol Witcher, Bonita Anderson, Yvette Jeter, Aletha Janifer, and Edwin McNair for their assistance with this study.

² Marie Leary, *Standards of Attorney Conduct and Disciplinary Procedures: A Study of the Federal District Courts 335* (Federal Judicial Center 1997), *reprinted in* Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of the Federal Rules Governing Attorney Conduct (Administrative Office of the United States Courts 1997) [hereinafter the FJC District Court Study].

³ Daniel R. Coquillette, *Study of Recent Bankruptcy Cases (1990-1996) Involving Rules of Attorney Conduct 293* (1997), *reprinted in* Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (Administrative Office of the United States Courts 1997) [hereinafter Study of Bankruptcy Cases].

The Standing Committee has asked the Advisory Committee on Bankruptcy Rules [the Advisory Committee] to consider whether bankruptcy courts should be exempt from the attorney conduct proposals the Standing Committee is considering, whether the “core” rules being considered for district courts should make special allowances for the unique conditions of bankruptcy practice, or whether specific and different “core” rules of attorney conduct are required for bankruptcy courts.

To supplement the 1997 Study of Bankruptcy Cases, in June 1998 the Standing Committee asked that the Federal Judicial Center coordinate with the Advisory Committee and conduct a study of attorney conduct issues in the bankruptcy courts. The Advisory Committee at its October 1998 meeting asked its subcommittee on attorney conduct to oversee the study. The following report describes this study.

The information in this report is based on responses to questionnaires that were developed by the Center with the assistance of the Advisory Committee. Two versions of the questionnaire were distributed. Version one (see Appendix A) was sent to all chief bankruptcy judges and all bankruptcy judges in districts with only one bankruptcy judge.⁴ The total number of judges in this group was 90. This questionnaire asked the chief judges to answer questions about the formal and informal sources of attorney conduct standards in their bankruptcy court, the adequacy of those standards, the type and frequency of attorney conduct issues that have arisen in their court, and the need for national uniform attorney conduct rules for bankruptcy courts. We received responses to 77 out of the 90 questionnaires mailed to chief judges (an 86% response rate).

Version two of the questionnaire (see Appendix B), which was sent to all other bankruptcy judges, was identical to version one except that it did not include the questions on the formal and informal sources of attorney conduct standards. The total number of judges in this second group was 227. We received responses to 174 of these questionnaires (a 77% response rate).⁵

II. Sources of Standards Governing Attorney Conduct in Bankruptcy Courts (Questionnaire for Chief Bankruptcy Judges)

A. Sources of Standards and the Impact of Changing District Court Rules

Version one of the questionnaire asked chief bankruptcy judges to verify or correct information about the formal sources of attorney conduct standards in their bankruptcy court, and to answer questions about any informal standards used.⁶ One goal

⁴ Throughout this report, unless indicated otherwise, reference to “chief bankruptcy judges” includes chief bankruptcy judges and bankruptcy judges who preside in districts with only one bankruptcy judge.

⁵ We received at least one questionnaire from each bankruptcy court except for the Southern District of West Virginia, Southern District of Illinois, Western District of Arkansas, Eastern District of Oklahoma, District of Wyoming, District of the Virgin Islands, and the District of Guam.

⁶ See Section A of the Chief Judge Questionnaire, located in Appendix A of this report.

of this series of questions was to determine how closely bankruptcy courts follow the rules of attorney conduct used by their corresponding district courts. This would help gauge how widespread the impact of any changes in federal district court rules would be on the bankruptcy courts.⁷

The chief judge questionnaire included a table that showed the local rule in each district and bankruptcy court.⁸ For each district court, the table in the questionnaire identified any local rule on standards of attorney conduct published as of April 28, 1997. For each bankruptcy court, the table showed whether the court has a local bankruptcy rule on standards of attorney conduct and, if so, the source of the standards adopted in the rule as far as we could determine them.⁹ We asked each chief judge to review and comment on the accuracy of the information in the questionnaire for their court.

For each source of attorney conduct standard identified in the questionnaire,¹⁰ Table 1 below shows the number of chief bankruptcy judges who indicated that their court used that source. Some chief bankruptcy judges identified more than one source. Seventy-seven chief bankruptcy judges responded.

⁷ The 1997 Study of Bankruptcy Cases concluded that 73% (69) of the bankruptcy courts had adopted the local rules of attorney conduct of their respective district courts. *See* Study of Bankruptcy Cases, *supra* note 3, at 299-301. However, this conclusion may oversimplify the status of these 69 courts. For example, where the local rules of the bankruptcy court were silent on attorney conduct, the Study of Bankruptcy Cases assumed that the rules of the district court applied (32 bankruptcy courts) and, where the bankruptcy court adopted the local district court rules generally, the Study of Bankruptcy Cases assumed that this implicitly included any district court local rules on attorney conduct (18 bankruptcy courts). *Id.* at 299 & n.3, 300. Thus, of the 69 bankruptcy courts that the Study of Bankruptcy Cases had concluded had adopted the district court's local rules of attorney conduct, 50 (32 + 18) have local rules with no specific statement to that effect.

⁸ *See* Appendix 1 of the Chief Judge Questionnaire, located in Appendix A of this report.

⁹ We derived our information from the sources of standards identified in the Study of Bankruptcy Cases. *See* Study of Bankruptcy Cases, *supra* note 3, at Appendix III of that report. We then updated this information to the best extent we could.

¹⁰ *See* Section A, Question 1 of the Chief Judge Questionnaire, located in Appendix A.

Table 1
Sources of Attorney Conduct Standards in the Bankruptcy Courts
 (N=77)*

Number of Chief Bankruptcy Judges Who Indicated that Their Court Used the Given Source (% of chief bankruptcy judge respondents)	Sources of Attorney Conduct Standards
20 (26%)	Source A**—Adopts District Court’s Local Rules in General: My bankruptcy court has a local bankruptcy rule that adopts the local rules of the district court <u>in general</u> ; our local bankruptcy rule makes no specific mention of any district court provision concerning attorney conduct and professional responsibility.
29 (38%)	Source B***—Adopts District Court’s Rules of Attorney Conduct Specifically: My bankruptcy court has a local bankruptcy rule that specifically states that the bankruptcy court has adopted the district court’s rules on attorney conduct, attorney discipline, professional responsibility, or a similar phrase.
5 (7%)	Source C—Developed Its Own Attorney Conduct Standards: My bankruptcy court has developed its own attorney conduct standards and has incorporated them into a local bankruptcy rule or adopted them by general order.
7 (9%)	Source D—Adopts Other Standards: My bankruptcy court has a local bankruptcy rule that adopts other standards to govern attorney conduct such as the ABA Model Rules of Professional Conduct or Model Code of Professional Responsibility; these standards are other than those in the district court local rules.
9 (12%)	Source E—Has No Local District or Bankruptcy Rule: My bankruptcy court has no local district or bankruptcy rule, general order, promulgated guideline, standing order, or other written court-wide standard that governs attorney conduct.
13 (17%)	Source F—None of the Above: None of the above describes the situation in my bankruptcy court.

*Some judges identified more than one source.

**Note that of the 20 who identified Source A, one judge indicated that Source C standards are also used in his or her bankruptcy court.

***Note that of the 29 who identified Source B, two judges indicated that they also use Source C standards and three judges indicated that they also use Source D standards.

Of the 20 chief bankruptcy judges who indicated that their bankruptcy court has a local bankruptcy rule that adopts the local rules of the district court in general (Source A in Table 1), 18 (90%) indicated that they actually follow or have adopted the district court’s attorney conduct standards.¹¹ In addition, 29 chief bankruptcy judges indicated that they adopt the district court’s rules of attorney conduct specifically (Source B in Table 1). Therefore, we can conclude that 47 (18 + 29) of the 77 responding bankruptcy courts (61%) have adopted or follow the local rules of attorney conduct of their respective district courts. If we add to these 47 courts the nine courts that indicated that they have no local district or bankruptcy rule or other written court-wide standard that governs attorney conduct (Source E in Table 1), and if we adopt the assumption of the Study of Bankruptcy Cases that the rules of the federal district court apply where the local rules of the bankruptcy court are silent on the issue of attorney conduct,¹² then it would follow that 56 (73%) of the 77 responding bankruptcy courts follow the local rules of attorney conduct of their respective district courts.

The table reinforces the conclusion of the Study of Bankruptcy Cases that most bankruptcy courts do not have their own independently developed set of local rules governing attorney conduct¹³—only 7% of bankruptcy courts indicated so in their

¹¹ See Section A, Question 2 of the Chief Bankruptcy Judge Questionnaire, located in Appendix A of this report.

¹² See discussion *supra* note 7.

¹³ See Study of Bankruptcy Cases, *supra* note 3, at 299.

responses to our questionnaire (Source C in Table 1). Given these findings, proposed changes in district court rules could carry over to most of the bankruptcy courts, even if the proposed changes are not directly aimed at or applied to the bankruptcy courts.¹⁴

The 1997 FJC District Court Study found that: “Eighty-nine federal districts (95% of all districts) have a local rule informing attorneys practicing before the districts’ courts which professional standards of conduct they are required to abide by The local rules of 68 districts (76% of federal districts with attorney conduct rules) incorporate the relevant standards of the state in which the district is located.”¹⁵ Thus, since the majority of bankruptcy courts follow their district court’s local rules on attorney conduct, and the majority of district courts with local rules governing attorney conduct incorporate the relevant state standards of the district wherein they are located, if the Standing Committee decides to recommend that district courts adopt the standards of the state wherein they are located, and this rule is made applicable to the bankruptcy courts, this will not mean a change from current practice for many bankruptcy courts.

However, as pointed out by previous studies, there are many differences between the states’ attorney conduct rules.¹⁶ For example, the majority of states that have adopted some form of the ABA Model Rules have changed key sections.¹⁷ Thus, if district courts are uniformly required to adopt state standards of attorney conduct, requiring all bankruptcy courts to follow their district court’s local rule on attorney conduct would make the source of standards uniform across bankruptcy courts, but it will not produce uniformity in the practical application of the standards.

B. Bankruptcy Courts’ Use of Standards Other than Those in Local Rules

Although our results show that the majority of bankruptcy courts adopt the attorney conduct rules of the district court, several qualifications must be noted. First, some courts have multiple sources of authority. Of the 20 chief bankruptcy judges who identified Source A (adopts district court’s local rules in general), one indicated Source C standards are also used in his or her bankruptcy court. Out of the 29 chief bankruptcy judges who indicated Source B standards (adopts district court’s rules of attorney conduct specifically), two indicated that they also use Source C standards and three others indicated that they also use Source D standards. Second, in applying attorney conduct rules bankruptcy judges look for guidance to sources other than those listed in their local rules, such as the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, the American Bar Association Model Rules and Model Code, and the common law of bankruptcy.¹⁸

¹⁴ *Id.* at 307.

¹⁵ *See* FJC District Court Study, *supra* note 2, at 337 (Summary).

¹⁶ *See, e.g.*, Daniel R. Coquillette, Report on Local Rules Regulating Attorney Conduct in the Federal Courts 4 (1995), *reprinted in* Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of the Federal Rules Governing Attorney Conduct (Administrative Office of the United States Courts 1997).

¹⁷ *Id.*

¹⁸ *See* Study of Bankruptcy Cases, *supra* note 3, at 301-06.

These qualifications make it more difficult to determine which attorney conduct standards the bankruptcy courts actually use and more difficult to predict the effect of carrying over uniform rules from the district court.

To gain a sense of how widespread the practice of turning to outside sources is, we asked chief bankruptcy judges from districts with some form of attorney conduct standards (those who identified at least one of the Sources A through D in Table 1) to state whether their bankruptcy court (or the judges in their bankruptcy court) ever used standards or sets of standards other than the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, or the formal standards referred to in their local bankruptcy rules or district court rules. Of the 53 chief bankruptcy judges who responded to this question, 60% or 32 said their court never used other standards, while 40% or 21 indicated they did.¹⁹

Compare this to the 1997 FJC District Court Study of local rules governing attorney conduct in which we asked district judges: “Are attorneys practicing in your district prevented from relying on the explicit language of your local rule because your district has ‘incorporated’ external standards into your local rules or utilized external standards not apparent in the rules themselves to interpret the standards?”²⁰ Out of the 71 districts responding to this inquiry, only seven (10%) reported that attorneys practicing in their district could not rely solely on the explicit language of their local rules because their court used external standards to interpret the district’s attorney conduct rules.²¹

In order to determine what the other standards were that bankruptcy courts turn to, we asked these 21 chief bankruptcy judges who indicated they used outside standards not in their local bankruptcy rules to describe them.²² The other standards they reported using included: state ethics rules (8 chief judges); state bar ethics rules (6 chief judges); ABA Model Rules of Professional Conduct (3 chief judges); case law on attorney responsibility (2 chief judges); treatises on attorney responsibility (1 chief judge); ABA Code of Professional Responsibility (1 chief judge); ABA Canon of Professional Ethics (1 chief judge); state code provisions (1 chief judge); and advisory opinions of state ethics committee and opinions of state bar disciplinary counsel (1 chief judge).

The diversity of sources used is illustrated further by the following responses. Twenty-two (29%) of responding chief bankruptcy judges indicated that (1) their bankruptcy court had no local district or bankruptcy rule, general order or other written court-wide standard that governs attorney conduct (Source E in Table 1 above), or (2)

¹⁹ See Section A, Question 3 in Chief Bankruptcy Judge Questionnaire, located in Appendix A of this report.

²⁰ See FJC District Court Study, *supra* note 2, at 348.

²¹ *Id.* & Table A-7 in the appendix. Two of the seven districts reported that their district looks to ABA models (either the Model Rules of Professional Conduct or the Model Code of Professional Responsibility) to “interpret” local rules and resolve ambiguities, even though their district had not expressly incorporated ABA models into its local rules. Four of the seven districts reported “other” situations and problems caused by their use of external standards.

²² See Section A, Question 3 in Chief Bankruptcy Judge Questionnaire, located in Appendix A of this report.

that none of the possible choices given in the questionnaire described the situation in their bankruptcy court (Source F in Table 1 above). We asked these judges to state what standards or set of standards other than the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure their bankruptcy court (or the judges in their bankruptcy court) apply to resolve attorney conduct issues.²³ The standards reported by the 22 responding judges included: state ethics rules (8 chief judges); state bar ethics rules (3 chief judges); district court local rules (3 chief judges); state statutory law (1 chief judge); state case law (1 chief judge); bankruptcy court case law (1 chief judge); ABA standards (2 chief judges).

These responses indicate that when bankruptcy courts look outside of their local rules and outside the Bankruptcy Code and Federal Rules of Bankruptcy Procedure for guidance in resolving an attorney conduct issue or when bankruptcy courts with no written rules or guidelines resolve an attorney conduct issue, most turn to state ethics rules.

III. Type and Frequency of Attorney Conduct Issues in Bankruptcy (Questionnaire for All Bankruptcy Judges)

A. Frequency of Ten Specific Types of Attorney Conduct Issues

We asked all bankruptcy judges to identify the frequency with which ten types of attorney conduct issues have arisen before them during the past two years. We specifically requested the judges to include instances in which the conduct resulted in (1) actual findings that a breach of conduct had occurred and (2) where either a party alleged unethical conduct or the judges perceived that unethical conduct had occurred but no allegation was made. We asked only for estimates, and did not require reference to specific case files or reported case law.²⁴ Table 2, which combines responses for chief and all other bankruptcy judges,²⁵ shows the number of judges who indicate a specified frequency for the type of attorney conduct listed. The chief judges answered only for themselves and not for their courts.

²³ See Section A, Question 4 in the Chief Judge Questionnaire, located in Appendix A of this report.

²⁴ See Section B, Question 5 of Chief Bankruptcy Judge Questionnaire, or the identical Question 1 of the Bankruptcy Judge Questionnaire, located in Appendixes A and B respectively of this report.

²⁵ We noticed no discernable differences between the frequencies reported by chief bankruptcy judges and non-chief bankruptcy judges. Thus, we report the combined frequencies in Table 2.

Table 2
Frequency of Actual or Perceived Breaches of Specific Attorney Conduct Issues
(N=number shown in Column 2)

Attorney Conduct Issues ²⁶	Number of Bankruptcy Judge Respondents	Number of Respondents Identifying Frequency With Which Attorney Conduct Issue Has Arisen in Past Two Years (% of respondents to given question*)				
		Never	Once	Two to Five Times	Six to Ten Times	More than Ten times
1. Conflict of Interest: the conduct was such that the attorney was disqualified or was the subject of a disqualification motion on the basis of a standard, such as ABA Model Rules 1.7 through 1.11, governing disqualification for conflict of interest.	249	75 (30%)	44 (18%)	112 (45%)	12 (5%)	6 (2%)
2. Conflict of Interest: the conduct was such that the attorney was disqualified or was the subject of a disqualification motion on the basis of 11 U.S.C. § 327 or § 1103, governing representation of an adverse interest or conflicts of interest. <i>Please include matters that meet the criteria of this Issue # 2 even if the matters have also been included in Issue # 1 above.</i>	249	51 (21%)	40 (16%)	129 (52%)	22 (9%)	7 (3%)
3. Required Disclosures: the conduct violated or allegedly violated disclosure requirements of 11 U.S.C. § 329(a) or Bankruptcy Rules 2014 or 2016.	247	72 (29%)	62 (25%)	85 (34%)	25 (10%)	3 (1%)
4. Safekeeping of Client Property: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 1.15.	245	179 (73%)	37 (15%)	27 (11%)	1 (0.4%)	1 (0.4%)
5. Attorneys' Fees: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 1.5.	244	93 (38%)	40 (16%)	65 (27%)	24 (10%)	22 (9%)
6. Lawyer as a Witness: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 3.7.	245	155 (63%)	50 (20%)	36 (15%)	1 (0.4%)	3 (1%)
7. Confidentiality: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 1.6.	246	200 (81%)	32 (13%)	14 (6%)	0	0
8. Communication With Represented Persons: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 4.2.	246	172 (70%)	42 (17%)	30 (12%)	2 (1%)	0
9. Candor Towards a Tribunal: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 3.3.	248	107 (43%)	55 (22%)	61 (25%)	14 (6%)	11 (4%)
10. Truthfulness in Statements to Others: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 4.1.	247	137 (56%)	44 (18%)	49 (20%)	8 (3%)	9 (4%)

*Note that if percentages do not add to 100% across the rows, it is due to rounding.

²⁶ The questionnaires included an appendix with the full text of all ABA Model Rules, national Bankruptcy Rules, and statutes cited in the questionnaires. (See Appendix 2 of the Chief Bankruptcy Judge Questionnaire, or the identical Appendix 1 of the Bankruptcy Judge Questionnaire, located in Appendixes A and B respectively of this report.)

As shown in Table 2, a majority of the bankruptcy judges reported that five out of the ten listed types of attorney conduct issues have occurred one or more times within the past two years. Conflict of interest issues occurred at the highest rate for the responding bankruptcy judges. Out of the 249 responding judges, 80% or 198 reported one or more incidences of disqualification (or a disqualification motion) based on 11 U.S.C. § 327 or § 1103 (which govern representation of an adverse interest or conflicts of interest). *See* Row #2 in Table 2. Nearly 70% or 174 respondents reported one or more incidences of disqualification (or a disqualification motion) on the basis of a standard analogous to ABA Model Rules 1.7 through 1.11. *See* Row #1 in Table 2.

Issues concerning conduct violating or allegedly violating the disclosure requirements of 11 U.S.C. § 329(a) or Bankruptcy Rules 2014 and 2016 occurred at a rate of just over 70% (that is, 175 of the 247 respondents reported one or more incidences of the issue). *See* Row #3 in Table 2. One or more incidences of issues involving standards analogous to ABA Model Rule 1.5 (rules regarding attorneys’ fees) were reported by 62% (or 151 of the 244 judges responding to that part of the question). *See* Row #5 of Table 2. And one or more incidences of issues relating to standards analogous to ABA Model Rule 3.3 (candor towards a tribunal) were reported by 57% (or 141 of the 248 responding judges). *See* Row #9 of Table 2.

The majority of responding judges indicated that each of the five remaining types of attorney conduct issues had never arisen in the past two years. These are worth noting, however, since the numbers of judges reporting one or more incidences were not insignificant. Nearly half (45%) reported one or more incidences of issues involving standards analogous to ABA Model Rule 4.1 (truthfulness in statements to others). *See* Row #10 of Table 2. Over a third (37%) reported one or more incidences of issues involving standards analogous to ABA Model Rule 3.7 (lawyer as a witness). *See* Row #6 of Table 2. And nearly a third (30%) reported one or more incidences of issues involving standards analogous to ABA Model Rule 4.2 (communication with represented person). *See* Row #8 of Table 2.

Issues relating to standards analogous to ABA Model Rules 1.6 (confidentiality) and 1.15 (safekeeping of client property) rarely arose. A small number of bankruptcy judges (19% and 27%, respectively) indicated that the issues had arisen one or more times within the past two years. *See* Rows #7 and 4 of Table 2.

B. Frequency of “Other” Types of Attorney Conduct

In addition to requesting information on the frequency of the ten attorney conduct issues shown in Table 2, we provided a catchall “other” category in which we invited bankruptcy judges to describe any violations or alleged violations of any other standards, whether or not they were covered by the ABA Model Rules, and to identify the frequency with which each such attorney conduct issue had arisen before them in the past two years.²⁷ Table 3 summarizes these responses.

²⁷ *See* Section B, Question 5k of the Chief Bankruptcy Judge Questionnaire, or the identical Question 1k of the Bankruptcy Judge Questionnaire, located in Appendixes A and B respectively of this report.

Table 3
Frequency of Actual or Perceived Breaches of “Other” Attorney Conduct Issues
(N is as shown in Column 2)

“Other” Attorney Conduct Issues Listed by Bankruptcy Judges	Number of Bankruptcy Judge Respondents	Number of Respondents Identifying Frequency With Which “Other” Attorney Conduct Issue Has Arisen in Past Two Years				
		Never	Once	Two to Five Times	Six to Ten Times	More than Ten times
1. Failure to adequately, diligently and competently prepare and represent a client. (ABA Model Rule 1.1)	13	0	0	2	3	7
2. Failure to appear for a scheduled hearing.	4	0	0	1	0	3
3. Client assertion that attorney failed to properly communicate with the client.	4	0	0	2	1	1
4. Violation of Bankruptcy Rule 9011.	3	0	0	2	0	1
5. Abandoning a client in an adversary proceeding.	2	0	1	0	0	1
6. Multiple proceedings 28 U.S.C. § 1927.	2	0	1	1	0	0
7. Violation of standards for petition preparers.	1	0	0	0	0	1
8. Padding time records to increase fees.	1	0	0	0	0	1
9. Charging an hourly rate for an appearance attorney who has paid a flat fee.	1	0	0	0	0	1
10. Failure to comply with orders regarding repayment of money.	1	0	0	0	0	1
11. Taking filing fees and not filing a case.	1	0	0	0	0	1
12. Failure to comply with discovery rules, resulting in legal disputes.	1	0	0	0	0	1
13. Failure to timely serve or ever serve papers on opposing counsel.	1	0	0	0	0	1
14. Indifference to rule of officer of court.	1	0	0	0	0	1
15. Failure to defend client based on low fee arrangement.	1	0	0	0	0	1
16. Failure to bring a meritorious claim (ABA Model Rule 3.1).	1	0	0	0	1	0
17. Termination of representation (ABA Model Rule 1.16).	1	0	0	1	0	0
18. Unauthorized practice of law.	1	0	0	1	0	0
19. Failure of debtor’s counsel to appear at a hearing in violation of a local bankruptcy rule.	1	0	0	1	0	0
20. Attorney taking fee outside of bankruptcy court’s approval.	1	0	0	1	0	0
21. Failure to obtain client’s approval of settlement terms.	1	0	0	1	0	0
22. Violation of lawyers’ creed (obligation to be reasonable and work things out).	1	0	0	1	0	0
23. Client asserting that attorney had failed to properly attend the case.	1	0	0	1	0	0
24. Inappropriate description of opposing counsel; sexual bias.	1	0	1	0	0	0

Our findings suggest that only a very small group of attorney conduct issues arise in bankruptcy courts with notable frequency. These findings are consistent with the Study of Bankruptcy Cases, which found that almost all bankruptcy opinions involving attorney conduct involve a small core group of rules, thus not involving the majority of the ABA Model Rules of Professional Conduct.²⁸ The Study of Bankruptcy Cases compared its findings to the results of a similar study of district court and court of appeals cases involving local rules of attorney conduct.²⁹ Although both studies found that almost all district court cases also involve a small core group of attorney conduct rules, some rules were found to be more or less prevalent in the bankruptcy courts than in district courts.³⁰ For example, with the exception of conflict of interest rules, which were found to have consistently high frequencies of occurrence in both district and bankruptcy courts, communications with represented parties and lawyer as witness were found to be significantly less prevalent in bankruptcy courts than in district courts and courts of appeal. And cases involving attorneys' fees and safekeeping of client property were significantly more prevalent in bankruptcy courts than in district courts and courts of appeals.³¹

In the instant study, our findings show that bankruptcy courts are faced with certain attorney conduct issues not relevant to district court practice. Table 2 shows that the responding bankruptcy judges were confronted with attorney conduct issues involving statutory or bankruptcy-related standards more often than other types of standards. Compare Rows 2 and 3 to Rows 4 through 10 of Table 2. Further, the other types of attorney conduct issues prevalent in bankruptcy courts (conflict of interest issues analogous to those covered by ABA Model Rules 1.7 through 1.11, attorneys' fees, and candor towards a tribunal) which may also arise in district court practice, often involve different concerns in the context of bankruptcy court practice due to the unique characteristics of such practice.³²

²⁸ See Study of Bankruptcy Cases, *supra* note 3, at 298-99. The 1997 Study of Bankruptcy Cases examined 93 opinions of bankruptcy cases reported from January 1, 1990 to March 23, 1996 that involved local rules of attorney conduct. The study categorized each case by the specific ethical rule involved. The study showed that 53% (49 of the 93 cases) of the reported bankruptcy cases involved ABA Model Rules 1.7 through 1.11 (conflict of interest) or standards analogous to those rules. An additional 13% (12 of the 93 cases) involved ABA Model Rule 1.15 (safekeeping of client property) or analogous standards. The third largest category with 9% or 8 cases involved attorneys' fees (ABA Model Rule 1.5). And 4% (4 of the 93 cases) involved ABA Model Rule 3.7 (lawyer as a witness) or analogous standards. The remaining cases involved miscellaneous rules. *Id.* at 296-98.

²⁹ *Id.* at 298-99, citing Daniel R. Coquillette, Report on Local Rules Regulating Attorney Conduct in the Federal Courts (1995), *reprinted in* Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of the Federal Rules Governing Attorney Conduct (Administrative Office of the United States Courts September 1997).

³⁰ *Id.* at 298-99.

³¹ *Id.*

³² See Study of Bankruptcy Cases, *supra* note 3, at 301-306.

IV. Adequacy of Standards Governing Attorney Conduct

The 1997 Study of Bankruptcy Cases found that the bankruptcy system presents unique ethical issues because, although most bankruptcy courts follow the local rules of the federal district court of their district, in practice bankruptcy courts have developed standards of attorney conduct that are very different from federal district court practice.³³ This stems from the fact that the Bankruptcy Code and the Bankruptcy Rules have their own provisions relating to attorney conduct. For example, 11 U.S.C. § 327 of the Bankruptcy Code is a statutorily prescribed ethical rule governing conflict of interests for attorneys and other professional persons employed in the bankruptcy context. This is further complicated by the fact that application of § 327 among the bankruptcy courts is not uniform.³⁴ In addition, there are many disagreements and policy disputes concerning the proper relationship between the Bankruptcy Code provisions, particularly § 327, and the local rules governing attorney conduct in the bankruptcy courts.³⁵ For example, bankruptcy cases that apply § 327 also frequently involve the conflict of interest rules of the ABA Model Rules of Professional Responsibility, which has been incorporated in some form by the majority of state attorney conduct rules. The majority of district courts adopt these state rules.³⁶

In order to gain a sense of whether bankruptcy judges are satisfied with the statutory and non-statutory standards they use to resolve attorney conduct issues, we asked all bankruptcy judges a series of questions concerning the adequacy of these standards. We found that the majority of responding bankruptcy judges were satisfied with the statutory and non-statutory standards, did not find any problematic inconsistencies between their district’s statutory and non-statutory standards, and had never encountered attorney conduct issues that arose only in bankruptcy courts that were not covered adequately by existing statutory or non-statutory standards.

A. Statutory Standards

First, we asked the judges if the “statutory standards,” which we defined as those in the Bankruptcy Code and national Bankruptcy Rules, are adequate.³⁷ Among the 248 responding bankruptcy judges, 75% (186) said the statutory standards are adequate, and 25% (62) answered they are not. We asked those bankruptcy judges who believed the statutory standards are not adequate to describe why they believed so. The recurring themes among those bankruptcy judges included complaints that:

- (1) The statutory standards are not broad or specific enough to cover attorney conduct issues that actually arise in the bankruptcy courts, thus forcing bankruptcy judges to turn to other standards to supplement them.

³³ *Id.*

³⁴ *Id.* at 303-06.

³⁵ *Id.* at 306.

³⁶ See discussion *infra* p. 8.

³⁷ See Section B, Question 6a in Chief Bankruptcy Judge Questionnaire, or the identical Question 2a in the Bankruptcy Judges Questionnaire, located in Appendices A and B respectively of this report.

- (2) The statutory standards do not address whether bankruptcy judges have authority to suspend attorneys from practicing before a bankruptcy court.
- (3) The statutory standards governing conflicts of interest are not specific enough to provide guidance (e.g., the vagueness of the disinterestedness standard under 11 U.S.C. § 327(a)) and they are too strict to allow for flexibility in application.
- (4) The disclosure rules are too lax and subject to manipulation.

Appendix C of this report contains a more detailed summary of representative respondent comments.

B. Non-Statutory Standards

Next, we asked all bankruptcy judges whether they believed the “non-statutory” standards, which we defined as standards other than those in the Bankruptcy Code and national Bankruptcy Rules, are adequate.³⁸ Only 12% or 29 of the 245 responding bankruptcy judges indicated that the non-statutory standards used in their court are not adequate, while 88% or 216 answered that their non-statutory standards are adequate. We asked respondents who believed that their non-statutory standards are not adequate to describe why and what other source they would turn to to resolve attorney conduct issues, such as state ethics codes or model rules or codes. The recurring themes were that:

- (1) The non-statutory standards, especially those dealing with conflicts of interest, do not address issues unique to bankruptcy, such as fiduciary duties, the existence of multiple parties, and “potential” conflicts.
- (2) The non-statutory standards are not readily available to or known by practitioners since they are located in the district court local rules.
- (3) The non-statutory standards do not grant bankruptcy courts authority to conduct formal disciplinary proceedings for attorney misconduct that occurs in the bankruptcy court. Further, reliance upon state bar grievance procedures or the district court to conduct investigations delays the process and risks incorrect judgements due to insufficient understanding of bankruptcy issues.

Appendix D of this report contains a more detailed, representative listing of the comments we received.

C. Conflict Between Statutory and Non-Statutory Standards

We asked all bankruptcy judges whether they had found any problematic inconsistencies between their district’s statutory and non-statutory attorney conduct standards.³⁹ Among the 241 responding bankruptcy judges, 88% or 213 reported no problematic inconsistencies, while 12% or 28 respondents said there are such inconsistencies. We asked the bankruptcy judges who found inconsistencies to describe them and the problems they present. The main problem identified was the difficulty judges have applying the non-statutory conflict of interest provisions within the bankruptcy context. For example, judges reported they frequently encounter

³⁸ See Section B, Question 6b in Chief Bankruptcy Judge Questionnaire, or the identical Question 2b in the Bankruptcy Judge Questionnaire, located in Appendices A and B respectively of this report.

³⁹ See Section B, Question 6c in the Chief Bankruptcy Judge Questionnaire, or the identical Question 2c in the Bankruptcy Judge Questionnaire, located in Appendices A and B respectively of this report.

inconsistencies between the disinterestedness standard of 11 U.S.C. § 327(a) and the provisions for multiple representation in the ABA Model Rules and Code. These inconsistencies are problematic because the ABA models do not contemplate a debtor-client who is a fiduciary with respect to parties with adverse interests (creditors and others in bankruptcy). Other bankruptcy judges complained that the statutory rules are ambiguous or often too vague. And others said the inconsistencies allow attorneys to look to state law standards that are loosely enforced. Appendix E of this report contains a more detailed summary of the comments.

D. Bankruptcy-Specific Attorney Conduct Issues Not Adequately Addressed

The final question regarding adequacy of standards was whether the respondents had ever encountered attorney conduct issues that arose only in bankruptcy courts and were not covered adequately or at all by existing statutory or non-statutory conduct standards.⁴⁰ Among the 240 responding bankruptcy judges, 72% or 172 stated that they had never encountered such issues, while 28% or 68 said they had. We asked the latter group to describe these issues. Their comments focused on general conflict of interest issues, disclosure requirements, and problems with the definition of disinterestedness. In addition, once again several bankruptcy judges mentioned the absence of guidance on whether they have the power to discipline attorneys by, for example, barring them from practicing before the bankruptcy court. Appendix F of this report contains a more detailed summary of the comments.

V. Adequacy of Disclosure Standards Regarding Employment of Attorneys

Another controversial attorney conduct issue that may not be adequately addressed by existing state rules or by the ABA Model Rules is Federal Rule of Bankruptcy Procedure 2014, which requires an attorney or other professional person to disclose certain information to the court before they can be employed by the estate. We asked all bankruptcy judges whether they had ever experienced any problems with the adequacy of disclosure by attorneys seeking employment in bankruptcy cases.⁴¹ Among the 250 responding bankruptcy judges, 62% or 156 said they had experienced problems, while 38% or 94 said they had not.

Then we asked the judges who said they had experienced problems whether they were caused by inadequate requirements for disclosure in Bankruptcy Rule 2014.⁴² Among the 153 responding bankruptcy judges, 75% or 114 said that none of these

⁴⁰ See Section B, Question 6d in the Chief Bankruptcy Judge Questionnaire, or the identical Question 2d in the Bankruptcy Judge Questionnaire, located in Appendices A and B respectively of this report.

⁴¹ See Section B, Question 7a on the Chief Bankruptcy Judge Questionnaire, or the identical Question 3a of the Bankruptcy Judge Questionnaire, located in Appendices A and B respectively of this report.

⁴² See Section B, Question 7b on the Chief Bankruptcy Judge Questionnaire, or the identical Question 3b of the Bankruptcy Judge Questionnaire, located in Appendices A and B respectively of this report.

problems were caused by such inadequacies, while 26% or 39 said the problems were so caused.

Finally, we asked the judges who indicated a causal relationship to provide suggestions for amending Rule 2014 to improve the adequacy of disclosure.⁴³ Thirty-nine bankruptcy judges suggested improvements including recommendations that Bankruptcy Rule 2014:

- (1) require more detail in consumer cases to disclose fees paid in prior cases where debtors are multiple filers, especially in chapter 13 cases;
- (2) apply to chapter 13 cases;
- (3) provide more specific examples of entities falling into the category of “parties in interest” and specific examples of what is meant by “all of the person’s connections”;
- (4) require the fee agreement to be attached to the employment application;
- (5) require specific details of client representations by all members of a firm, with a requirement of disqualification by the court if not done or if details indicate a conflict of interest;
- (6) require that attorneys disclose the source of funds for a retainer and future payment.

In addition, several judges explained that the problem lies not with Rule 2014 but with the willingness of attorneys who practice in bankruptcy courts to follow the rule and the courts’ strictness in enforcing the rule. In many districts there are supplements to Rule 2014 in the form of guidelines or local rules.⁴⁴ Appendix G summarizes in more detail representative comments from respondents.

VI. National Uniform Attorney Conduct Standards in Bankruptcy Courts

In the instant study, we found that a little over half of responding bankruptcy judges were in favor of uniform attorney conduct standards and in favor of the same standards for both bankruptcy and district courts.⁴⁵ More specifically, of the 248 responding bankruptcy judges, 52% or 130 stated that attorney conduct in bankruptcy

⁴³ See Section B, Question 7c on the Chief Bankruptcy Judge Questionnaire, or the identical Question 3c of the Bankruptcy Judge Questionnaire, located in Appendices A and B respectively of this report.

⁴⁴ See, e.g., D. Massachusetts Local Bankruptcy Rule 2014-1, Application to Employ Professional Persons; N.D. Ind. Local Bankruptcy Rule B-214, Employment of Professionals by Debtor-in-Possession; C.D. Cal., Notice of Amended Standards to be Employed in the Review of Applications for Authorization of Employment of Professionals (Revised Form 8/98); C.D. Cal. Local Bankruptcy Rule 2014-1, Employment of Debtor and Professional Persons; United States Trustee, C.D. Cal., Guide to Applications for Employment of Professionals and Treatment of Retainers (Revised May 1994).

⁴⁵ These findings can be compared to the 1997 FJC District Court Study on attorney conduct rules in the district courts in which we asked district judges “Should all federal district courts have the same rules governing the professional conduct of attorneys?” Out of the 79 responding districts, 67% or 53 respondents did not support a national rule; 30% or 24 respondents said they would be in favor of a national rule; and two had no opinion. See FJC District Court Study, *supra* note 2, at 351.

courts should be governed by uniform standards, and 27% or 67 said there should not be uniform standards, while 21% or 51 answered they “can’t say.”⁴⁶

We also asked all bankruptcy judges whether the standards applied in bankruptcy courts should be the same as those applied in district courts, assuming uniform standards were adopted by all district and bankruptcy courts.⁴⁷ Fifty-two percent or 128 of the 248 responding bankruptcy judges said the standards should be the same, and 28% or 70 said they should not be, while 20% or 50 said they “can’t say.”

We asked all bankruptcy judges to explain why they believed such standards should be the same or different in the bankruptcy and district courts.⁴⁸ For the most part, bankruptcy judges in favor of the same uniform standards for bankruptcy and district courts stated that attorneys should not have to worry about or learn two sets of standards given that bankruptcy courts are statutorily units of the district court, and counsel are members of the bar of the district court not the bankruptcy court. Further, many respondents said uniformity would ensure efficient operation of both courts and would ensure that the federal courts have a simple set of unified standards for all districts, making it easily and readily determinable what the expectations are, regardless of the federal court in which an attorney practices. Different rules will only lead to greater noncompliance due to confusion and oversight, they suggested.

On the other hand, bankruptcy judges who do not support uniformity in standards for bankruptcy and district courts stated that because there are so many important issues that are unique to bankruptcy cases (e.g., fiduciary obligations owed by the trustee and debtor-in-possession to all parties; disclosure obligations; and conflict of interest issues dealing with disinterestedness complicated by the multitude of interests present in bankruptcy cases), a uniform district court standard may cause confusion in bankruptcy cases. These judges said uniformity is not desirable because the sheer volume of cases in bankruptcy courts suggests that some conduct standards could be relaxed for certain issues, whereas the fiduciary responsibilities in bankruptcy may require more stringent standards with a broader scope for other issues.

Appendix H of this report contains a representative summary of the responses discussed in the last two paragraphs.

VII. Specific Suggestions for National Uniform Attorney Conduct Standards in Bankruptcy Courts

The Standing Committee is considering a proposal to adopt a set of “core” national rules that would apply to specific types of attorney conduct identified as

⁴⁶ See Section B, Question 8a on the Chief Bankruptcy Judge Questionnaire, or the identical Question 4a of the Bankruptcy Judge Questionnaire, located in Appendices A and B respectively of this report.

⁴⁷ See Section B, Question 8b on the Chief Bankruptcy Judge Questionnaire, or the identical Question 4b of the Bankruptcy Judge Questionnaire, located in Appendices A and B of this report.

⁴⁸ *Id.*

problematic in the district court, leaving all other areas to be governed by the attorney conduct rules of the state wherein the district is located. To address this proposal, the final section of the questionnaire sought input from all bankruptcy judges on the adoption of uniform standards for nine types of attorney conduct, some of which are being considered as core national rules to be applied uniformly in all district courts.⁴⁹ The questionnaire respondents were instructed to assume for this series of questions that the national uniform standards would be identical or substantially similar to the provisions of the ABA Model Rules of Professional Conduct that currently address the nine types of conduct identified in the questionnaire.⁵⁰

A. Should There Be National Uniform Rules for Bankruptcy Courts on Certain Topics? Should the Rules Be the Same For Bankruptcy and District Courts?

For each of the nine types of attorney conduct listed (see Column 1 in Table 4 below), we first asked all bankruptcy judges whether bankruptcy courts should have a national uniform standard governing that type of conduct, be it the corresponding ABA Model Rule on the subject or some other standard. (See Column 2 in Table 4 below.)⁵¹ Then we asked all bankruptcy judges who said there should be a national uniform standard whether the national uniform standard should be the same for bankruptcy and district courts (See Column 3 in Table 4).⁵² Table 4 below shows the responses we received to these inquiries.

⁴⁹ See Section B, Question 9 on the Chief Bankruptcy Judge Questionnaire, or the identical Question 5 of the Bankruptcy Judge Questionnaire, located in Appendices A and B respectively of this report.

⁵⁰ The text of all cited Model Rules was provided in an appendix to the questionnaires. See Appendix 2 of the Chief Bankruptcy Judge Questionnaire, or the identical Appendix 1 of the Bankruptcy Judge Questionnaire, located in Appendices A and B respectively of this report.

⁵¹ See Section B, Question 9, Column 3 on the Chief Bankruptcy Judge Questionnaire, or the identical Question 5, Column 3 of the Bankruptcy Judge Questionnaire, located in Appendices A and B respectively of this report.

⁵² See Section B, Question 9, Column 4 on the Chief Bankruptcy Judge Questionnaire, or the identical Question 5, Column 4 of the Bankruptcy Judge Questionnaire, located in Appendices A and B respectively of this report.

Table 4
Suggested Uniform Attorney Conduct Standards in Bankruptcy Court
 N = number of respondents shown in Columns 2 and 3)⁵³

Column 1 Subject of Suggested Uniform Standard	Column 2 Should bankruptcy courts have a national uniform standard on the subject in Column 1, whether it be similar to the ABA Model Rule listed in Column 1 or some other standard on the subject?	Column 3 If you feel there should be a uniform standard for bankruptcy courts on the subject in Column 1, should the national uniform standard be the same for bankruptcy and district courts?
1. Confidentiality of Information (Based on Model Rule 1.6)	Total Number of Bankruptcy Judges Responding = 236 NO 92 (39%) YES 144 (61%)	Total Number of Bankruptcy Judges Responding = 138 NO 22 (16%) YES 116 (84%)
2. General Rule on Conflicts of Interest (Based on Model Rule 1.7)	Total Number of Bankruptcy Judges Responding = 235 NO 85 (36%) YES 150 (64%)	Total Number of Bankruptcy Judges Responding = 139 NO 59 (42%) YES 80 (58%)
3. Conflicts of Interest Concerning Prohibited Transactions (Based on Model Rule 1.8)	Total Number of Bankruptcy Judges Responding = 233 NO 88 (38%) YES 145 (64%)	Total Number of Bankruptcy Judges Responding = 136 NO 25 (18%) YES 111 (82%)
4. Conflict of Interest Concerning Former Client (Based on Model Rule 1.9)	Total Number of Bankruptcy Judges Responding = 232 NO 90 (39%) YES 142 (61%)	Total Number of Bankruptcy Judges Responding = 131 NO 30 (23%) YES 101 (77%)
5. Rule on Imputed Disqualification (Based on Model Rule 1.10)	Total Number of Bankruptcy Judges Responding = 232 NO 95 (41%) YES 137 (60%)	Total Number of Bankruptcy Judges Responding = 127 NO 25 (20%) YES 102 (80%)
6. Rule on Candor Towards a Tribunal (Based on Model Rule 3.3)	Total Number of Bankruptcy Judges Responding = 235 NO 84 (36%) YES 151 (64%)	Total Number of Bankruptcy Judges Responding = 141 NO 7 (5%) YES 134 (95%)
7. Rule on Lawyers As Witness (Based on Model Rule 3.7)	Total Number of Bankruptcy Judges Responding = 235 NO 89 (38%) YES 146 (62%)	Total Number of Bankruptcy Judges Responding = 138 NO 11 (8%) YES 127 (92%)
8. Rule on Truthfulness in Statements to Others (Based on Model Rule 4.1)	Total Number of Bankruptcy Judges Responding = 235 NO 85 (36%) YES 150 (64%)	Total Number of Bankruptcy Judges Responding = 141 NO 5 (4%) YES 136 (97%)
9. Rule on Communications with Person Represented by Counsel (Based on Model Rule 4.2)	Total Number of Bankruptcy Judges Responding = 234 NO 89 (38%) YES 145 (62%)	Total Number of Bankruptcy Judges Responding = 139 NO 9 (7%) YES 130 (94%)

Table 4 shows that for each type of attorney conduct listed, the majority (ranging from 60% to 64%) of responding judges said there should be a national uniform standard in the

⁵³ The discrepancy between the number of respondents answering “YES” in Column 2 and the “total number of bankruptcy judges responding” in Column 3 is attributed to the respondents who failed to indicate a response in Column 3.

bankruptcy courts. In addition, for each type of attorney conduct, the majority (ranging from 58% to 97%) of respondents who said there should be national uniform standards in bankruptcy courts also said the standard should be the same in bankruptcy and district courts.

B. How Should Uniform Bankruptcy Rules Be Different From Uniform District Court Rules?

Next, we asked those bankruptcy judges who did not believe the standard should be the same to explain how the national uniform standard for bankruptcy courts should differ from that for district courts.⁵⁴ A brief summary of their comments is provided below for each of the nine types of attorney conduct. Appendix I gives a more detailed summary of the comments.

- 1. Confidentiality of Information.** The bankruptcy court uniform rule on confidentiality of information should: (a) permit broader disclosure (i.e., determine that fewer disclosures are protected by confidentiality restrictions); (b) account for the fact that bankruptcy cases deal with *evolving* factual matters, as opposed to *past* factual matters, and thus conflicts may arise post-petition in bankruptcy cases more frequently than post-filing in district cases; (c) include a provision allowing a creditors' committee to share, when necessary, information it has obtained; and (d) permit disclosure of confidential information not only to prevent death or serious bodily harm, but also to disclose crime or fraud threatening substantial financial loss.
- 2. General Rule on Conflicts of Interest.** The bankruptcy court uniform rule on general conflicts of interest should: (a) be different because of the large number of interested parties with shifting interests involved in some bankruptcy cases and the increased likelihood of a conflict arising; (b) be different because of the fiduciary obligations owed by certain persons in bankruptcy cases to a broad range of parties; (c) require attorneys appointed by the court to disclose all potential conflicts of interest, and require attorneys to seek court approval when representing the debtor or estate (even if the client consents to the conflict); (d) include Title 11's additional requirements of disinterestedness and bankruptcy rule requirements of complete disclosure; and (e) require consents and disclosures to be in writing.
- 3. Conflict of Interest Concerning Prohibited Transactions.** The bankruptcy court uniform rule on conflicts of interest concerning prohibited transactions should: (a) take into account that certain counsel in bankruptcy (e.g., attorneys for debtors-in-possession), creditors' and other official committees, and trustees owe fiduciary obligations to a broad range of parties and require heightened scrutiny generally not applicable in district court; (b) be more restrictive (i.e., cover more) than the applicable standard in district courts; (c) prohibit a debtor's attorney from having any business relationship with his client, including an absolute prohibition against buying

⁵⁴ See Section B, Question 9, Column 5 on the Chief Bankruptcy Judge Questionnaire, or the identical Question 5, Column 5 of the Bankruptcy Judge Questionnaire, located in Appendices A and B respectively of this report.

property of the estate; and (d) address issues problematic in bankruptcy such as where lawyers take security interests, mortgage judgments, etc., to secure the payment of fees.

4. **Conflict of Interest Concerning Former Client.** The bankruptcy court uniform rule on conflicts of interest concerning a former client should: (a) provide bankruptcy judges with discretion to resolve conflict issues because of the broad range in the size and complexity of bankruptcy cases; (b) be made consistent with § 327(c) and (e) of the Bankruptcy Code, permitting an attorney to represent the debtor even though the attorney formerly represented a creditor of the debtor; and (c) require more disclosure in the area of potential conflicts of interest and ongoing disclosure to deal with firm mergers, where conflicts develop during a case.
5. **Rule on Imputed Disqualification.** The uniform rule on imputed disqualification for bankruptcy courts should: (a) provide bankruptcy judges with discretion in resolving conflict issues because of the difference in size and complexity of bankruptcy cases; (b) address the provisions of the Bankruptcy Code (§327(c) and (e)) that permit an attorney to represent the debtor even though the attorney formerly represented a creditor of the debtor; (c) adequately address lateral moves between firms and the transactional representation of business clients; and (d) address the problems bankruptcy courts have with ABA Rule 1.10(c) regarding waiver of conflict.
6. **Rule on Candor Towards the Tribunal.** The bankruptcy court uniform rule on candor towards the tribunal should: (a) not be based on ABA Model Rule 3.3(a)(3) because it puts lawyers in conflict with their duty to their own client; and (b) define whether debtors' counsel have a duty to disclose information to creditors if that information is necessary to address preferential transfer, hidden agendas, etc.
7. **Rule on Lawyer As Witness.** The bankruptcy court uniform rule on the lawyer as a witness should: (a) provide a clear rule prohibiting attorney submission when bankruptcy courts use Federal Rule of Civil Procedure 43 (taking of witness testimony) and Federal Rule of Civil Procedure 56 (summary judgment) to decide matters; and (b) address the situation not addressed by ABA Model Rule 3.7 where the attorney for a debtor may become a post-petition transaction witness (if the attorney is a sole practitioner or in a small firm, it is not practical to withdraw, especially in small consumer cases).
8. **Rule on Truthfulness in Statements to Others.** The bankruptcy court uniform rule on truthfulness in statements to others should: (a) address parameters of settlement offers in the bankruptcy context; (b) address the inadequacies of ABA Model Rule 4.1(b) in determining what conduct is "fraudulent" in bankruptcy cases (confidentiality should be waived if a Model Rule 4.1 circumstance arises in bankruptcy); and (c) be broadened because ABA Model Rule 1.6 is not broad enough in bankruptcy cases.

- 9. Rule on Communications with Person Represented by Counsel.** The bankruptcy court uniform rule on communications with a person represented by counsel should: (a) allow for situations where an attorney who is a trustee and who also acts as counsel for the trustee may (when acting as the trustee) communicate with a debtor who is represented by counsel; (b) be flexible enough in consumer cases to allow communication where a debtor’s attorney signs on for a limited fee and a limited purpose; and (c) include provisions of Bankruptcy Rule 7004 requiring service of pleadings on the consumer debtor as well as debtor’s counsel to assure the consumer debtor is apprised of matters in the case.

C. Should National Uniform Bankruptcy and District Court Rules Be Based on the ABA Model Rules?

For each of the nine types of attorney conduct, we asked bankruptcy judges who stated that the national uniform standard should be the same for all bankruptcy and district courts whether the national uniform standard should be based on the corresponding ABA Model Rule for that type of conduct or on a different standard.⁵⁵ And if different, we asked the judges to explain how the national uniform standard should differ from the ABA Model Rules.⁵⁶ A brief summary of their comments is provided below for each of the nine types of attorney conduct. The majority of bankruptcy judges said the national uniform standard should be based on the corresponding ABA Model Rule.⁵⁷ A minority of judges in each category described a different standard. Appendix J provides a more detailed summary of the comments. For the following nine types of conduct, according to respondents, any national uniform standard that is applied to both bankruptcy and district courts should be based on the corresponding ABA Model Rule or:

- 1. Confidentiality of Information:** a different standard—the corresponding ABA Model Rule, except that there should be some flexibility to include state rules of conduct where they are stricter, so local attorneys are not held to higher conduct standards than out-of-state attorneys.
- 2. General Rule on Conflicts of Interest:** (a) a different standard—the ABA Model Rule except it should be modified for a relaxed disinterestedness standard under §

⁵⁵ See Section B, Question 9, Column 5 on the Chief Bankruptcy Judge Questionnaire, or the identical Question 5, Column 5 of the Bankruptcy Judge Questionnaire, located in Appendices A and B respectively of this report

⁵⁶ *Id.*

⁵⁷ The percentage of judges who indicated that the national uniform standard should be based on the corresponding ABA Model Rule were as follows for each category of attorney conduct:

- confidentiality of information (68%);
- general rule of conflicts of interest (68%);
- conflict of interest concerning prohibited transactions (69%);
- conflict of interest concerning former client (67%);
- rule on imputed disqualification (67%);
- rule on candor towards the tribunal (63%);
- rule on lawyer as witness (62%);
- rule on truthfulness in statements to others (63%);
- rule on communication with a person represented by counsel (62%).

327 so that lawyers who are owed fees by their clients may represent them in bankruptcy proceedings; (b) a different standard—the ABA Model Rule combined with a requirement of full disclosure (disinterestedness standard should be abandoned in favor of the ABA Model Rule) which gives judges a flexible tool to deal with conflict of interest issues.

3. **Conflict of Interest Concerning Prohibited Transactions:** (a) a different standard—the ABA Model Rule but modified for bankruptcy cases where a trustee is a plaintiff in a multi-party proceeding; (b) a different standard—the ABA Model Rule supplemented with the Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure.
4. **Conflict of Interest Concerning Former Client:** (a) a different standard—the ABA standard modified to include a provision to deal with the problem of large firms and national firms that represent large creditors and debtors; (b) a different standard—the ABA standard modified for conflict issues problematic to bankruptcy courts, such as where a trustee is a plaintiff in a multi-party proceeding.
5. **Rule on Imputed Disqualification:** a different standard—the ABA Model Rules modified for conflict issues problematic to bankruptcy courts, to reflect the reality of bankruptcy practice such as where a trustee is a plaintiff in a multi-party proceeding.
6. **Rule on Candor Towards the Tribunal:** a different standard—the ABA standard but applied with flexibility so as to include state rules of conduct where they are stricter, so local attorneys are not held to higher conduct standards than out-of-state attorneys.
7. **Rule on Lawyer as Witness:** a different standard—the ABA standard except as to applications for attorneys' fees.
8. **Rule on Truthfulness in Statements to Others:** a different standard—the ABA standard modified for “truthfulness in statements to others” issues problematic to bankruptcy courts.
9. **Rule on Communication with a Person Represented by Counsel.** (a) a different standard—the ABA standard with clarification of “who” is represented by counsel; (b) a different standard—the ABA standard but modified for issues concerning “communications with persons represented by counsel” that are problematic to bankruptcy courts such as the inclusion of communications with creditors of the same class.

D. Should a National Uniform Standard on Any Other Attorney Conduct Issue Be Drafted for Use in Bankruptcy Courts?

The final question asked all bankruptcy judges whether a national uniform standard on any other attorney conduct issue should be drafted for use in all bankruptcy

courts.⁵⁸ Among the 198 responding bankruptcy judges, 84% or 166 said that no additional attorney conduct issues should be covered by national uniform rules, while 16% or 32 bankruptcy judges said additional issues should be covered. Subjects mentioned by several judges as good candidates for uniform rules included: competency of the practicing attorney before the bankruptcy court; civility to the court, witnesses, and other attorneys; modifications of ABA Model Rules to the bankruptcy context; authority to suspend, disbar, or discipline attorneys by the bankruptcy courts; fiduciary duties; disclosure issues; and bankruptcy-specific conflict of interest issues. Appendix K provides a more detailed summary of their comments.

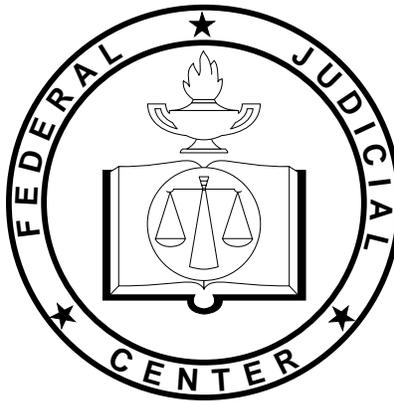
VIII. GENERAL COMMENTS

The questionnaire included a “General Comments” section in which we asked all bankruptcy judges to add any comments that might help the Standing Committee understand the current issues and problems facing bankruptcy courts with regard to attorney conduct. Ninety-one judges chose to give comments here (36% of all respondents). These comments fell into three general categories: comments in favor of uniform standards; comments opposed to uniform standards; and comments containing mixed and miscellaneous views. In addition, many judges expressed a preference for allowing their bankruptcy court to continue to apply the state ethics rules, supplemented by the statutory bankruptcy standards. Many responding bankruptcy judges in favor of uniform national standards stated that it was important to create uniformity of standards to assist attorneys from one section of the country practicing in bankruptcy courts in other sections. Arguments rejecting uniform national attorney conduct rules for bankruptcy courts comprised the bulk of the general comments. These comments were not in proportion to responses to other questions in the survey.⁵⁹ Many responding bankruptcy judges stated that attorneys who practice in state courts should not face differing standards when they appear before bankruptcy courts. Further, many expressed support for permitting local courts to develop additional or stricter standards of conduct, as well as addressing problems of unique, local concern. Appendix L of this report contains a more detailed summary of these comments arranged by category of comment.

⁵⁸ See Section B, Question 9j in the Chief Bankruptcy Judge Questionnaire, or the identical Question 5j in the Bankruptcy Judge Questionnaire, located in Appendices A and B respectively of this report.

⁵⁹ Responses to the other questions, for example, showed that 52% of responding bankruptcy judges were in favor of uniform standards for bankruptcy and district courts. See discussion of national uniformity, *infra* Section VI.

Appendix A



Standards Governing Attorney Conduct in the Bankruptcy Courts

Questionnaire for Chief Judges of United States Bankruptcy Courts

Purpose and Instructions

The Judicial Conference Committee on Rules of Practice and Procedure (the Standing Committee) is studying whether nonuniformity in attorney conduct standards across districts has any negative or positive effects. The Standing Committee has asked the Federal Judicial Center to conduct a study of attorney conduct issues in the bankruptcy courts. This questionnaire, developed with the assistance of the Judicial Conference's Advisory Committee on Bankruptcy Rules, asks about the formal and informal sources of attorney conduct standards in your bankruptcy court, the adequacy of those standards, the type and frequency of attorney conduct issues that have arisen in your court, and the need for national uniform attorney conduct rules for bankruptcy courts. A questionnaire identical to Section B of this questionnaire has been sent to all bankruptcy judges. A similar study has already been completed for district courts.

If you need more space to answer any question, please use the "General Comments" section on pages 9 through 11 of the questionnaire. Please give the number of the question you are answering.

Presentation of Responses

Individual respondents will not be identified in the report prepared for the Advisory Committee, but districts may be identified in the report's description of standards and procedures. Only research staff at the Center will have access to the completed questionnaires.

Returning the Questionnaire

The Center is to provide the results of this study to the Advisory Committee on Bankruptcy Rules prior to the Committee's March 1999 meeting. We ask that you please return the completed questionnaire in the enclosed envelope or fax your response by **January 15, 1999** to:

Marie Leary
Research Division
The Federal Judicial Center
One Columbus Circle, NE
Washington, DC 20002-8003
(202) 273-4021 (fax)

Questions

If you have any questions, please call Marie Leary or Bob Niemic at (202) 273-4070.

Section A. Sources of Standards Governing Attorney Conduct in Bankruptcy Courts

The table in the enclosed Appendix 1 shows the status of local rules governing attorney conduct in each federal district court and bankruptcy court. For each district court, the table identifies any local rule on standards of attorney conduct published as of April 28, 1997. For each bankruptcy court, the table shows whether the court has a local bankruptcy rule on standards of attorney conduct and, if so, the source of the standards adopted in the rule as far as we could determine them.

Please locate your district in the table and refer to the information provided there as you answer Question 1 below. After you answer Question 1, please go to the box at the bottom of this page, find the instruction that applies to you, and proceed to the specified question as directed. If you have any problems with the questionnaire, please call Marie Leary at (202) 273-4070 for assistance.

1. To let us know whether the information in Appendix 1 is correct, which of the following best describes the current situation in your bankruptcy court regarding standards governing attorney conduct?

*Check **all** of the following that apply to your bankruptcy court:*

- a. ₁ My bankruptcy court has a local bankruptcy rule that adopts the local rules of the district court in general; our local bankruptcy rule makes no specific mention of any district court provision concerning attorney conduct and professional responsibility.
- b. ₂ My bankruptcy court has a local bankruptcy rule that specifically states that the bankruptcy court has adopted the district court's rules on attorney conduct, attorney discipline, professional responsibility, or a similar phrase.
- c. ₃ My bankruptcy court has developed its own attorney conduct standards and has incorporated them into a local bankruptcy rule or adopted them by general order.
- d. ₄ My bankruptcy court has a local bankruptcy rule that adopts other standards to govern attorney conduct such as the ABA Model Rules of Professional Conduct or Model Code of Professional Responsibility; these standards are other than those in the district court local rules.
- e. ₅ My bankruptcy court has no local district or bankruptcy rule, general order, promulgated guideline, standing order, or other written court-wide standard that governs attorney conduct.
- f. ₆ None of the above describes the situation in my bankruptcy court.

If you checked	a only or a with any other combination—>	Go to question 2.
If you checked	b only or b with any other combination—>	Go to question 3.
If you checked	c only—>	Go to question 3.
If you checked	d only—>	Go to question 3.
If you checked	c and d—>	Go to question 3.
If you checked	e or f—>	Go to question 4.

2. If your court has adopted the district court's rules generally, is it correct to assume that your bankruptcy court also follows or has adopted the district court's attorney conduct standards (if any)?

- ₁ No
₂ Yes

3. To resolve attorney conduct issues, does your bankruptcy court (or do the judges in your bankruptcy court) ever use standards or sets of standards other than the Bankruptcy Code, Federal Rules of Bankruptcy Procedure, the formal standards referred to in the local bankruptcy rules, or the district court rules?

- ₁ No—> **Go to Section B on next page.**
₂ Yes

If **YES**, please describe these standards and the frequency with which they are used. **Then go to Section B on next page.**

4. When issues of attorney conduct arise, what standards or set of standards other than the Bankruptcy Code and Federal Rules of Bankruptcy Procedure does your bankruptcy court (or do the judges in your bankruptcy court) apply to resolve the issues? **After responding, go to Section B on next page.**

Section B. Standards Governing Attorney Conduct in the Bankruptcy Courts

Please answer the following questions as they pertain to proceedings before you as an individual judge (i.e., do not answer them as a representative of your bankruptcy court as a whole).

5. **Type and Frequency of Attorney Conduct Issues in Bankruptcy.** Please identify below (by placing a check in the appropriate column) the frequency with which the following attorney conduct issues have arisen before you **during the past two years**. Please include in your count both (1) actual findings that a breach of conduct occurred and (2) instances where either a party raised allegations of unethical conduct or you perceived that unethical conduct had occurred but no allegation was made. There is no need to refer to specific case files or reported case law. Your estimate is sufficient. The full text of all ABA Model Rules, national Bankruptcy Rules, and statutes cited below are in the enclosed Appendix 2.

Attorney Conduct Issues	Frequency With Which Attorney Conduct Issue Has Arisen in the <u>Past Two Years</u>				
	Never	Once	Two to five times	Six to ten times	More than ten times
5a. Conflict of Interest: the conduct was such that the attorney was disqualified or was the subject of a disqualification motion on the basis of a standard, such as ABA Model Rules 1.7 through 1.11, governing disqualification for conflict of interest.	<input type="checkbox"/> ₁	<input type="checkbox"/> ₂	<input type="checkbox"/> ₃	<input type="checkbox"/> ₄	<input type="checkbox"/> ₅
5b. Conflict of Interest: the conduct was such that the attorney was disqualified or was the subject of a disqualification motion on the basis of 11 U.S.C. § 327 or § 1103, governing representation of an adverse interest or conflicts of interest. <i>Please include matters that meet the criteria of this question 5b even if the matters have also been included in question 5a above.</i>	<input type="checkbox"/> ₁	<input type="checkbox"/> ₂	<input type="checkbox"/> ₃	<input type="checkbox"/> ₄	<input type="checkbox"/> ₅
5c. Required Disclosures: the conduct violated or allegedly violated disclosure requirements of 11 U.S.C. § 329(a) or Bankruptcy Rules 2014 or 2016.	<input type="checkbox"/> ₁	<input type="checkbox"/> ₂	<input type="checkbox"/> ₃	<input type="checkbox"/> ₄	<input type="checkbox"/> ₅
5d. Safekeeping of Client Property: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 1.15.	<input type="checkbox"/> ₁	<input type="checkbox"/> ₂	<input type="checkbox"/> ₃	<input type="checkbox"/> ₄	<input type="checkbox"/> ₅
5e. Attorneys' Fees: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 1.5.	<input type="checkbox"/> ₁	<input type="checkbox"/> ₂	<input type="checkbox"/> ₃	<input type="checkbox"/> ₄	<input type="checkbox"/> ₅

Attorney Conduct Issues	Frequency With Which Attorney Conduct Issue Has Arisen in the <u>Past Two Years</u>				
	Never	Once	Two to five times	Six to ten times	More than ten times
5f. Lawyer as a Witness: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 3.7.	<input type="checkbox"/> ₁	<input type="checkbox"/> ₂	<input type="checkbox"/> ₃	<input type="checkbox"/> ₄	<input type="checkbox"/> ₅
5g. Confidentiality: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 1.6.	<input type="checkbox"/> ₁	<input type="checkbox"/> ₂	<input type="checkbox"/> ₃	<input type="checkbox"/> ₄	<input type="checkbox"/> ₅
5h. Communication with represented persons: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 4.2.	<input type="checkbox"/> ₁	<input type="checkbox"/> ₂	<input type="checkbox"/> ₃	<input type="checkbox"/> ₄	<input type="checkbox"/> ₅
5i. Candor Towards a Tribunal: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 3.3.	<input type="checkbox"/> ₁	<input type="checkbox"/> ₂	<input type="checkbox"/> ₃	<input type="checkbox"/> ₄	<input type="checkbox"/> ₅
5j. Truthfulness in Statements to Others: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 4.1.	<input type="checkbox"/> ₁	<input type="checkbox"/> ₂	<input type="checkbox"/> ₃	<input type="checkbox"/> ₄	<input type="checkbox"/> ₅
<p>5k. Other: This question allows you to describe any violations or allegations of violations of any other standards (whether or not covered by the ABA Model Rules). Please describe below the subject of the standard(s) involved and again identify (by placing a check in the appropriate column) the frequency with which each attorney conduct issue has arisen before you during the past two years. If more space is needed, please use the "General Comments" section on pages 9 through 11.</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>	<input type="checkbox"/> ₁	<input type="checkbox"/> ₂	<input type="checkbox"/> ₃	<input type="checkbox"/> ₄	<input type="checkbox"/> ₅
	<input type="checkbox"/> ₁	<input type="checkbox"/> ₂	<input type="checkbox"/> ₃	<input type="checkbox"/> ₄	<input type="checkbox"/> ₅
	<input type="checkbox"/> ₁	<input type="checkbox"/> ₂	<input type="checkbox"/> ₃	<input type="checkbox"/> ₄	<input type="checkbox"/> ₅
	<input type="checkbox"/> ₁	<input type="checkbox"/> ₂	<input type="checkbox"/> ₃	<input type="checkbox"/> ₄	<input type="checkbox"/> ₅

6. **Adequacy of Standards Governing Attorney Conduct**

6a. Do you think the “**statutory**” standards (i.e., those in the Bankruptcy Code and national Bankruptcy Rules) for resolving bankruptcy-related issues of attorney conduct are adequate?

₁ No.

₂ Yes.

If **NO**, please describe why these standards are inadequate:

6b. Do you think the **non-statutory** standards (i.e., standards other than those in the Bankruptcy Code and national Bankruptcy Rules) your district uses to resolve bankruptcy-related issues of attorney conduct are adequate?

₁ No.

₂ Yes.

If **NO**, please describe why these standards are inadequate and what other sources you would turn to to resolve attorney conduct issues (e.g., state ethics codes, model rules or codes):

6c. Are there any inconsistencies that you have found problematic between the statutory and non-statutory attorney conduct standards as defined in Questions 6a and 6b above?

₁ No.

₂ Yes.

If **YES**, please describe the inconsistency(ies) and the problem(s) they present:

6d. Are there attorney conduct issues that arise **only** in bankruptcy courts and are not covered or adequately covered by existing statutory or non-statutory attorney conduct standards used by your court?

₁ No.

₂ Yes.

If **YES**, please describe those issues:

7. **Adequacy of Disclosure Standards Regarding Employment of Attorneys**

- 7a. Have you experienced any problems with the adequacy of disclosure by attorneys seeking employment in bankruptcy cases?
- ₁ No—>Go to question 8.
₂ Yes—>Go to question 7b.
- 7b. Were any of the problems caused by inadequate requirements for disclosure in Bankruptcy Rule 2014?
- ₁ No—>Go to question 8.
₂ Yes—>Go to question 7c.
- 7c. If you have any suggestions for amending Bankruptcy Rule 2014 to improve the adequacy of disclosure, please give them here:

8. **National Uniform Attorney Conduct Standards in Bankruptcy Courts**

The Standing Committee has been considering whether uniform standards of attorney conduct should be adopted for the district and bankruptcy courts. The following questions seek your input on this issue.

- 8a. Should attorney conduct in all bankruptcy courts be governed by uniform standards?
- ₁ No
₂ Yes
₃ Can't say
- 8b. Assuming uniform standards are adopted, should the standards applied in bankruptcy courts be the same as those applied in district courts?
- ₁ No
₂ Yes
₃ Can't say

Please explain why you think the standards should be the same or different in the bankruptcy and district courts:

9. Suggested Uniform Standards. Please answer the following more specific questions about attorney conduct standards that ---> standards. For purposes of this inquiry, assume the national uniform standards would be identical or substantially similar to the---> For each subject in Column 1, answer no or yes to the question in column 3 and then proceed according to the instructions given.

Column 1 Subject of Suggested Uniform Standard	Column 2 ABA Model Rule	Column 3 Should bankruptcy courts have a national uniform standard on the subject in Column 1, whether it be the ABA Model Rule listed in Column 2 or some other standard on the subject?	Column 4 Should a national uniform standard on the subject in Column 1 be the same for bankruptcy and district courts?
9a. Confidentiality of Information	Rule 1.6	<input type="checkbox"/> ₁ No—> Go to question 9b. <input type="checkbox"/> ₂ Yes—> Go to Column 4.	<input type="checkbox"/> ₁ No—> Go to Column 5. <input type="checkbox"/> ₂ Yes—> Go to Column 5.
9b. General Rule on Conflicts of Interest	Rule 1.7	<input type="checkbox"/> ₁ No—> Go to question 9c. <input type="checkbox"/> ₂ Yes—> Go to Column 4.	<input type="checkbox"/> ₁ No—> Go to Column 5. <input type="checkbox"/> ₂ Yes—> Go to Column 5.
9c. Conflict of Interest Concerning Prohibited Transactions	Rule 1.8	<input type="checkbox"/> ₁ No—> Go to question 9d. <input type="checkbox"/> ₂ Yes—> Go to Column 4.	<input type="checkbox"/> ₁ No—> Go to Column 5. <input type="checkbox"/> ₂ Yes—> Go to Column 5.
9d. Conflict of Interest Concerning Former Client	Rule 1.9	<input type="checkbox"/> ₁ No—> Go to question 9e. <input type="checkbox"/> ₂ Yes—> Go to Column 4.	<input type="checkbox"/> ₁ No—> Go to Column 5. <input type="checkbox"/> ₂ Yes—> Go to Column 5.
9e. Rule on Imputed Disqualification	Rule 1.10	<input type="checkbox"/> ₁ No—> Go to question 9f. <input type="checkbox"/> ₂ Yes—> Go to Column 4.	<input type="checkbox"/> ₁ No—> Go to Column 5. <input type="checkbox"/> ₂ Yes—> Go to Column 5.
9f. Rule on Candor Towards the Tribunal	Rule 3.3	<input type="checkbox"/> ₁ No—> Go to question 9g. <input type="checkbox"/> ₂ Yes—> Go to Column 4.	<input type="checkbox"/> ₁ No—> Go to Column 5. <input type="checkbox"/> ₂ Yes—> Go to Column 5.
9g. Rule on Lawyer as Witness	Rule 3.7	<input type="checkbox"/> ₁ No—> Go to question 9h. <input type="checkbox"/> ₂ Yes—> Go to Column 4.	<input type="checkbox"/> ₁ No—> Go to Column 5. <input type="checkbox"/> ₂ Yes—> Go to Column 5.
9h. Rule on Truthfulness In Statements to Others	Rule 4.1	<input type="checkbox"/> ₁ No—> Go to question 9i. <input type="checkbox"/> ₂ Yes—> Go to Column 4.	<input type="checkbox"/> ₁ No—> Go to Column 5. <input type="checkbox"/> ₂ Yes—> Go to Column 5.
9i. Rule on Communications with Person Represented by Counsel.	Rule 4.2	<input type="checkbox"/> ₁ No—> Go to 9j on page 9. <input type="checkbox"/> ₂ Yes—> Go to Column 4.	<input type="checkbox"/> ₁ No—> Go to Column 5. <input type="checkbox"/> ₂ Yes—> Go to Column 5.

might be adopted on a national basis. Column 1 lists nine types of attorney conduct that could be governed by national uniform ABA Model Rules of Professional Conduct listed in column 2 (see the enclosed Appendix 2 for the text of the ABA Model Rules). Make sure to explain in Column 5 your response given in Column 4. Feel free to use pages 9 through 11 if you need more space.

Column 5

- If you answered “No” in Column 4, explain how the bankruptcy standard on the subject in Column 1 should differ from any national uniform standard drafted for use in district courts.
- If you answered “Yes” in Column 4, state whether the national uniform standard should be based on the ABA Model Rule in Column 2 or on a different standard. If different, explain how the national uniform standard should differ from the ABA Model Rule.

9j. Other Standards. Should a national uniform standard on any other attorney conduct issue be drafted for use in all bankruptcy courts?

₁ No

₂ Yes

If **YES**, please describe the standard:

General Comments

Please use the space below to add any comments you think would help the Standing Committee understand the current issues and problems facing bankruptcy courts with regard to attorney conduct.

THANK YOU VERY MUCH FOR YOUR COOPERATION!

Questionnaire for Chief Judges of United States Bankruptcy Courts on Standards Governing Attorney Conduct in the Bankruptcy Courts

Appendix 1

Rules Governing Attorney Conduct in the Federal District Courts and Bankruptcy Courts

Circuit	District	Local Rule Regulating Attorney Conduct District Courts ¹	Local Rule and Source of Standards Governing Attorney Conduct Bankruptcy Courts ²
1	Mass.	Local Rule 83.6(4)	No Local Bankruptcy Rule
1	Me.	Local Rule 83.3	No Local Bankruptcy Rule ³
1	N.H.	Local Rule 83.5 (DR-1 and DR-5)	No Local Bankruptcy Rule
1	P.R.	Local Rule 211.4(b) (renumbered as Rule 83.5 but effective date unknown at present)	Local Bankruptcy Rule: adopted District Court's Rule(s)
1	R.I.	Local Rule 4(d)	Local Bankruptcy Rule: adopted District Court's Rule(s) ⁴
2	Conn.	Local Civil Rule 3(a)	No Local Bankruptcy Rule
2	N.Y.-E	Local Civil Rule 1.5(b)(5)	No Local Bankruptcy Rule
2	N.Y.-N	Local Rule 83.4(j)	No Local Bankruptcy Rule
2	N.Y.-S	Local Civil Rule 1.5(b)(5)	No Local Bankruptcy Rule
2	N.Y.-W	Local Civil Rule 83.3(c)	Local Bankruptcy Rule: local rule does not state standard to be applied.
2	Vt.	Local Civil Rule 83.2(d)(4)	No Local Bankruptcy Rule
3	Del.	Local Rule 83.6(d)	Local Bankruptcy Rule: adopted District Court's Rule(s)
3	N.J.	Local Civil Rules 103.1(a) & 104.1(d)	Local Bankruptcy Rule: adopted District Court's Rule(s)
3	Pa.-E	Local Civil Rule 83.6, Rule IV	Local Bankruptcy Rule: local rule does not state standard to be applied.
3	Pa.-M	Local Rule 83.23 & Appendix D: Code of Professional Conduct	Local Bankruptcy Rule: local rule does not state standard to be applied.
3	Pa.-W	Local Civil Rule 83.6.1	Local Bankruptcy Rule: adopted District Court's Rule(s)
3	V.I.	Local Civil Rules 83.2(a)(1) & (b)(4)	No Local Bankruptcy Rule
4	Md.	Local Rule 704	Local Bankruptcy Rule 42(k): Counsel are "encouraged to be familiar" with the "Discovery Guidelines of the Maryland State Bar."
4	N.C.-E	Local Rule 2.10	No Local Bankruptcy Rule

¹ The identification and categorization of each district's local rule is based upon the published local rule in effect on April 28, 1997. See Marie Leary, *Standards of Attorney Conduct and Disciplinary Procedures: A Study of the Federal District Courts* (Federal Judicial Center June 1997) in *Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct* (Administrative Office of the United States Courts September 1997).

² The sources of standards governing attorney conduct adopted by bankruptcy court local rules are from Daniel R. Coquillette, *Study of Recent Bankruptcy Cases (1990-1996) Involving Rules of Attorney Conduct*, App. III (May 11, 1997) in *Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct* (Administrative Office of the United States Courts September 1997).

³ Where a Bankruptcy Court is listed as having "No Local Bankruptcy Rule," the court has no promulgated local bankruptcy rule addressing standards of attorney conduct.

⁴ Where a Bankruptcy Court is listed as having "Local Bankruptcy Rule: adopted District Court's Rule(s)," this includes two types of local bankruptcy rules: (1) local bankruptcy rules that adopt the local rules of the district court in general making no reference to provisions concerning attorney conduct and professional responsibility, and (2) local bankruptcy rules that specifically state that they have adopted the district court's rules on attorney conduct, attorney discipline, professional responsibility, or a similar phrase.

Circuit	District	Local Rule Regulating Attorney Conduct District Courts¹	Local Rule and Source of Standards Governing Attorney Conduct Bankruptcy Courts²
4	N.C.-M	Local Rule 505	No Local Bankruptcy Rule
4	N.C.-W	General Local Rule 1 & Guidelines for Resolving Scheduling Conflicts Order	No Local Bankruptcy Rule
4	S.C.	Local Rule 83.1.09	Local Bankruptcy Rule: adopts SC Code of Prof. Resp.
4	Va.-E	Local Rule 83.1 & Appendix B: Federal Rules of Disciplinary Enforcement, Rule IV	Local Bankruptcy Rule 105(I): adopts Canons of Prof. Ethics of the ABA & the Va. State Bar
4	Va.W	Local Rules for W.D. Va., Federal Rules of Disciplinary Enforcement, Disciplinary Rule 4	No Local Bankruptcy Rule
4	W.Va.-N	Local Rule of General Practice 3.01	Local Bankruptcy Rule: adopted District Court's Rule(s)
4	W.Va.-S	Local Rule of General Practice 3.01	No Local Bankruptcy Rule
5	La.-E	Local Rule 83.2.4E	No Local Bankruptcy Rule
5	La.-M	Local Rule 20.04M	Local Bankruptcy Rule: adopts rules of Professional Conduct of LA State Bar Assoc.
5	La.-W	Local Rule 20.04W	Local Bankruptcy Rule: adopted District Court's Rule(s)
5	Miss.-N	Local Rule 21	Local Bankruptcy Rule: adopted District Court's Rule(s)
5	Miss.-S	Local Rule 21	Local Bankruptcy Rule: adopted District Court's Rule(s)
5	Tex.-E	Local Rule AT-2(a)	No Local Bankruptcy Rule
5	Tex.-N	Local Rule 83.8(e), Local Criminal Rule 57.8(e).	Local Bankruptcy Rule: adopted District Court's Rule(s)
5	Tex.-S	Local Rule 1(L) & Appendix A, Rule 1	Local Bankruptcy Rule: adopted District Court's Rule(s)
5	Tex.-W	Local Rule AT-4 & Appendix M: Texas Lawyer Creed	Local Bankruptcy Rule: adopted District Court's Rule(s) and references "litigation standard" announced in local case and states that it applies.
6	Ky.-E	Local Rule 83.3(c) & Local Criminal Rule 57.3(c)	No Local Bankruptcy Rule
6	Ky.-W	Local Rule 83.3(c) & Local Criminal Rule 57.3(c)	Local Bankruptcy Rule 3(b)(2)(E): adopts Standards of Professional Conduct adopted by Ky. Supreme Court
6	Mich.-E	Local Rule 83.22(d) & Civility Plan (includes Civility Principles based on the 7 th Circuit model)	Local Bankruptcy Rule: adopted District Court's Rule(s)
6	Mich.-W	Local Rules 17 & 21(a)	Local Bankruptcy Rule: authorizes discipline of attorneys but does not state standard to be applied.
6	Ohio-N	Local Civil Rule 83.5(b) & Local Criminal Rule 57.5(b)	Local Bankruptcy Rule: adopted District Court's Rule(s)
6	Ohio-S	Local Rule 83.4(f) referencing Appendix of Court Orders, Order 81-1, Rule IV	Local Bankruptcy Rule 4: adopts Code of Prof. Resp. adopted by Ohio S.Ct.
6	Tenn.-E	Local Rules 83.6 & 83.7	Local Bankruptcy Rule 2(c): adopts Code of Prof. Conduct adopted by Supreme Court of Tenn.
6	Tenn.-M	Local Rule 1(e)(4)	Local Bankruptcy Rule: adopted District Court's Rule(s) and has Local Bankruptcy Rule: asserts jurisdiction to enforce standards of conduct.

Circuit	District	Local Rule Regulating Attorney Conduct District Courts¹	Local Rule and Source of Standards Governing Attorney Conduct Bankruptcy Courts²
6	Tenn.-W	Local Rule 83.1(e) & Guidelines for Professional Responsibility and Courtesy and Conduct of Memphis Bar Association adopted by the W.D. Tenn. (on file with clerk)	Local Bankruptcy Rule: refers to ABA Code and District Court rules as they relate to attorney conduct.
7	Ill.-C	Local Rule 83.6(D)	No Local Bankruptcy Rule
7	Ill.-N ⁵	Local General Rule 3.52 incorporating Rules of Professional Conduct for the N.D. Ill., General Order of 10/29/91 with respect to adoption of the N.D. Ill. Rules & Seventh Circuit Standards of Professional Conduct	Local Bankruptcy Rule: adopted District Court's Rule(s)
7	Ill.-S	Local Rule 29(d)	Local Bankruptcy Rule: adopted District Court's Rule(s)
7	Ind.-N	Local Rule 83.5(f) & Seventh Circuit Standards of Professional Conduct	Local Bankruptcy Rule: adopted District Court's Rule(s)
7	Ind.-S	Local Rule 83.5(f), Rule IV of Rules of Disciplinary Enforcement & Seventh Circuit Standards of Professional Conduct	Local Bankruptcy Rule: adopted District Court's Rule(s)
7	Wis.-E	Local Rule 2.05(a)	Local Bankruptcy Rule: adopted District Court's Rule(s)
7	Wis.-W	No Local Bankruptcy Rule	No Local Bankruptcy Rule
8	Ark.-E	Local Rules for E. & W.D. Ark., Appendix: Model Federal Rules of Disciplinary Enforcement, Rule IV	Local Bankruptcy Rule: adopted Uniform Federal Rules of Disciplinary Enforcement.
8	Ark.-W	Local Rules for E. & W.D. Ark., Appendix: Model Federal Rules of Disciplinary Enforcement, Rule IV	Local Bankruptcy Rule: adopted Uniform Federal Rules of Disciplinary Enforcement.
8	Iowa-N	No Local Bankruptcy Rule	Local Bankruptcy Rule: modified standards
8	Iowa-S	No Local Bankruptcy Rule	Local Bankruptcy Rule: adopted District Court's Rule(s)
8	Minn.	Local Rule 83.6(d)	No Local Bankruptcy Rule
8	Mo.-E	Local Rule 12.02 & Rules of Disciplinary Enforcement, Rule IV	No Local Bankruptcy Rule
8	Mo.-W	Local Rule 83.6	Local Bankruptcy Rule: adopted District Court's Rule(s)
8	Neb.	Local Rule 83.5(d)	Local Bankruptcy Rule: adopted District Court's Rule(s)
8	N.D.	No Local Bankruptcy Rule	Local Bankruptcy Rule: adopted District Court's Rule(s)
8	S.D.	No Local Bankruptcy Rule	Local Bankruptcy Rule: adopted District Court's Rule(s)
9	Alaska	Local Rule 83.1(h)	Local Bankruptcy Rule: adopted District Court's Rule(s)
9	Ariz.	Local Rule 1.6(d) & Standards for Professional Conduct adopted by D. Ariz.	Local Bankruptcy Rule 9011: refers to ethics rules adopted by the state of Arizona.
9	Cal.-C	Local Civil Rule 2.5	Local Bankruptcy Rule: adopted District Court's Rule(s)
9	Cal.-E	Local General Rule 180(e)	Local Bankruptcy Rule: adopted District Court's Rule(s)
9	Cal.-N	Local Civil Rule 11-3(a)	Local Bankruptcy Rule: incorporated into District Court Rules
9	Cal.-S	Local Rule 83.5i	No Local Bankruptcy Rule

⁵ The approach adopted by the N.D. Ill.'s local rule does not fit into any of the three approaches in the table because the N.D. Ill. has adopted a standard of conduct unique to their district that does not follow state standards nor any ABA Model.

Circuit	District	Local Rule Regulating Attorney Conduct District Courts¹	Local Rule and Source of Standards Governing Attorney Conduct Bankruptcy Courts²
9	Guam	Local General Rule 22.3(b)	Local Bankruptcy Rule: adopted District Court's Rule(s)
9	Haw.	Local Rule 110-3	No Local Bankruptcy Rule
9	Idaho	Local Rule 83.5(a)	Local Bankruptcy Rule 9010(g): adopted Rules of Professional Conduct adopted by S.Ct. of Idaho.
9	Mont.	Local General Rule 110-3(a)	Local Bankruptcy Rule: adopted District Court's Rule(s)
9	Nev.	Local Rule IA 10-7(a)	No separate bankruptcy rules; only bankruptcy specific rules in District Court's rules.
9	N.M.I.	Local Rule 1.5	No Local Bankruptcy Rule
9	Or.	Local Civil Rule 110-3	No Local Bankruptcy Rule
9	Wash.-E	Local Rule 83.3(a)(2)	No Local Bankruptcy Rule
9	Wash.-W	Local General Rule 2(e)	Local Bankruptcy Rule: adopted District Court's Rule(s)
10	Colo.	Local Rule 83.6	No Local Bankruptcy Rule
10	Kan.	Local Rule 83.6.1	Local Bankruptcy Rule: adopted District Court's Rule(s)
10	N.M.	Local Rule 83.9	No Local Bankruptcy Rule
10	Okla.-E	Local Rule 83.3K	No Local Bankruptcy Rule
10	Okla.-N	Local Rule 83.2	No Local Bankruptcy Rule
10	Okla.-W	Local Rule 83.6(b)	Local Bankruptcy Rule: adopted District Court's Rule(s)
10	Utah	Local Rule 103-1(h)	
10	Wyo.	Local Rule 83.12.7	No Local Bankruptcy Rule
11	Ala.-M	Local Rule 1(a)(4) (renumbered and amended to Local Rule 83.1(f) but no effective date known at present)	Local Bankruptcy Rule: adopted District Court's Rule(s)
11	Ala.-N	Local Civil Rule 83.1(f)	Local Bankruptcy Rule: adopted District Court's Rule(s)
11	Ala.-S	Local Rule 1(A)(4) (renumbered and amended to Local Rule 83.5(f); effective 6/1/97)	Local Bankruptcy Rule: adopted ABA Rules and State Rules
11	Fla.-M	Local Rule 2.04(c)	Local Bankruptcy Rule: adopted ABA Rules and State Rules
11	Fla.-N	Local General Rule 11.1(G)(1) & Addendum: Customary and Traditional Conduct and Decorum in the US District Court	Local Bankruptcy Rule: adopted District Court's Rule(s)
11	Fla.-S	Local General Rule 11.1(C) & Rules Governing Attorney Discipline, Rule IV	Local Bankruptcy Rule: Attorney must read and remain familiar with Florida Bar's Rules of Prof. Conduct. No explicit statement on whether these rules apply or govern.
11	Ga.-M	Local Rule 13.1	No Local Bankruptcy Rule
11	Ga.-N	Local Rule 83.1C	Local Bankruptcy Rule: adopted District Court's Rule(s)
11	Ga.-S	Local Rule 83.5(d)	Local Bankruptcy Rule 505(d): adopts "Current Canons of Professional Ethics of the ABA".
DC	D.C.	Local Rule 706	Local Bankruptcy Rule: adopted District Court's Rule(s)

Questionnaire for Chief Judges of United States Bankruptcy Courts on Standards Governing Attorney Conduct in the Bankruptcy Courts

Appendix 2

AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT

Rule 1.5 FEES

- (a) **A lawyer's fee shall be reasonable. 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, if apparent to the client, 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) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.
- (c) A fee may be contingent on the outcome of a 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. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.
- (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 and does not object to the participation of all the lawyers involved; and
 - (3) the total fee is reasonable.

Rule 1.6 CONFIDENTIALITY OF INFORMATION

- (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
- (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
- (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
 - (2) 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.

Rule 1.7 CONFLICT OF INTEREST: GENERAL RULE

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Rule 1.8 CONFLICT OF INTEREST; PROHIBITED TRANSACTIONS

- (a) A lawyer shall not enter into a business transaction with a client and knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
 - (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
 - (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
 - (3) the client consents in writing thereto.
- (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.
- (c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.
- (d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part of information relating to the representation.
- (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
 - (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
 - (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.
- (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
 - (1) the client consents after consultation;
 - (2) there is no interference with the lawyer's independence of professional judgement or with the client-lawyer relationship; and
 - (3) information relating to representation of a client is protected as required by Rule 1.6.
- (g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.
- (h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.
- (i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer exempt upon consent by the client after consultation regarding the relationship.

- (j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
 - (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and
 - (2) contract with a client for a reasonable contingent fee in a civil case.

Rule 1.9 CONFLICT OF INTEREST: FORMER CLIENT

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.
- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
 - (1) whose interests are materially adverse to that person; and
 - (2) about whom the lawyer had acquired information protected by Rule 1.6 and 1.9(c) that is material to the matter;unless the former client consents after consultation.
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
 - (1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
 - (2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

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, 1.8(c), 1.9, or 2.2.
- (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 firm, 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 and 1.9(c) 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.

Rule 1.11 SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

- (a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
 - (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.
- (b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

- (c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:
 - (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or
 - (2) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).
- (d) As used in this Rule, the term "matter" includes:
 - (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and
 - (2) any other matter covered by the conflict of interest rules of the appropriate government agency.
- (e) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

Rule 1.15 SAFEKEEPING PROPERTY

- (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.
- (b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third persons entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
- (c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

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, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.7 LAWYER AS WITNESS

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
 - (1) the testimony relates to an uncontested issue;
 - (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) disqualification of the lawyer would work substantial hardship on the client.
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Rule 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material act to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

UNITED STATES CODE

11 USC § 101

§ 101. Definitions.

In this title—

- (14) “disinterested person” means person that—
 - (A) is not a creditor, an equity security holder, or an insider;
 - (B) is not and was not an investment banker for any outstanding security of the debtor;
 - (C) has not been, within three years before the date of the filing of the petition, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the debtor;
 - (D) is not and was not, within two years before the date of the filing of the petition, a director, officer, or employee of the debtor or of an investment banker specified in subparagraph (B) or (C) of this paragraph; and
 - (E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with or interest in, the debtor or an investment banker specified in subparagraph (B) or (C) of this paragraph, or for any other reason;

11 USC § 327

§ 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 USC § 328

§ 328. Limitation on compensation of professional persons.

- (c) Except as provided in section 327(c), 327(e), or 1107(b) of this title, the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 or 1103 of this title if, at any time during such professional person's employment under section 327 or 1103 of this title, such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.

11 USC § 329

§ 329. Debtor's transactions with attorneys.

- (a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid. If such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

11 USC § 1103

§ 1103. Powers and duties of committees.

- (a) At a scheduled meeting of a committee appointed under section 1102 of this title, at which a majority of the members of such committee are present, and with the court's approval, such committee may select and authorize the employment by such committee of one or more attorneys, accountants, or other agents, to represent or perform services for such committee.
- (b) An attorney or accountant employed to represent a committee appointed under section 1102 of this title may not, while employed by such committee, represent any other entity having an adverse interest in connection with the case. Representation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an adverse interest.
- (c) A committee appointed under section 1102 of this title may—
 - (1) consult with the trustee or debtor in possession concerning the administration of the case;
 - (2) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;
 - (3) participate in the formulation of a plan, advise those represented by such committee of such committee's determinations as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;
 - (4) request the appointment of a trustee or examiner under section 1104 of this title; and
 - (5) perform such other services as are in the interest of those represented.
- (d) As soon as practicable after the appointment of a committee under section 1102 of this title, the trustee shall meet with such committee to transact such business as may be necessary and proper.

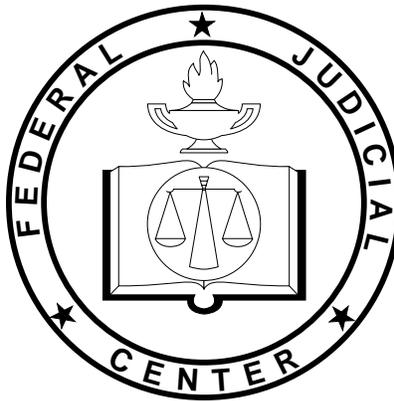
RULE 2014. Employment of Professional Persons.

- (a) **Application for and Order of Employment.** An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.
- (b) **Services Rendered by Member or Associate of Firm of Attorneys or Accountants.** If, under the Code and this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, or if a named attorney or accountant is employed, any partner, member, or regular associate of the partnership, corporation or individual may act as attorney or accountant so employed, without further order of the court.

Rule 2016. Compensation for Services Rendered and Reimbursement of Expenses.

- (a) **Application for Compensation or Reimbursement.** An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file with the court an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity. Unless the case is a chapter 9 municipality case, the applicant shall transmit to the United States trustee a copy of the application.
- (b) **Disclosure of Compensation Paid or Promised to Attorney for Debtor.** Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 15 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee with 15 days after any payment or agreement not previously disclosed.

Appendix B



Standards Governing Attorney Conduct in the Bankruptcy Courts

Questionnaire for Judges of United States Bankruptcy Courts

Purpose and Instructions

The Judicial Conference Committee on Rules of Practice and Procedure (the Standing Committee) is studying whether nonuniformity in attorney conduct standards across districts has any negative or positive effects. The Standing Committee has asked the Federal Judicial Center to conduct a study of attorney conduct issues in the bankruptcy courts. This questionnaire, developed with the assistance of the Judicial Conference's Advisory Committee on Bankruptcy Rules, asks about the adequacy of the formal and informal sources of attorney conduct standards in your bankruptcy court, the type and frequency of attorney conduct issues that have arisen in your court, and the need for national uniform attorney conduct rules for bankruptcy courts. This questionnaire has been sent to all bankruptcy judges; a similar questionnaire was sent to all chief bankruptcy judges. A similar study has already been completed for district courts.

If you need more space to answer any question, please use the "General Comments" section on page 8 of the questionnaire. Please give the number of the question you are answering. Attach additional sheets if necessary.

Presentation of Responses

Individual respondents will not be identified in the report prepared for the Advisory Committee, but districts may be identified in the report's description of standards and procedures. Only research staff at the Center will have access to the completed questionnaires.

Returning the Questionnaire

The Center is to provide the results of this study to the Advisory Committee on Bankruptcy Rules prior to the Committee's March 1999 meeting. We ask that you please return the completed questionnaire in the enclosed envelope or fax your response by **January 15, 1999** to:

Marie Leary
Research Division
The Federal Judicial Center
One Columbus Circle, NE
Washington, DC 20002-8003
(202) 273-4021 (fax)

Questions

If you have any questions, please call Marie Leary or Bob Niemic at (202) 273-4070.

Please answer the following questions as they pertain to proceedings before you as an individual judge (i.e., do not answer them as a representative of your bankruptcy court as a whole).

1. **Type and Frequency of Attorney Conduct Issues in Bankruptcy.** Please identify below (by placing a check in the appropriate column) the frequency with which the following attorney conduct issues have arisen before you **during the past two years**. Please include in your count both (1) actual findings that a breach of conduct occurred and (2) instances where either a party raised allegations of unethical conduct or you perceived that unethical conduct had occurred but no allegation was made. There is no need to refer to specific case files or reported case law. Your estimate is sufficient. The full text of all ABA Model Rules, national Bankruptcy Rules, and statutes cited below are in the enclosed Appendix .

Attorney Conduct Issues	Frequency With Which Attorney Conduct Issue Has Arisen in the <u>Past Two Years</u>				
	Never	Once	Two to five times	Six to ten times	More than ten times
1a. Conflict of Interest: the conduct was such that the attorney was disqualified or was the subject of a disqualification motion on the basis of a standard, such as ABA Model Rules 1.7 through 1.11, governing disqualification for conflict of interest.	<input type="checkbox"/> ₁	<input type="checkbox"/> ₂	<input type="checkbox"/> ₃	<input type="checkbox"/> ₄	<input type="checkbox"/> ₅
1b. Conflict of Interest: the conduct was such that the attorney was disqualified or was the subject of a disqualification motion on the basis of 11 U.S.C. § 327 or § 1103, governing representation of an adverse interest or conflicts of interest. <i>Please include matters that meet the criteria of this question 1b even if the matters have also been included in question 1a above.</i>	<input type="checkbox"/> ₁	<input type="checkbox"/> ₂	<input type="checkbox"/> ₃	<input type="checkbox"/> ₄	<input type="checkbox"/> ₅
1c. Required Disclosures: the conduct violated or allegedly violated disclosure requirements of 11 U.S.C. § 329(a) or Bankruptcy Rules 2014 or 2016.	<input type="checkbox"/> ₁	<input type="checkbox"/> ₂	<input type="checkbox"/> ₃	<input type="checkbox"/> ₄	<input type="checkbox"/> ₅
1d. Safekeeping of Client Property: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 1.15.	<input type="checkbox"/> ₁	<input type="checkbox"/> ₂	<input type="checkbox"/> ₃	<input type="checkbox"/> ₄	<input type="checkbox"/> ₅
1e. Attorneys' Fees: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 1.5.	<input type="checkbox"/> ₁	<input type="checkbox"/> ₂	<input type="checkbox"/> ₃	<input type="checkbox"/> ₄	<input type="checkbox"/> ₅

Attorney Conduct Issues	Frequency With Which Attorney Conduct Issue Has Arisen in the <u>Past Two Years</u>				
	Never	Once	Two to five times	Six to ten times	More than ten times
1f. Lawyer as a Witness: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 3.7.	<input type="checkbox"/> ₁	<input type="checkbox"/> ₂	<input type="checkbox"/> ₃	<input type="checkbox"/> ₄	<input type="checkbox"/> ₅
1g. Confidentiality: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 1.6.	<input type="checkbox"/> ₁	<input type="checkbox"/> ₂	<input type="checkbox"/> ₃	<input type="checkbox"/> ₄	<input type="checkbox"/> ₅
1h. Communication with represented persons: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 4.2.	<input type="checkbox"/> ₁	<input type="checkbox"/> ₂	<input type="checkbox"/> ₃	<input type="checkbox"/> ₄	<input type="checkbox"/> ₅
1i. Candor Towards a Tribunal: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 3.3.	<input type="checkbox"/> ₁	<input type="checkbox"/> ₂	<input type="checkbox"/> ₃	<input type="checkbox"/> ₄	<input type="checkbox"/> ₅
1j. Truthfulness in Statements to Others: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 4.1.	<input type="checkbox"/> ₁	<input type="checkbox"/> ₂	<input type="checkbox"/> ₃	<input type="checkbox"/> ₄	<input type="checkbox"/> ₅
<p>1k. Other: This question allows you to describe any violations or allegations of violations of any other standards (whether or not covered by the ABA Model Rules). Please describe below the subject of the standard(s) involved and again identify (by placing a check in the appropriate column) the frequency with which each attorney conduct issue has arisen before you during the past two years. If more space is needed, please use the "General Comments" section on page 8.</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>	<input type="checkbox"/> ₁	<input type="checkbox"/> ₂	<input type="checkbox"/> ₃	<input type="checkbox"/> ₄	<input type="checkbox"/> ₅
	<input type="checkbox"/> ₁	<input type="checkbox"/> ₂	<input type="checkbox"/> ₃	<input type="checkbox"/> ₄	<input type="checkbox"/> ₅
	<input type="checkbox"/> ₁	<input type="checkbox"/> ₂	<input type="checkbox"/> ₃	<input type="checkbox"/> ₄	<input type="checkbox"/> ₅
	<input type="checkbox"/> ₁	<input type="checkbox"/> ₂	<input type="checkbox"/> ₃	<input type="checkbox"/> ₄	<input type="checkbox"/> ₅

2. **Adequacy of Standards Governing Attorney Conduct**

2a. Do you think the “**statutory**” standards (i.e., those in the Bankruptcy Code and national Bankruptcy Rules) for resolving bankruptcy-related issues of attorney conduct are adequate?

₁ No.

₂ Yes.

If **NO**, please describe why these standards are inadequate:

2b. Do you think the **non-statutory** standards (i.e., standards other than those in the Bankruptcy Code and national Bankruptcy Rules) your district uses to resolve bankruptcy-related issues of attorney conduct are adequate?

₁ No.

₂ Yes.

If **NO**, please describe why these standards are inadequate and what other sources you would turn to to resolve attorney conduct issues (e.g., state ethics codes, model rules or codes):

2c. Are there any inconsistencies that you have found problematic between the statutory and non-statutory attorney conduct standards as defined in Questions 2a and 2b above?

₁ No.

₂ Yes.

If **YES**, please describe the inconsistency(ies) and the problem(s) they present:

2d. Are there attorney conduct issues that arise **only** in bankruptcy courts and are not covered or adequately covered by existing statutory or non-statutory attorney conduct standards used by your court?

₁ No.

₂ Yes.

If **YES**, please describe those issues:

3. **Adequacy of Disclosure Standards Regarding Employment of Attorneys**

- 3a. Have you experienced any problems with the adequacy of disclosure by attorneys seeking employment in bankruptcy cases?
- ₁ No—>Go to question 4.
₂ Yes—>Go to question 3b.
- 3b. Were any of the problems caused by inadequate requirements for disclosure in Bankruptcy Rule 2014?
- ₁ No—>Go to question 4.
₂ Yes—>Go to question 3c.
- 3c. If you have any suggestions for amending Bankruptcy Rule 2014 to improve the adequacy of disclosure, please give them here:

4. **National Uniform Attorney Conduct Standards in Bankruptcy Courts**

The Standing Committee has been considering whether uniform standards of attorney conduct should be adopted for the district and bankruptcy courts. The following questions seek your input on this issue.

- 4a. Should attorney conduct in all bankruptcy courts be governed by uniform standards?
- ₁ No
₂ Yes
₃ Can't say
- 4b. Assuming uniform standards are adopted, should the standards applied in bankruptcy courts be the same as those applied in district courts?
- ₁ No
₂ Yes
₃ Can't say

Please explain why you think the standards should be the same or different in the bankruptcy and district courts:

5. Suggested Uniform Standards. Please answer the following more specific questions about attorney conduct standards that → standards. For purposes of this inquiry, assume the national uniform standards would be identical or substantially similar to the → For each subject in Column 1, answer no or yes to the question in column 3 and then proceed according to the instructions given.

<p align="center">Column 1</p> <p align="center">Subject of Suggested Uniform Standard</p>	<p align="center">Column 2</p> <p align="center">ABA Model Rule</p>	<p align="center">Column 3</p> <p align="center">Should bankruptcy courts have a national uniform standard on the subject in Column 1, whether it be the ABA Model Rule listed in Column 2 or some other standard on the subject?</p>	<p align="center">Column 4</p> <p align="center">Should a national uniform standard on the subject in Column 1 be the same for bankruptcy and district courts?</p>
5a. Confidentiality of Information	Rule 1.6	<input type="checkbox"/> ₁ No → Go to question 5b. <input type="checkbox"/> ₂ Yes → Go to Column 4.	<input type="checkbox"/> ₁ No → Go to Column 5. <input type="checkbox"/> ₂ Yes → Go to Column 5.
5b. General Rule on Conflicts of Interest	Rule 1.7	<input type="checkbox"/> ₁ No → Go to question 5c. <input type="checkbox"/> ₂ Yes → Go to Column 4.	<input type="checkbox"/> ₁ No → Go to Column 5. <input type="checkbox"/> ₂ Yes → Go to Column 5.
5c. Conflict of Interest Concerning Prohibited Transactions	Rule 1.8	<input type="checkbox"/> ₁ No → Go to question 5d. <input type="checkbox"/> ₂ Yes → Go to Column 4.	<input type="checkbox"/> ₁ No → Go to Column 5. <input type="checkbox"/> ₂ Yes → Go to Column 5.
5d. Conflict of Interest Concerning Former Client	Rule 1.9	<input type="checkbox"/> ₁ No → Go to question 5e. <input type="checkbox"/> ₂ Yes → Go to Column 4.	<input type="checkbox"/> ₁ No → Go to Column 5. <input type="checkbox"/> ₂ Yes → Go to Column 5.
5e. Rule on Imputed Disqualification	Rule 1.10	<input type="checkbox"/> ₁ No → Go to question 5f. <input type="checkbox"/> ₂ Yes → Go to Column 4.	<input type="checkbox"/> ₁ No → Go to Column 5. <input type="checkbox"/> ₂ Yes → Go to Column 5.
5f. Rule on Candor Towards the Tribunal	Rule 3.3	<input type="checkbox"/> ₁ No → Go to question 5g. <input type="checkbox"/> ₂ Yes → Go to Column 4.	<input type="checkbox"/> ₁ No → Go to Column 5. <input type="checkbox"/> ₂ Yes → Go to Column 5.
5g. Rule on Lawyer as Witness	Rule 3.7	<input type="checkbox"/> ₁ No → Go to question 5h. <input type="checkbox"/> ₂ Yes → Go to Column 4.	<input type="checkbox"/> ₁ No → Go to Column 5. <input type="checkbox"/> ₂ Yes → Go to Column 5.
5h. Rule on Truthfulness In Statements to Others	Rule 4.1	<input type="checkbox"/> ₁ No → Go to question 5i. <input type="checkbox"/> ₂ Yes → Go to Column 4.	<input type="checkbox"/> ₁ No → Go to Column 5. <input type="checkbox"/> ₂ Yes → Go to Column 5.
5i. Rule on Communications with Person Represented by Counsel.	Rule 4.2	<input type="checkbox"/> ₁ No → Go to 5j on page 8. <input type="checkbox"/> ₂ Yes → Go to Column 4.	<input type="checkbox"/> ₁ No → Go to Column 5. <input type="checkbox"/> ₂ Yes → Go to Column 5.

might be adopted on a national basis. Column 1 lists nine types of attorney conduct that could be governed by national uniform ABA Model Rules of Professional Conduct listed in column 2 (see the enclosed Appendix for the text of the ABA Model Rules). Make sure to explain in Column 5 your response given in Column 4. Feel free to use page 8 if you need more space.

Column 5

- If you answered “No” in Column 4, explain how the bankruptcy standard on the subject in Column 1 should differ from any national uniform standard drafted for use in district courts.
- If you answered “Yes” in Column 4, state whether the national uniform standard should be based on the ABA Model Rule in Column 2 or on a different standard. If different, explain how the national uniform standard should differ from the ABA Model Rule.

5j. Other standards. Should a national uniform standard on any other attorney conduct issue be drafted for use in all bankruptcy courts?

₁ No

₂ Yes

If **YES**, please describe the standard:

General Comments

Please use the space below to add any comments you think would help the Standing Committee understand the current issues and problems facing bankruptcy courts with regard to attorney conduct.

THANK YOU VERY MUCH FOR YOUR COOPERATION!

Questionnaire for Chief Judges of United States Bankruptcy Courts on Standards Governing Attorney Conduct in the Bankruptcy Courts

Appendix

AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT

Rule 1.5 FEES

- (a) **A lawyer's fee shall be reasonable. 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, if apparent to the client, 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) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.
- (c) A fee may be contingent on the outcome of a 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. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.
- (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 and does not object to the participation of all the lawyers involved; and
 - (3) the total fee is reasonable.

Rule 1.6 CONFIDENTIALITY OF INFORMATION

- (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
- (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
- (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
 - (2) 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.

Rule 1.7 CONFLICT OF INTEREST: GENERAL RULE

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Rule 1.8 CONFLICT OF INTEREST; PROHIBITED TRANSACTIONS

- (a) A lawyer shall not enter into a business transaction with a client and knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
 - (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
 - (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
 - (3) the client consents in writing thereto.
- (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.
- (c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.
- (d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part of information relating to the representation.
- (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
 - (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
 - (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.
- (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
 - (1) the client consents after consultation;
 - (2) there is no interference with the lawyer's independence of professional judgement or with the client-lawyer relationship; and
 - (3) information relating to representation of a client is protected as required by Rule 1.6.
- (g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.
- (h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.
- (i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer exempt upon consent by the client after consultation regarding the relationship.

- (j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
 - (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and
 - (2) contract with a client for a reasonable contingent fee in a civil case.

Rule 1.9 CONFLICT OF INTEREST: FORMER CLIENT

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.
- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
 - (1) whose interests are materially adverse to that person; and
 - (2) about whom the lawyer had acquired information protected by Rule 1.6 and 1.9(c) that is material to the matter;unless the former client consents after consultation.
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
 - (1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
 - (2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

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, 1.8(c), 1.9, or 2.2.
- (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 firm, 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 and 1.9(c) 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.

Rule 1.11 SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

- (a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
 - (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.
- (b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

- (c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:
 - (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or
 - (2) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).
- (d) As used in this Rule, the term "matter" includes:
 - (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and
 - (2) any other matter covered by the conflict of interest rules of the appropriate government agency.
- (e) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

Rule 1.15 SAFEKEEPING PROPERTY

- (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.
- (b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third persons entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
- (c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

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, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.7 LAWYER AS WITNESS

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
 - (1) the testimony relates to an uncontested issue;
 - (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) disqualification of the lawyer would work substantial hardship on the client.
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Rule 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material act to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

UNITED STATES CODE

11 USC § 101

§ 101. Definitions.

In this title—

- (14) “disinterested person” means person that—
 - (A) is not a creditor, an equity security holder, or an insider;
 - (B) is not and was not an investment banker for any outstanding security of the debtor;
 - (C) has not been, within three years before the date of the filing of the petition, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the debtor;
 - (D) is not and was not, within two years before the date of the filing of the petition, a director, officer, or employee of the debtor or of an investment banker specified in subparagraph (B) or (C) of this paragraph; and
 - (E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with or interest in, the debtor or an investment banker specified in subparagraph (B) or (C) of this paragraph, or for any other reason;

11 USC § 327

§ 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 USC § 328

§ 328. Limitation on compensation of professional persons.

- (c) Except as provided in section 327(c), 327(e), or 1107(b) of this title, the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 or 1103 of this title if, at any time during such professional person's employment under section 327 or 1103 of this title, such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.

11 USC § 329

§ 329. Debtor's transactions with attorneys.

- (a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid. If such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

11 USC § 1103

§ 1103. Powers and duties of committees.

- (a) At a scheduled meeting of a committee appointed under section 1102 of this title, at which a majority of the members of such committee are present, and with the court's approval, such committee may select and authorize the employment by such committee of one or more attorneys, accountants, or other agents, to represent or perform services for such committee.
- (b) An attorney or accountant employed to represent a committee appointed under section 1102 of this title may not, while employed by such committee, represent any other entity having an adverse interest in connection with the case. Representation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an adverse interest.
- (c) A committee appointed under section 1102 of this title may—
 - (1) consult with the trustee or debtor in possession concerning the administration of the case;
 - (2) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;
 - (3) participate in the formulation of a plan, advise those represented by such committee of such committee's determinations as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;
 - (4) request the appointment of a trustee or examiner under section 1104 of this title; and
 - (5) perform such other services as are in the interest of those represented.
- (d) As soon as practicable after the appointment of a committee under section 1102 of this title, the trustee shall meet with such committee to transact such business as may be necessary and proper.

RULE 2014. Employment of Professional Persons.

- (a) **Application for and Order of Employment.** An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.
- (b) **Services Rendered by Member or Associate of Firm of Attorneys or Accountants.** If, under the Code and this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, or if a named attorney or accountant is employed, any partner, member, or regular associate of the partnership, corporation or individual may act as attorney or accountant so employed, without further order of the court.

Rule 2016. Compensation for Services Rendered and Reimbursement of Expenses.

- (a) **Application for Compensation or Reimbursement.** An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file with the court an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity. Unless the case is a chapter 9 municipality case, the applicant shall transmit to the United States trustee a copy of the application.
- (b) **Disclosure of Compensation Paid or Promised to Attorney for Debtor.** Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 15 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee with 15 days after any payment or agreement not previously disclosed.

Appendix C

Comments Indicating Statutory Standards for Resolving Bankruptcy-Related Issues of Attorney Conduct Were Not Adequate

- The statutory attorney conduct standards for conflicts of interest are not adequate because:
 - (1) The statutory standards are not articulated in a specific or detailed enough manner to provide the necessary guidance to attorneys, usually causing more problems than they solve (especially the disinterestedness standard under § 327(a)). The vagueness of § 327(a) requires the court to make difficult decisions concerning whether conflicts are such as to disqualify a professional. (Summary of comments from 7 bankruptcy judges.)
 - (2) The statutory standards are too strict (specifically the definition of disinterested persons under 11 U.S.C. § 327(a)) and do not provide enough flexibility or allow for judicial discretion in their application. (Summary of comments from 6 bankruptcy judges.)
 - (3) The statutory standards should be clarified as to related corporate debtors. Representation of multiple, related entities ordinarily should be allowed if all were operated as an integrated group with one decision-maker. There needs to be a better definition of the conflict rule pertaining to the debtor and the principal of a debtor entity represented by the same attorney. (Summary of comments from 3 bankruptcy judges.)
 - (4) The multi-party nature of bankruptcy, and the fact that bankruptcy cases often involve a multitude of separate legal transactions unlike a single civil action or criminal case, often makes it difficult to tell when a conflict or potential conflict is likely because the potential for conflict or overreaching is constantly shifting and is often obscure or obscured. Also, it is unrealistic to require disclosure of all conflicts to the parties-in-interest because there can be so many of them. (Summary of comments from 2 bankruptcy judges.)
 - (5) The disinterestedness concept in the Code does not work in reality because it is incomplete. For example, the remoteness of conflicts that may exist across a large firm are not addressed, nor are problems arising in closely held corporations. Further, it is not clear what duty an attorney for a chapter 11 debtor-in-possession has when he or she is acting in her own interest other than the interest of the bankruptcy estate.
 - (6) The statutory standards should be clearer on issues of multiple representation: that is, an attorney representing two related debtors; an attorney representing a debtor corporation or a debtor subsidiary corporation; or debtor partner and debtor partnership.
 - (7) The statutory standards should be clearer on issues arising from representation of a pre-bankruptcy debtor and a debtor-in-possession.
- The statutory standards do not cover a broad enough range of attorney conduct issues, forcing judges to turn to other standards to supplement them such as the ABA Model Rules and state supreme court rules. The statutory standards mostly address conflict

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issues affecting only attorneys paid by the estate (trustees' and creditors' committees' attorneys and chapters 7 and 13 debtors' attorneys), leaving many other issues such as those listed in this questionnaire unaddressed. The statutory standards are not specific enough in most situations because they do not address all aspects of attorney conduct toward the court, clients, or other parties in interest. For example, the statutory standards fail to set forth adequate criteria for the limitation of the scope of representation of chapters 7 and 13 debtors. (Summary of comments from 16 bankruptcy judges).

- The statutory standards govern the attorneys' conduct but provide little guidance for dealing with that conduct—such as whether bankruptcy judges have authority to suspend attorneys from practicing before a bankruptcy court. Sua sponte contempt powers should be expanded because referral of attorney misconduct to the U.S. trustee, U.S. Attorney, or state bar association often results in no action and no report back to the court. Also, there is a wide divergence of enforcement among bankruptcy districts, causing attorneys to expect lax enforcement in certain districts. The “honor system” does not work. There needs to be a policing and enforcement mechanism other than denial of fees once a conflict becomes known. Sanctions and contempt should be clearly authorized. (Summary of comments from 7 bankruptcy judges.)
- The statutory disclosure standards are too lax and used perfunctorily by too many major firms. They can be interpreted by the lawyer required to make the disclosure in ways that lead to opposite conclusions about whether disqualification is required. (Summary of comments reported by 2 bankruptcy judges.)
- The Code and Rules are not adequate because they do not cover compensating an attorney who submits an employment application in good faith, immediately performs services, and is then disqualified in a “close call.” Should the attorney be able to recover for services that benefit the estate during this “gap” period?
- The Code and Rules are not adequate because they fail to recognize the “realities” connected with attorney representation of consumer debtors. These clients simply cannot pay a lawyer a fee adequate to allow for competent representation.
- Section 1927 of Title 28 should be amended to permit clear use by bankruptcy and magistrate judges.
- The statutory standards should be applicable to all professionals in a case, including those representing parties other than the trustee/debtor in possession.

Appendix D

Comments Indicating Non-Statutory Standards for Resolving Bankruptcy-Related Issues of Attorney Conduct Were Not Adequate

- The non-statutory standards that are employed (e.g., state ethics codes and model rules) are not adequate because they are not geared to issues unique to bankruptcy such as the fiduciary duties bankruptcy imposes, the disclosures bankruptcy mandates and issues of dual representation. (Summary of responses from 3 bankruptcy judges).
- Unlike the state courts, bankruptcy courts do not conduct investigations and must rely on the state bar grievance committee to take action on bankruptcy complaints and their decisions are far too lax. (Summary of responses from 3 bankruptcy judges).
- The non-statutory standards are not readily available to or known by practitioners (since they are located in the local district court rules.) Education as to the existence and content of the non-statutory rules is needed. (Summary of responses from 2 bankruptcy judges).
- The non-statutory standards are not applied uniformly and they lack clarity.
- The bankruptcy court in each district should have authority to conduct formal disciplinary proceedings for attorney misconduct that occurs in the bankruptcy court, instead of the current situation where the district court does so which delays the process. In addition, the district court may have insufficient understanding of issues of bankruptcy procedure to make correct judgements. Bankruptcy courts should be permitted to disbar or suspend attorneys that practice in bankruptcy court.
- The state’s code of professional conduct is inadequate because it is applied in one-on-one situations despite the fact that bankruptcy requires consideration of multiple parties and relative interests that are not comprehensively addressed in the non-statutory standards.
- The non-statutory standards dealing with conflicts are unclear when applied to prior representation in an unrelated matter of creditors who are peripheral to the case. The standards do not adequately define a “potential” conflict that is non-disqualifying, or how and when disclosure should be given when the situation has “ripened” to an actual conflict. And non-statutory conflicts standards do not identify what remedy is appropriate when a major chapter 11 is at the plan confirmation stage and counsel for the debtor-in-possession develops a conflict.
- The non-statutory standards are inadequate because they are too cumbersome to prevent an attorney with multiple infractions from continuing to represent entities in bankruptcy court. An individual judge should be able to issue an order preventing ongoing violations and representation, subject to immediate review.

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- The non-statutory standards are inadequate because: (1) an attorney working for the bankruptcy estate has fiduciary duties to the estate that an attorney outside of bankruptcy does not have; (2) the California Code of Professional Responsibility and the ABA ethics rules on potential conflict and actual conflict have never worked well either in or outside of the bankruptcy context.

Appendix E

Comments Reporting Problematic Inconsistencies between Statutory and Non-Statutory Attorney Conduct Standards

- The inconsistencies between the disinterestedness standard of 11 U.S.C. § 327(a) and the provisions for multiple representations in the ABA Model Rule and Code are frequently encountered and problematic because:
 - (1) § 327 broadly disqualifies without regard to the degree of disinterestedness (i.e., small unpaid fee) and does not permit knowing, intelligent waivers of conflicts as do state rules (such as DR 5-105) under which it is possible to represent two parties that have a potential or actual conflict as long as an appropriate client waiver is obtained.
 - (2) The disinterestedness requirement works a hardship on small business debtors and is often impractical.
 - (3) A professional person owed pre-petition debt automatically fails the disinterestedness test under the statute but not under any application of attorney conduct rules.
 - (4) Multiple-member law firms and accounting firms represent parties who are adverse in some cases and justify this by describing the matters as not “related” when in reality these firms are friendly with both sides.
 - (5) An attorney should not be disqualified from representing a debtor simply because the attorney is owed fees for pre-petition representation.
(Summary of comments from 10 bankruptcy judges.)
- The inconsistencies between statutory and non-statutory attorney conduct standards are problematic because attorneys look to state law which is loosely enforced. The conflict of interest standards under the ABA and state rules of conduct are sometimes not very useful when attempting to apply them within the bankruptcy context because the conflicts arising in bankruptcy cases can be more numerous and complex.
(Summary of comments from 3 bankruptcy judges.)
- The inconsistencies are problematic because trustee employment of the trustee and the trustee’s law firm is statutorily permissible but presents conduct problems.
(Summary of comments from 2 bankruptcy judges.)
- The inconsistencies are problematic because the ABA model ethics principles do not contemplate that the client (debtor) is a fiduciary toward parties with adverse interests (creditors), and the statutory rules are ambiguous or often too vague. (Summary of comments from 2 bankruptcy judges.)
- The inconsistencies are problematic because of the difficulties created by the blur between situations presenting an “actual” conflict versus a non-disqualifying “potential” conflict. Notwithstanding the Code, I find either an actual, or a perception of, a conflict of interest when a trustee also practices in cases under the same chapter for other clients.

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- The inconsistencies regarding confidentiality can present difficulties because the trustee can waive the attorney client privilege for corporate debtors while it is less clear whether the corporate debtor or an individual debtor can do so.

Appendix F

Comments Reporting Bankruptcy-Specific Attorney Conduct Issues Not Covered by Rules

- An issue that arises only in bankruptcy courts and is not adequately covered by existing attorney conduct standards is conflict of interest issues:
 - (1) The conflict of interest standards under the ABA and state rules of conduct are sometimes not very useful when attempting to apply them within the bankruptcy context because the conflicts arising in bankruptcy cases can be more numerous and complex (for example, potential conflicts due to the vast number of creditors affected.).
 - (2) It is unrealistic to require disclosure of all connections to the parties in interest because there can be so many of them.
 - (3) The Bankruptcy Code and Rules do not provide enough flexibility or allow for judicial discretion in their application. Strict enforcement and application of the Bankruptcy Code and Rules is often impracticable.
 - (4) The disinterestedness requirement of 11 U.S.C. § 327(a) needs to be defined more precisely and not applied so strictly, especially in a smaller community.
 - (5) The conflict issue that results from an attorney representing a client pre-bankruptcy and then seeking to represent the debtor or debtor-in-possession is not adequately addressed.
 - (6) Conflict issues relating to fee disclosures are not adequately covered by existing standards.(Summary of responses from 16 bankruptcy judges.)

- An issue that is not covered by our attorney conduct standards is the absence of guidance on whether the bankruptcy judge has the power to discipline attorneys by, for example, barring them from practicing before the bankruptcy court. I often feel frustrated by the lack of mechanisms available to me to protect the debtor from his or her attorney's incompetence in bankruptcy court representation. I have had many cases where clients were ill-advised to file or to reaffirm debts or where lawyers ignored deadlines, or did not communicate with clients. Bankruptcy Rule 2090 should specifically provide that bankruptcy judges have the authority to impose sanctions against lawyers and parties. (Summary of responses from 5 bankruptcy judges.)

- A bankruptcy case triggers considerations of many competing and countervailing interests unlike traditional two-party lawsuits. For example, creditors' committees may employ professionals who are confronted with special provisions under 11 U.S.C. § 1103(b) when multidisciplinary issues are involved.

- Other areas/issues unique to bankruptcy courts and not adequately covered by existing standards include:
 - (1) conduct violating or allegedly violating disclosure requirements of 11 U.S.C. § 329(a) or Bankruptcy Rules 2014 or 2016.
 - (2) whether one counsel can represent affiliated corporations in chapter 11s.

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- (3) the tension between an attorney’s need for advance payment in bankruptcy and the prohibitions against an attorney receiving payment in advance for post-petition work.
 - (4) an attorney’s refusal to represent a debtor client where the client is sued by a creditor to prevent dischargeability of particular debts.
 - (5) A Chapter 11 attorney for a debtor-in-possession has an inherent conflict between representing the reorganization needs of the debtor and requiring the debtor-in-possession to be a fiduciary.
 - (6) Trustees who employ their own firms as counsel have a problem in determining what is “trustee work” and included in their statutory fees and what they can be separately compensated for.
 - (7) Attorneys who own paralegal mill operations.
 - (8) Attorneys who seeks to “limit” responsibilities to a consumer debtor client, i.e., preparing the schedules and statement of affairs but not appearing as attorney of record.
 - (9) Conflict in representing a corporation and its principals, especially in closely-held corporations. The distinction is problematic because the owner provides the authority for the attorney who represents the debtor-in-possession.
 - (10) Bankruptcy attorneys who abuse the system by filing multiple bankruptcies for debtors that are not warranted under the law or facts.
 - (11) Attorneys who do a poor job of advising debtors and seeing that schedules and other documents are accurate.
- Many attorneys for debtors do not understand or recognize their fiduciary duties. The Bankruptcy Rules should clarify that a trustee or debtor in possession is a fiduciary to the estate but the lawyer for the estate is not the fiduciary. The lawyer is an officer of the court and has ethical duties to the client, who is the fiduciary. Recognition of an attorney’s duty of candor to the tribunal often places an attorney between a rock and a hard place. Another fiduciary relationship not understood is the fiduciary relationship of the attorney in Chapter 11 to the creditors. (Summary of responses from 11 bankruptcy judges.)
 - Individual Chapter 7 debtors may be represented by counsel when they file a petition. However, that counsel “frequently” has not been retained to file motions to lift the stay, to make objections to claims or exemptions or for adversary proceedings involving dischargeability. Unless at least mail communication is made directly to the debtor by the moving party, the debtor may not learn of these matters timely. Thus, communication needs to be tailored so they go to both attorneys and the debtor until represented status is clarified.
 - Allowing Chapters 7 and 13 trustees to represent debtors in bankruptcy court encourages the “you-do-a-favor for me today and I’ll do the same for you tomorrow” syndrome. “Trustee shopping” is common. More trustees are needed. Further, trustees should be prohibited from retaining themselves (or their law firms) as counsel to trustee. Double billing and duplicative services are encouraged by this risky practice.

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- Requests for withdrawal of counsel by counsel for debtors, particularly when representing individuals unable to retain new counsel due to financial constraints. With insolvent debtors, by definition and in fact, they do not have the resources to pay for adversary proceedings in which they may have a meritorious defense. (Summary of responses from 2 bankruptcy judges.)
- It is essential that multiple representations be permitted for cost reasons even where there are potential conflicts.
- Some conflicts that cannot be waived in bankruptcy courts, but they may be waivable in non-bankruptcy matters.
- Our district recognizes “limited appearances” for debtors’ attorneys in Chapter 7’s and 13’s. This creates a problem because other attorneys in these cases do not readily know when they can communicate directly with parties.
- There needs to be clarity on issues arising from representation of pre-bankruptcy debtor and debtor-in-possession. Also, there needs to be clarity on issues arising from representation by the same debtor’s counsel of related debtors (parent and subsidiaries, etc.) and when that representation may become a conflict. (Summary of responses from 5 bankruptcy judges.)
- Fee splitting is allowed in some states, but strictly prohibited in the bankruptcy context. Practitioners must be educated and/or the standard be made uniform.

Appendix G

Comments on Inadequate Disclosure Requirements of Bankruptcy Rule 2014

- Bankruptcy Rule 2014 requires more detail in consumer cases to disclose fees paid in prior cases where debtors are multiple filers. This is especially necessary in chapter 13 cases. The multiple filings are frequently driven by attorney’s fees. Also, Rule 2014 does not apply to Chapter 13 cases, but it should.
- Bankruptcy Rule 2014 should include a much clearer requirement to show prior experience in representing debtors in small chapter 11 cases, and to show the level of success in confirming plans or negotiating structured dismissals within the prior 3 to 5 years.
- Bankruptcy Rule 2014 should require an affidavit by the person who made (or should have made) the conflicts check as to exactly what effort was made and require disclosure of every representation within a prior period (perhaps 2 years before the bankruptcy filing date), and the nature, beginning and end dates of every entity that is or becomes a creditor or equity holder in the debtor-in-possession. The Rule should require regular amendments as “new” conflicts arise. Model Rule 1.7(a)(1) should be totally abrogated in bankruptcy in favor of full disclosure.
- Bankruptcy Rule 2014 should provide more specific examples of entities falling into the category of “parties in interest” so as to allow less wiggle room.
- Bankruptcy Rule 2014’s provision “all of the person’s connections” is arguably vague. I would suggest some specific examples that would not limit the scope of this language but rather would demonstrate the expansive intent behind this limitation to representation. It would help eliminate the many excuses we get in this area.
- Bankruptcy Rule 2014 could provide for more strict enforcement in chapter 11’s. (Summary of responses of 2 bankruptcy judges.)
- Bankruptcy Rule 2014 should require that the fee agreement be attached to the application.
- Bankruptcy Rule 2014 should specifically require details of client representations by all members of a firm, with a requirement of action of disqualification by the court if not done or if details indicate a conflict of interest.
- Bankruptcy Rule 2014 should include a provision that the attorney disclose the source of funds for a retainer and future payment.
- We have supplemented the disclosure requirements of Rule 2014 with a local bankruptcy court rule.

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- Often the question of inadequate disclosure results from the applicant's failure to fully consider all the possible ramifications or subtleties associated with the requirements of being "disinterested" and/or holding no "materially adverse interest." In this district, we have tried to minimize this problem through a local rule which supplements the disclosure requirements of Rule 2014.
- Bankruptcy Rule 2014 or local rules should require more than just a conclusory statement. There should be some requirement to describe the steps or procedures undertaken to determine whether a conflict may exist.
- Bankruptcy Rule 2014 should require disclosure of all payments made by the debtor to the attorney within one year prior to filing, as well as a description of any retainer paid.
- We have addressed the inadequacies by specific disclosure required by my standards, my court's local rules and U.S. trustee guidelines.
- Three bankruptcy judges indicated that the problems they've experienced with Rule 2014 stem from attorneys' failure to follow the provisions of the Rule.

Appendix H

Comments in Support of (and Opposed to) the Same Uniform Standards for Bankruptcy and District Courts

The standards should be the same for bankruptcy courts as those applied to district courts:

- Because uniformity of all federal courts with respect to conduct is desirable to ensure efficient operation of both courts. Bankruptcy courts, by statute, are units of the district court, and jurisdiction for bankruptcy courts is referred from district courts. See 28 U.S.C. § 1334. Bankruptcy court judges constitute units of the district court. See 28 U.S.C. § 151. Since the district court is where the attorney is authorized to practice (i.e., counsel are members of the bar of the district court, not the bankruptcy court), attorneys should not have to worry about or learn two sets of standards. Attorneys who practice mostly in the district court should not be trapped when making an appearance in the bankruptcy court, nor should a non-specialist be deterred from representing clients in bankruptcy cases by the creation of specialized rules for bankruptcy. The bankruptcy court has no separate admission and should not have. Public expectations of conduct should not depend on the specialty of the practitioner. We should hold attorneys to the highest standards of competence and ethical conduct no matter what court they are in. The federal courts should have a simple set of unified standards for all units, making it easily and readily determinable what expectations are, regardless of what federal court or where a practitioner is. The more layers of rules which attorneys must follow, the greater the noncompliance due to confusion and oversight. While there are some things peculiar to bankruptcy such as Rule 2014, creditor committee employment, limits on options to waive problems, to name a few, such differences can be handled by footnote references in the uniform rules. (Summary of comments reported by 50 bankruptcy judges.)
- Provided that the district court standards are as stringent as the bankruptcy court standards. I would not like to see relaxation of standards, especially in the conflicts or disclosure areas. In addition, the “related entity” disputes, which are more common in bankruptcy, must be recognized. My perception is the district courts do not enforce or police this conflicts area as strictly as bankruptcy courts do. (Summary of comments reported by 2 bankruptcy judges.)
- But some bankruptcy specific supplementation would likely be necessary/desirable such as acknowledgement of bankruptcy court standards, including disclosures (under Bankruptcy Rules 2014 and 2016), the role of attorneys for debtors, and disinterestedness. (Summary of comments reported by 7 bankruptcy judges.)
- Although the standards of disclosure may be different in a bankruptcy context, there is no reason for the standards of conduct to be different.

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- Because state standards presently apply in both bankruptcy and district courts and are adequate.
- Although uniform standards should be the same, how they are applied should differ because this is where bankruptcy practitioners could use some guidance.

The standards should *not* be the same for bankruptcy courts as those applied to district courts:

- Because the usual two-party civil actions do not involve as many “parties” (as the thousands of creditors that may be involved in a bankruptcy action), disclosure obligations, and fiduciary obligations. The multitude of interests in bankruptcy produce different issues, especially conflict of interest issues dealing with disinterestedness, which are more numerous and complex in bankruptcy cases. For example, issues dealing with past representation of a creditor or other party interest and whether that is a conflict of interest or appearance of impropriety are unique to bankruptcy courts. The multitude of separate legal “transactions” that may be involved in a bankruptcy case cause the potential for conflict, overreaching, etc., to be constantly shifting and often obscure or obscured. Because parties in interest enter and exit bankruptcy proceedings during a case, the bankruptcy standards should recognize related hardships that may arise. Waiver is not a practical solution when all creditors are potentially affected. It is essential that multiple representations be permitted for cost reasons even where there are potential conflicts. Moreover, district judges are usually not aware of what is required of lawyers in no-asset chapter 7, chapter 13, or small business chapter 11 cases. (Summary of comments reported by 38 bankruptcy judges.)
- Because the fiduciary obligations owed by trustee and debtor-in-possession counsel to all parties in consumer cases are unique to bankruptcy and a uniform district court standard may confuse the bankruptcy standard. Model Rule 1.8 is problematic in bankruptcy where lawyers take security interests, mortgage judgements, etc. to secure payment of fees. Attorney fee issues must be analyzed in terms of all interested parties (creditors/debtor/trustee) rather than just plaintiff and defendant as in the district court. (Summary of comments reported by 12 bankruptcy judges.)
- Because the sheer volume of cases in the bankruptcy courts suggests that some conduct standards should be relaxed; whereas the fiduciary responsibilities may require more stringent standards with a broader scope. Higher conflicts standards in bankruptcy help ensure disclosure of debtor’s situation which is critical to the course of the case and fairness to all parties. On the other hand, the number of parties involved in an insolvency case are enormous while in district court the number of parties are limited; to prevent an attorney from representing a party in the bankruptcy court because of what might be a conflict in the district court would be disruptive and serve no purpose. (Summary of comments reported by 8 bankruptcy judges.)

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- Because the Bankruptcy Code, Rules and case law are more stringent ethically than general federal statutes or case law due to the abuses in the bankruptcy system when the Chandler Act (former bankruptcy act) was in effect. The district courts generally follow the ethical rules of the state supreme courts in the district in which the court is located. Given this historical perspective, it is unlikely that the standards will be uniform between the bankruptcy and district courts.
- Because the bankruptcy code and rules themselves, such as Bankruptcy Rule 2014 or 2016, make adoption of uniform rules impractical. (Summary of responses reported by 3 bankruptcy judges.)
- Because in bankruptcy the attorney represents the debtor and, if the debtor is a corporation, the principal needs separate counsel because sometimes the interest of the debtor and the principal will not be identical. It may be difficult to determine which communications are confidential in discussions between the principal and debtor.
- In bankruptcy courts there should be separate admission to practice, a separate measure of competence, and a sanction procedure.

Appendix I

Comments Explaining How a National Uniform Standard for Bankruptcy Courts on Selected Attorney Conduct Issues Should Differ From That Applied to District Courts

1. **Confidentiality of Information.** The uniform rule on confidentiality of information for bankruptcy courts should:
 - permit broader disclosure (i.e., determine that fewer disclosures are confidential) in order to deal with the issue of a debtor-in-possession as fiduciary and the resulting fiduciary obligations imposed on the attorney in bankruptcy cases; as well as required disclosures in employment applications or in fee applications. For example, a bankruptcy attorney must disclose connections with other parties and the nature of the work performed. (Summary of comments reported by 9 bankruptcy judges.)
 - include a provision allowing a creditors' committee to, at times, share information it has obtained. There are too many "parties" in bankruptcy cases to permit the same rules on confidentiality as in civil cases in the district courts.
 - contain a much clearer requirement to show prior experiences in representing debtors in small chapter 11 cases and the level of success in confirming plans or negotiating structured dismissals within the prior three to five years.
 - account for the fact that bankruptcy cases deal with evolving factual matters as opposed to district courts that deal with past factual matters and thus adverse interests may arise post-petition in bankruptcy cases.
 - be expanded to permit disclosure necessary to prevent perjury/false statements in court documents, including bankruptcy schedules and statements.
 - permit a debtor's attorney to report to the bankruptcy court when he has reason to believe his client is using the protection or umbrella of the bankruptcy court to further an illegal or improper course of conduct. Thus, disclosure of confidential information should be permitted not only to prevent death or serious bodily harm, but also to disclose crime or fraud threatening substantial financial loss.
 - more narrowly draw the ability to reveal confidential information in the context of a lawyer/client dispute.
 - allow for release of information to the trustee when a case is converted to chapter 7.

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2. **General Rule on Conflicts of Interest.** The uniform rule on general conflicts of interest for bankruptcy courts should:
- be different because of the large number of interested parties with shifting interests involved in some bankruptcy cases and the increased likelihood of a conflict arising (client’s consent feature may not work well) and because of the fiduciary obligations owed by certain counsel in bankruptcy cases (debtor’s counsel) to all parties (e.g., to maximize value for creditors). (Summary of comments reported by 14 bankruptcy judges.)
 - provide bankruptcy judges with discretion in resolving conflict issues because of the difference in the size and complexity of bankruptcy cases.
 - require attorneys appointed by the court to disclose all potential conflicts of interest, and possibly require attorneys to seek court approval when representing the debtor or estate (even if the client consents to the conflict). (Summary of comments reported by 4 bankruptcy judges.)
 - provide a higher standard in bankruptcy cases because bankruptcy is an in rem procedure with no client to give consent in many cases. (Summary of comments reported by 2 bankruptcy judges.)
 - be more restrictive than the national uniform standard in district courts because bankruptcy conflicts must receive different scrutiny than general litigation or representation. (Summary of comments reported by 3 bankruptcy judges.)
 - not disqualify professionals with pre-petition debts.
 - permit multiple representation with the court’s approval. (Summary of comments reported by 2 bankruptcy judges.)
 - be different from the rule for district courts because the concept of disinterestedness does not coincide with the model rules for general conflicts of interest. For example, an attorney owed money by the client can’t represent the client as a debtor even if the client consents. Under the Bankruptcy Code an attorney’s “reasonable belief” as to disinterestedness is not enough. (Summary of comments reported by 5 bankruptcy judges.)
 - be broadened in bankruptcy to require disqualification whenever a lawyer holds or obtains a judgment, lien, etc., against the represented debtor-in-possession, trustee or any member of a committee. Model Rule 1.7(a)(1) should be abrogated in bankruptcy.
 - include Title 11’s additional requirements of disinterestedness and rule requirements of complete disclosure.

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- be based on 11 U.S.C. § 327 and provide for circumstances articulated in 11 U.S.C. §327(d) because § 327 is much stricter than the ABA rules.
 - prohibit waivers in bankruptcy court.
 - require consent in writing, disclosures in writing, and consultation with a third party is urged.
 - take into consideration representation at initial stages of bankruptcy (i.e., § 341 meetings) and should have flexibility concerning potential conflicts.
3. **Conflict of Interest Concerning Prohibited Transactions.** The uniform rule on conflicts of interest concerning prohibited transactions for bankruptcy courts should:
- take into account that certain counsel in bankruptcy (attorneys for debtors-in-possession), creditors and other official committees, and trustees owe fiduciary obligations to all parties and require heightened scrutiny generally not applicable in district court. In bankruptcy, defendant conflicts of interest arise in more ways than the model rule suggests (parties being impacted in the bankruptcy context is far greater than the traditional two party dispute concept in the district court). Bankruptcy matters have many parties, some of whom have conflicting interests and some of whom have coincident interests. (Summary of comments reported by 7 bankruptcy judges.)
 - be more restrictive than the national uniform standard for conflicts of interest concerning prohibited transactions in district courts; the definition of what may be prohibited must be broader in bankruptcy cases. For example, ABA Model Rule 1.8(f) allows third party (non-client) compensation upon a client’s informed consent. In bankruptcy, there is an additional requirement of disclosure. (Summary of comments reported by 6 bankruptcy judges.)
 - prohibit a debtor’s attorney from having any business relationship with his client, including an absolute prohibition against buying property of estates. (Summary of comments reported by 2 bankruptcy judges.)
 - address issues problematic in bankruptcy such as where lawyers take security interests, mortgage judgments, etc., to secure the payment of fees.
 - be based on 11 U.S.C. § 327 which is much stricter than the ABA rules. The ABA standard as adapted by the particular state or the state’s ethics rules should be used to support the analysis.

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4. **Conflict of Interest Concerning Former Client.** The uniform rule on conflicts of interest concerning a former client for bankruptcy courts should:
- provide bankruptcy judges with discretion to resolve conflict issues because of the difference in size and complexity of bankruptcy cases.
 - be made consistent with § 327(c) and (e) of the Bankruptcy Code, permitting an attorney to represent the debtor even though the attorney formerly represented a creditor of the debtor.
 - require an attorney to satisfy the bankruptcy court that the attorney is disinterested for bankruptcy code purposes.
 - require more disclosure in the area of potential conflicts of interest and ongoing disclosure to deal with firm mergers, if the attorney represents the debtor or estate, etc., where conflicts develop during a case. (Summary of comments reported by 4 bankruptcy judges.)
 - address the fact that many more parties are impacted in the bankruptcy context. Informed consent by the client alone is insufficient in the bankruptcy context. (Summary of comments reported by 3 bankruptcy judges.)
 - include Title 11's additional requirements of disinterestedness and rule requirements of complete disclosure. Client consent (ABA Model Rule 1.9(a)(b)) is not alone sufficient as to estate professionals in bankruptcy.
 - be based on 11 U.S.C. §327 which is much stricter than the ABA Rules. The ABA standard as adopted by the particular state or its ethics rules should be used to support the analysis.
 - address the bankruptcy specific situation that sometimes occurs in large creditor cases where the petitioning creditors attorney involuntarily becomes the trustee's attorney, and the creditor's attorney becomes special counsel to the trustee.
 - set out specific guidelines for debtor representation (i.e., principal v. debtor and conversion).
5. **Rule on Imputed Disqualification.** The uniform rule on imputed disqualification for bankruptcy courts should:
- provide bankruptcy judges with discretion in resolving conflict issues because of the difference in size and complexity of bankruptcy cases.

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- address the provisions of the Bankruptcy Code (§327(c) and (e)) that permit an attorney to represent the debtor even though the attorney formerly represented a creditor of the debtor.
- address the fact that attorneys in bankruptcy have fiduciary obligations to many parties, and that there are many mini-transactions particularly dealing with secured lenders. (Summary of comments reported by 2 bankruptcy judges.)
- adequately address lateral moves between firms and the transactional representation of business clients. Larger firms or boutique firms rarely represent business clients on a broad range of matters. A corporation may use 10 or more firms in the same state for intellectual property, environmental, securities, commercial litigation, ERISA, corporate finance, patent prosecution, and bankruptcy matters. This “reality” is not tracked by the conflicts rules, which presuppose a general business representation of a business entity by a single firm.
- require a firm to satisfy the bankruptcy court that it is disinterested for bankruptcy code purposes. (Summary of comments reported by 2 bankruptcy judges.)
- require on-going disclosure to deal with firm mergers, etc., where conflicts develop during a case.
- recognize and impose appropriate safeguard provisions against bankruptcy courts allowance of a “Chinese wall” for firms that may do some work for one of the debtor’s creditors as well as the debtor. (Summary of comments reported by 2 bankruptcy judges.)
- not automatically disqualify an attorney from representing a client just because a lawyer is owed fees.
- address the problems bankruptcy courts have with ABA Rule 1.10(c) regarding waiver of conflict.
- be based on 11 U.S.C. § 327 which is much stricter than the ABA Rules. The ABA standard as adopted by the particular state or its ethics rules should be used to support the analysis.
- provide for more disclosure and stricter disclosure rules.
- recognize that bankruptcy courts have to take into account the interests of all parties rather than just the client. Informed consent by the client alone is insufficient. Waiver of conflict by the affected client does not resolve all possible concerns by the parties in interest.

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6. **Rule on Candor Towards the Tribunal.** The uniform rule on candor towards the tribunal for bankruptcy courts should:
 - require candor toward a tribunal and affirmative disclosure of any fraud being perpetrated on the tribunal even over a client confidence (and not merely withdraw from the case).
 - not be based on ABA Rule 3.3(a)(3) because it puts lawyers in conflict with their duty to their own client.
 - address a lawyer’s further responsibilities when representing debtors.
 - define whether debtors’ counsel has a duty to disclose information to creditors if that information is necessary to address preferential transfer, hidden agendas, etc.

7. **Rule on Lawyer As Witness.** The uniform rule on the lawyer as a witness for bankruptcy courts should:
 - provide for the situation in bankruptcy courts where matters in the main bankruptcy case require an attorney to testify as a witness which differs from the situation where an attorney would be a witness in litigation in the district court. (Summary of comments reported by 2 bankruptcy judges.)
 - provide a clear rule prohibiting attorney submission when bankruptcy courts use Federal Rule of Civil Procedure 43 and Federal Rule of Civil Procedure 56 declarations to decide matters.
 - provide leeway for the trustee/attorney/witness. (Summary of comments reported by 2 bankruptcy judges.)
 - address the situation not addressed by ABA Model Rule 3.7 where the attorney for a debtor may become a post-petition transaction witness. If the attorney is a sole practitioner or in a small firm, it is not practical to withdraw especially in small consumer cases.

8. **Rule on Truthfulness in Statements to Others.** The uniform rule on truthfulness in statements to others for bankruptcy courts should:
 - address parameters of settlement offers in the bankruptcy context.
 - address the inadequacies of ABA Model Rule 4.1(b) in determining what conduct is “fraudulent” in bankruptcy cases. Confidentiality should be waived if a 4.1(b) circumstance arises in bankruptcy.

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- be broadened because ABA Model Rule 1.6 is not broad enough in bankruptcy cases.

9. Rule on Communications with Person Represented by Counsel. The uniform rule on communications with a person represented by counsel for bankruptcy courts should:

- allow for situations where an attorney who is a trustee and who also acts as counsel for the trustee may (when acting as the trustee) communicate with a debtor who is represented by counsel.
- be flexible enough in consumer cases to allow communication where the debtor's attorney signs on for a limited fee and a limited purpose (Summary of comments reported by 2 bankruptcy judges.)
- include provisions of Bankruptcy Rule 7004 requiring service of pleadings on the consumer debtor as well as debtor's counsel to assure consumer debtor is apprised of matters in the case.

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Comments on Whether the National Uniform Standard for Bankruptcy and District Courts Should Be Based on the Corresponding ABA Model Rule for the Specified Type of Conduct or on a Different Standard

1. **Confidentiality of Information.** The national uniform standard on confidentiality of information applied to both bankruptcy and district courts should be based on:
 - the corresponding ABA Model Rule for that type of conduct. (Summary of comments reported by 79 bankruptcy judges.)
 - a different standard—the corresponding ABA Model Rule except there should be some flexibility to include state rules of conduct where they are stricter, so local attorneys are not held to higher conduct standards than out-of-state attorneys.

2. **General Rule on Conflicts of Interest.** The national uniform standard on the general rule on conflicts of interest applied to both bankruptcy and district courts should be based on:
 - the corresponding ABA Model Rule for that type of conduct. (Summary of comments reported by 54 bankruptcy judges.)
 - a different standard—the ABA Model Rule except it should be modified for relaxed disinterestedness under § 327 so that lawyers who are owed fees by their clients may represent them in bankruptcy proceedings.
 - a different standard—the ABA Model Rule except it should be modified for bankruptcy where necessary, such as where a trustee is plaintiff in a multi-party proceeding. (Summary of responses reported by 2 bankruptcy judges.)
 - a different standard—the ABA Model Rule combined with a requirement of full disclosure (disinterestedness standard should be abandoned in favor of the ABA Model Rule) which gives judges a flexible tool to deal with conflict of interest issues.
 - a different standard—the ABA Model Rule, supplemented with specific language on the limits of representing both a corporation and its principal.
 - a different standard—the ABA Model Rule supplemented with a prohibition against trustees hiring themselves as attorneys and practicing law under the same chapter.
 - a different standard—the ABA Model Rule as long as the disinterestedness person provisions of the case still apply.

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3. **Conflict of Interest Concerning Prohibited Transactions.** The national uniform standard on conflicts of interest concerning prohibited transactions applied to both bankruptcy and district courts should be based on:
 - the corresponding ABA Model Rule for that type of conduct. (Summary of comments reported by 77 bankruptcy judges.)
 - a different standard—the ABA Model Rule but modified for relaxed disinterestedness under § 327 so that lawyers who are owed fees by their clients may represent them in bankruptcy proceedings.
 - a different standard—the ABA Model Rule but modified for bankruptcy cases where a trustee is a plaintiff in a multi-party proceeding.
 - a different standard—the ABA Model Rule supplemented with the Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure.
 - a different standard—the ABA Model Rule but modified for issues unique to bankruptcy.
 - a different standard—the ABA Model Rule supplemented by disinterestedness person provisions of the Bankruptcy Code.

4. **Conflict of Interest Concerning Former Client.** The national uniform standard on conflicts of interest concerning a former client applied to both bankruptcy and district courts should be based on:
 - the corresponding ABA Model Rule for that type of conduct. (Summary of comments reported by 68 bankruptcy judges.)
 - a different standard—the ABA standard modified to include a provision to deal with the problem of large firms and national firms that represent large creditors and debtors.
 - a different standard—the ABA standard modified for conflict issues problematic to bankruptcy courts, such as where a trustee is a plaintiff in a multi-party proceeding.
 - a different standard—the ABA standard supplemented with the Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure.
 - a different standard—the ABA standard supplemented by the disinterestedness provisions of the Bankruptcy Code.

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- a different standard—the ABA standard except that there should be a standard of materiality and not just a per se rule.
5. **Rule on Imputed Disqualification.** The national uniform standard on imputed disqualification applied to both bankruptcy and district courts should:
- be based on the corresponding ABA Model Rule for that type of conduct. (Summary of comments reported by 68 bankruptcy judges.)
 - a different standard—the ABA Model Rules modified for conflict issues problematic to bankruptcy courts, to reflect the reality of bankruptcy practice, such as where a trustee is a plaintiff in a multi-party proceeding. (Summary of comments reported by 5 bankruptcy judges.)
 - a different standard—the ABA standard supplemented with the Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure.
 - a different standard—the ABA standard except that there should be a standard of materiality and not just a per se rule.
6. **Rule on Candor Towards the Tribunal.** The national uniform standard on candor towards the tribunal applied to both bankruptcy and district courts should be based on:
- the corresponding ABA Model Rule for that type of conduct. (Summary of comments reported by 84 bankruptcy judges.)
 - a different standard—the ABA standard but applied with flexibility so as to include state rules of conduct where they are stricter, so local attorneys are not held to higher conduct standards than out-of-state attorneys.
 - a different standard—the ABA standard except that ABA Model Rule 3.3(d) may not apply in a criminal proceeding.
 - a different standard—the ABA standard supplemented with the Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure.
 - a different standard—the ABA standard modified for candor issues problematic to bankruptcy courts.

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7. **Rule on Lawyer as Witness.** The national uniform standard on lawyer as a witness applied to both bankruptcy and district courts should be based on:
- the corresponding ABA Model Rule for that type of conduct. (Summary of comments reported by 79 bankruptcy judges.)
 - a different standard—the ABA standard but applied with flexibility so as to include state rules of conduct where they are stricter, so local attorneys are not held to higher conduct standards than out-of-state attorneys.
 - a different standard—the ABA standard except as to applications for attorneys’ fees.
 - a different standard—the ABA standard supplemented with the Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure.
 - a different standard—the ABA standard modified for lawyer as witness issues problematic to bankruptcy courts.
8. **Rule on Truthfulness in Statements to Others.** The national uniform standard on truthfulness in statements to others applied to both bankruptcy and district courts should be based on:
- the corresponding ABA Model Rule for that type of conduct. (Summary of comments reported by 85 bankruptcy judges.)
 - a different standard—the ABA standard but applied with flexibility so as to include state rules of conduct where they are stricter, so local attorneys are not held to higher conduct standards than out-of-state attorneys.
 - a different standard—the ABA standard supplemented with the Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure.
 - a different standard—the ABA standard modified for truthfulness in statements to others issues problematic to bankruptcy courts.
9. **Rule on Communication with a Person Represented by Counsel.** The national uniform standard on communications with persons represented by counsel applied to both bankruptcy and district courts should be based on:
- the corresponding ABA Model Rule for that type of conduct. (Summary of comments reported by 81 bankruptcy judges.)
 - a different standard—the ABA standard with clarification of “who” is represented by counsel.

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- a different standard—the ABA standard but modified for issues concerning communications with persons represented by counsel issues problematic to bankruptcy courts such as the inclusion of communications with creditors of the same class.
- a different standard—the ABA standard supplemented with the Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure.
- a different standard—the ABA standard but applied with flexibility so as to include state rules of conduct where they are stricter, so local attorneys are not held to higher conduct standards than out-of-state attorneys.

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Comments from Judges Who Indicated That National Uniform Standards on Other Attorney Conduct Issues Should Be Drafted for Use in All Bankruptcy Courts

- A national civility rule that directs lawyers to refrain from making disparaging comments based on race, gender or sexual orientation about opposing counsel or clients.
- A lawyer must not undertake representation where she lacks the necessary skill, energy and devotion to the task, including familiarity with local rules of practice for the applicable bankruptcy court, the Bankruptcy Code and Rules. (Summary of comments reported by 3 bankruptcy judges.)
- There should be a national uniform rule mandating civility to the court, witnesses and other attorneys. (Summary of comments reported by 3 bankruptcy judges.)
- While not specifically attorney conduct, some national rule should be drafted to define the duties that are included in the “representation” of a debtor in a chapter 7 bankruptcy case. Too often chapter 7 debtors are literally abandoned by their attorneys where they become defendants in adversary proceedings commenced pursuant to 11 U.S.C. § 523 and 727.
- There should be a national uniform rule based on the ABA standards as molded to the Bankruptcy Code and Rules (especially with amplification to reflect a debtor-in-possession’s duties to creditors). (Summary of comments reported by 2 bankruptcy judges.)
- A national uniform rule should provide bankruptcy courts with explicit authority to suspend, disbar or discipline attorneys who fail to comply with court orders or become disabled or otherwise unable to practice, until more formal state or federal disciplinary procedures can take place. The district court process is too slow to be effective. (Summary of comments reported by 3 bankruptcy judges.)
- There should be a national uniform rule addressing the fiduciary relationship of attorneys to creditors in chapter 11 cases.
- There should be a national uniform rule establishing the standard for what attorneys must minimally do before filing a bankruptcy case.
- A national uniform rule should provide a better definition of “disinterested”.
- A national uniform rule should make Bankruptcy Rule 9011 more specific as to the extent a lawyer is expected to go to review schedules and statements filed by or on behalf of the debtor.

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- A national uniform rule should require an affidavit by the person who made (or should have made) the conflicts check as to exactly what effort was made and require disclosure of every representation within a prior period (perhaps 2 years before the bankruptcy filing date), and the nature (including beginning and end dates) of every entity that is or becomes a creditor or equity holder in the debtor-in-possession. The rules should require regular amendments as “new” conflicts arise. Model Rule 1.7(a)(1) should be totally abrogated in bankruptcy in favor of full disclosure.
- A national uniform rule should specify that Bankruptcy Rule 2016(a) and (b) applies to all persons, including bankruptcy petition preparers, and add that violations when discovered must be brought to the court by the U.S. trustee for the court to impose appropriate sanctions.
- There should be a national uniform rule only as to conflicts of interest.
- There should be a uniform national rule controlling subornation of perjury by treating preparation of bankruptcy schedules to be unprotected by the attorney/client privilege.
- There should be a uniform rule prohibiting trustees from hiring themselves as attorneys and disallowing trustees from practicing law under the same chapter.
- There should be a uniform rule requiring passage of a test for admission to the bankruptcy court and a required number of annual CLE hours.
- Any national uniform standard will have to take into account the “trust law” overlay that uniquely exists in the bankruptcy context.
- There should be a national uniform rule establishing standards for trustee representation by his or her own law firm.

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General Comments

I. In Favor of National Uniform Standards

- While attorney misconduct is infrequent, proposed national uniform rules are desirable to familiarize attorneys with disciplinary rules effective in all bankruptcy courts. In addition, proposed national uniform standards are advisable because of the ease with which attorneys from one section of the country practice in bankruptcy courts in other sections.
- I believe the standards for bankruptcy practice, district court practice, and state court practice should be the same, meaning no separate standards for bankruptcy courts other than those in the bankruptcy code and rules (e.g., Section 327 and Rule 2014(a)). As to section 327(a) (need for court appointment) and Rule 2014, I believe these requirements serve a useful purpose and should be retained, but separate rules for handling of retainer money and the issues in question 9 (suggested uniform standards) would not be a good idea.
- It is my opinion that an emerging trend and ultimate goal should be to attempt to model and coordinate, to the extent possible, bankruptcy practice with that of the United States district courts and state courts. Many excellent attorneys are reluctant to practice before the bankruptcy courts based on actual or perceived peculiarities of bankruptcy practice. In reality, bankruptcy, it has been said, is not a specialty, but is generic.
- It would be a grave mistake to impose standards in bankruptcy that would differ from those adopted by the district courts. We should continue to recognize the bankruptcy court as a unit within the district court and attorneys appearing before either should adhere to the same standards. I see no problems or need for any change.

II. Opposed to National Uniform Standards

- I sincerely question the necessity of “nationalization.” Sure, attorneys who practice only (or principally) in bankruptcy courts would like a national, unvarying standard. However, most of the attorneys I see are also very active in state court. Why should they face varying standards? Incorporation of state rules of conduct, with some variation for bankruptcy works just fine.
- Assuming the purpose of national rules is to aid out-of-state counsel who appear in a local court, I am generally opposed to national uniform standards. They appear to be a solution without a perceived problem. (1) Judges generally do not sanction attorneys for unethical conduct without prior notice of what the standards are the judge expects to be upheld. (2) The standards are commonly written, whether in statutory or non-statutory form. (3) Attorneys are expected to be familiar with the rules of the court in

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which they appear. (4) In addition, many courts require affiliation with local counsel to assure practice by out-of-state counsel complies with any local requirements. (5) Many states' codes of conduct are similar and the state courts and committees have publicized case law and advisory opinions interpreting those codes. (6) Many judges refer to the national ABA Model Rules for guidance. Attorneys should already be familiar with these rules. (7) Bankruptcy Rule 9011 addresses many abuses. This national rule has been interpreted by publicized case law. For all of these reasons, I see no need for uniform rules.

- The current issues and problems facing bankruptcy courts are the same that faced them 11 years ago, namely, attorneys who fail to disclose conflicts or fail to perform services in accordance with rules of professional responsibility. Efforts to “nationalize” these rules based on a district court model will only confuse the issues and result in disaster, much like the current proposed revisions to the Federal Rules of Bankruptcy Procedure. There seems to be a desire to have the district court practitioners rush to bankruptcy court. This is to be accomplished by a “cram down” of new rules on the bankruptcy courts. This is a fallacy. If we build it, they will not come.
- If there is a problem it is not with the existing standards and rules, which I feel should be left alone.
- I see no need for any national standards. Lawyer discipline is traditionally a state matter. We simply do not need another set of standards. However, if standards are adopted (for whatever reason) I think the same standards should apply in all federal courts.
- I oppose uniform standards period. Stay out of it. If it is a problem in our district, let the judge address it on a case-by-case basis.
- My experience has been that when rules are “nationalized” it tends to cause delay and increase expense for this court. I fear that national rules regarding attorney conduct would lower the level of conduct that we now have in this court.
- I do not think it reasonable to assume that a national, uniform standard of attorney conduct could be developed that could be fairly and evenly applied to lawyers practicing in Idaho and Los Angeles, and to attorneys practicing in chapter 11 mega-cases and to those practicing in consumer chapter 7 cases. Attorney conduct standards, by necessity, should be developed by the local bar association and local bankruptcy courts. Our biggest challenges are in cases where there are too many lawyers (large chapter 11s) and in cases where fees are too low (consumer chapter 7s) where there is intense competition for clients. While there may be instances where minimum standards of conduct could be developed, local courts should also be allowed to develop additional or stricter standards of conduct to address problems of unique, local concern.

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- I think that the standards adopted at the state level should apply in bankruptcy courts, and in district courts. Why require a separate set of standards? For example, our state standards track the ABA standards. Where local conditions require a different rule, the local district and bankruptcy courts can modify by a local rule. The proliferation of “standards” is designed to confuse and is not necessary. A little room for the “working of the joints” is in order.
- If there are differences between the Rules of Professional Conduct (as adopted by the [state] Court of Appeals made applicable to our bankruptcy court by . . . Local Rule . . .) and some hypothetical national standard, I would vote in favor of following the [state] Rule instead of the national standard. Attorneys practicing in [this jurisdiction] ought not be required to conform their conduct to two conflicting standards. Potentially the two different standards might on rare occasion give rise to an attorney’s not being able to be in compliance with both standards at the same time. For example, a rigorous standard for disclosures to a court under a hypothetical national rule might conflict with an attorney’s duty to guard a client’s confidences under the state rule.
- Attorney conduct issues should be handled on a local level. Adopting a national uniform standard would take away the rights and responsibilities of individual judges to do their jobs.
- The ABA Model Rules are sufficient. We do not need any more rules
- I do not believe that another general set of standards governing attorney conduct would be helpful. Every jurisdiction already has state ethical rules, and a single federal standard does not guaranty uniformity among districts. In terms of bankruptcy, a mechanism should exist regarding waiver of conflicts upon notice and with court approval. Debtors in possession should be able to hire their prepetition accountants even if they owe the accountants a debt. The alternative, new accountants, can be expensive. Moreover, with so few major accounting firms remaining, it is difficult to find disinterested accountants in larger cases. These comments are not limited to accountants. There are circumstances where an actual conflict may nonetheless be technical and the alternatives too costly.
- Lawyers already have enough rules and canons to follow. More rules would only cause more disputes involving more time and money. We don’t need more rules. Leave well enough alone.
- The problem lies in differences among state law requirements. Unless all state codes of professional responsibility become uniform, federal court nationalized requirements would only lead to conflicting responsibilities.

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- Other than an occasional allegation that an attorney’s fee request is excessive, or an occasional display of conduct by an attorney which might be classified as somewhat lacking in civility, this court has not experienced any “problems” with regard to attorney conduct. With respect to attorney civility, I believe that local rules, such as our district’s local rule on attorney conduct, is sufficient.
- Attorney conduct is often a product of local legal culture or lack thereof. Attorneys who work together frequently and trust each other tend to have fewer conduct problems, or the consequence is immediate. National standards aid attorneys who practice in more than one jurisdiction, but are unnecessary and have no benefit to the vast numbers of attorneys who practice in a single district and state. Local ties and tradition are more helpful for such attorneys.
- In this and other areas, I believe the rules of conduct are best left to the individual states. I see no need for a national, uniform rule in these areas.
- On reflection, the Canons of Ethics and Standard of Conduct applicable to [our state’s] lawyers are sufficient to maintain an ethical environment in the U.S. Bankruptcy Court for the district. Almost all lawyers who practice in our court are members of the [state] Bar. I see no need for a separate national standard. If the ethical rules differ significantly from one state or jurisdiction to another, tell me what the differences are before asking me if we need a national standard.
- [Our state] has state rules that cover the same areas as the ABA model rules. There are differences. For example, ABA Rule 3.7 generally prohibits an attorney from being called as a witness. The [state] rule is less restrictive. I do not understand how national standards will interface with state standards.
- Attorneys are used to the state rules of professional conduct on these issues and the body of case law interpreting those rules. Those rules are adequate to deal with professional conduct in bankruptcy court.
- It seems difficult to craft a set of conflicts rules that will work in all types of cases, without considering the amounts in issue. Absolute disqualification rules which may work (and be necessary) in large corporate cases will create special problems in consumer debtor cases. Technically, a married couple filing a consumer chapter 7 is two cases with separate estates, even if they are not both liable on all the debts. The potential for conflict can be large. And if the debtors end up getting divorced, the conflict gets worse.
- I oppose uniform standards period. Stay out of it. If it is a problem in our district let the judge address it on a case-by-case basis.
- The problem in dealing with attorney conduct issues is not only the unique character of bankruptcy issues, but also questions of context. In my view it is possible to set

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general guidelines for disclosure and to rely on the disciplinary standards already in place in each district. However, setting uniformity between districts or between the district and bankruptcy court assumes that the issues arise in the same way or in similar context. They often do not, and the setting of a uniform standard might restrict the ability of bankruptcy courts to control attorney conduct rather than promote it.

- National standards sometimes lower the bar of conduct of counsel. They are subject to change due to focused lobbying pressure by attorney associations. I strongly urge that such a motion be rejected.
- I believe attorney conduct standards are best left in the first instance to the governing state bar and then to the local federal courts to adopt those standards to the needs of the local courts and bar. “National” and “uniform” are not better in this area, in my view.
- ABA standards and state bar standards are quite adequate to govern attorney conduct. We do not need another set of standards applicable only in bankruptcy courts and United States district courts.
- I am not of the view that uniform federal rules of ethics are necessary or appropriate.
- No uniform requirements can take into account local differences of ethics, behaviors, or expected behaviors.
- National standards are “pie in the sky” because local culture tends to govern. And my experience indicates that the rules in place are adequate for the task.
- First, I am unalterably opposed to this trend toward uniform national rules and standards to cover every situation that comes before the court. Second, I feel that I have a good sense of what are legally, ethically and morally proper standards of conduct for an attorney appearing in my court. If there is a problem, it is handled, quietly, quickly and efficiently without having to refer to a national standard. I have had a few problems and they never occurred a second time.
- I do not believe national standards applicable to the bankruptcy court are necessary or appropriate. Judges can and probably should be stricter in sanctioning attorney misconduct, but another layer of rules does not seem necessary.
- I do not believe we need national standards. In [a state], we have thorough rules of professional conduct, which work quite well in the bankruptcy context. I am of the view that if it is not broken, don’t fix it. I’m not aware that it is broken here in the bankruptcy courts.
- District court procedure would be difficult to apply in bankruptcy cases and proceedings. I would not change existing procedure.

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- Keeping in mind that I have only been a judge for a few months (but a bankruptcy attorney for years before that), I believe the Rules of Professional Conduct in [our state] (and, I assume, other states) combined with the Bankruptcy Code and Rules and any local rules are more than enough. Adding an overlay of national standards would create an unnecessary layer of regulation and potential confusion
- I am generally opposed to a national standard. Each state has adopted a code of professional responsibility or similar canon of ethics. If the national standard conflicted with that prescribed by the state supreme court, which would the attorney follow? I am not in the attorney discipline business. In [our state], the Board of Professional Responsibility is set up to handle complaints and does so in an effective and efficient manner.

III. Mixed and Miscellaneous Views

- I think we must also be mindful of the role of state bar organizations who generally govern attorney conduct. I do not know whether the state bars' codes of conduct differ in any significant way from the ABA Model Rules. If they do, it would seem unwise to set one standard for attorneys practicing in the federal courts and another for those practicing in the state courts where those federal courts are located.
- I am not opposed to a national standard. I am opposed to a standard that differs, nationally or locally, from that of the district court.
- There needs to be debate in this area. For example, bankruptcy court opinions are all over the place on whether one counsel can represent affiliated corporations in chapter 11s.
- Standards should be kept straightforward and simple.
- Adopting a national standard for attorney conduct in the bankruptcy courts would only cause unwanted problems. Attorneys are members of state and local bars which have their own rules. Requiring attorneys to abide by two sets of rules only complicates matters. If uniform rules are adopted, they should be the ABA Model Rules with no changes. Attorney conduct problems are the same in all courts: there are no special problems in bankruptcy courts that do not occur in state and district courts. Thus, the rules should be the same in all courts; and the closer those rules are to common sense, the better. The issues and problems past, current, and future, with regard to attorney conduct were, are and will be the same in all courts. Some will ignore the rules, some will not need rules, and most will be confused by the rules.
- Because of the complicated nature of the process of settling standards for judging human conduct, it was very difficult answering some questions without appearing to be inconsistent with the answers to other questions. This may suggest that there are so

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many different circumstances here, that it will be impossible to craft an identical set of standards for bankruptcy and district courts. Whatever decision is made, the national uniform standard in the bankruptcy courts should be flexible to account for regional customs.

- There are no special “bankruptcy-related” issues with regard to attorney conduct. Accordingly, uniformity should be a touchstone of any rulemaking.
- I do not believe any problems are caused by inadequate requirements for disclosure in Bankruptcy Rule 2014. It would help to add “irrespective of whether the applicant or person to be employed perceives any such connection to represent a conflict of interest” because attorneys think they are the decision maker as to whether a conflict exists. They need to better understand that they are to make a full disclosure and the court decides if a conflict exists.
- There are very few conduct issues arising in my district, or the other districts where I’ve served.
- The issues of attorney discipline needs to be addressed: (1) What if sanctions are inappropriate (i.e., both sides at fault so neither side should be rewarded or it would be a windfall to the other side or the court is the “party” who has been wronged)? (2) Since attorneys are admitted to the district court, what authority does the bankruptcy court have to “disbar” them?
- I believe leaving it up to the individual bankruptcy court works well. There is no reason for a national uniform standard to be adopted. If it is determined that a national standard must be adopted, it would be the same as the district court standard and based on the ABA Model Rules.
- Conflict issues in bankruptcy cases frequently tend to be different and more complex than those arising in district courts due to the frequent involvement of multiple parties in bankruptcy cases. It is fairly common for situations to arise where attorneys become disabled or otherwise cease practice or making appearances for clients and where attorneys fail to adhere to court orders mandating repayment of funds. I believe bankruptcy courts should be able to act swiftly to discipline attorneys in these areas with sanctions, including suspension. It is not clear that this power exists or how it should be exercised apart from the district court.
- I believe that both the district courts and the bankruptcy courts should adopt the Code of Professional Conduct which is applicable in the state in which those courts are located. Although I do not believe that any problems were caused by inadequate requirements for disclosure in Bankruptcy Rule 2014, it might be helpful if the rule contained some explanation of the meaning of “connections” as used in Rule 2014 without attempting to have an all-inclusive definition.

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- Codes of ethics and codes of conduct dealing with honesty and the appearances of honesty should be broadly drafted and universal. Codes of civility, dealing with professionalism, respect for the system and each other, should be drafted in much greater detail. Many lawyers think ethics and civility are about the same issues; they are not. Many lawyers think ethics rules are inherently more important than civility; they are not.
- One problem is the use by judges of their personal perceptions of “fairness” in ruling on fees. This can result in “penny ante” moralism rather than effecting any constructive change in attorney behavior. Certainly “padding” the book is inappropriate but it is purely arbitrary to deny or characterize as padding all intraoffice conferences, for example. I think that there is an over-fixation on looking at time records with a fine-tooth comb and failing to evaluate the fee applications in the context of the monetary size of the estate. Even if every time entry is justified, fees should have a reasonable relationship to the size of the estate and be reduced if they don’t.
- The rules on disclosure and “connection” with any attorney, accountant, or professional person by the debtor’s counsel in a chapter 11 case for each creditor is a rule that defies practical application. This disclosure is impractical when applied to a partner in a firm of 200 lawyers, 1000 creditors, or a big-6 accounting firm engaged by the debtor and another firm engaged by the creditors’ committee. The rule on “imputed disqualification” is hopelessly snarled, especially when attorneys make lateral moves among firms. Detailed description of time entries in the fee applications routinely result in either unintelligible coded entries or breaches of confidentiality. We desperately need a rule on minimum scope of engagements in chapters 7 and 13 cases. Ultimately, we need admission to a bankruptcy bar to reflect specialization.
- There should not be a uniform national standard. If there is a uniform national standard, it should be the ABA Model Rules on all subjects noted. State supreme courts regulate the legal profession. Our state’s rules apply in our state’s federal courts. We do not have a problem with rules, although we occasionally have a problem with a lawyer adhering to the rules. When that happens, we deal with that. The practice of law should not be federalized with separate rules in federal courts and in each state court.
- The status quo, albeit riddled with conundrums, is preferable to more rules that merely add to the risk of confusion. If there are to be federal court standards, there should be no difference between bankruptcy and district courts.
- By and large, in this district there are not big problems in this whole area, especially among the bulk of practitioners. Code provisions on conflicts of interest, and maybe on the disinterestedness standard, should be relaxed somewhat to allow some discretion on part of the bankruptcy court.

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- The biggest problem I have and hear about relates to attorney competence rather than conduct issues. [ABA Model] Rules 1.5(a)(1), (4) and (7) allow some action by the court but are limited and someone has to raise the issue.
- Most problems stem from a lack of adequate or appropriate communications which results in assumptions that give rise to disputes which could be resolved without rancor or court intervention.
- There seem to be no good reasons why the standards of conduct an attorney is expected to adhere to should differ. Nonetheless, the standards of conduct (to the extent they are not dictated by statute or the applicable rules of procedure) should properly be determined by the court which is charged with supervising admission to the bar. Since the bankruptcy court is part of (a unit of) the district court (28 U.S.C. Section 151), the standards of conduct promulgated by the various district courts govern the bankruptcy courts in those districts. Any difference should be a function of either statutes or the Federal Rules of Bankruptcy Procedures, not some separate standard or model that would apply only to bankruptcy matters.
- This [district] has a very useful general order which can be used to prevent an attorney from practicing anywhere in the district.
- I think we need to opt for uniformity of standards in each state at the expense of national uniformity. Thus, the same standards should be applied to, [a state's] lawyers, for example, whether they appear in state or federal court. As a matter of comity, federal courts should apply state rules and standards unless there is a real odd ball local state law or an identifiable need for national uniformity.
- There is no national uniform standard for district courts. If there were, I'd want bankruptcy courts to follow it. As matters are, I think bankruptcy courts should follow local rules on attorney conduct.
- The heavy volume of cases and large numbers of attorneys who appear in bankruptcy courts make the review and resolution of attorney conduct issues difficult. In addition, the large number of interested parties with varying interests lends to many conflict issues.
- Disputes regarding alleged conflict of interest revolves (usually) around the "disinterestedness" standard. The standard serves no useful purpose on its own and should be eliminated. In its place, the usual conflict rules should apply.
- The rub is in the drafting. The National Bankruptcy Review Commission found it relatively easy to conceptualize the issues, and very difficult to articulate standards and methods for resolving the issues. Nonbankruptcy groups and scholars have had similar experiences. Nevertheless, somebody should pick up the inquiry and suggestions left by the Commission and continue to try to identify problem areas and

Appendix L

to study possible drafting solutions to those problems. It is entirely possible that an identification of standards applicable in nonbankruptcy areas will emerge from the identification of solutions in the bankruptcy areas. Alternatively, the creation of standards to be used in connection with the peculiar problems facing attorneys involved in bankruptcy cases and proceedings will become clearer as the same or similar issues are illuminated by work in areas seemingly beyond the bankruptcy context.

- I would abolish the disinterestedness limitation in the Bankruptcy Code and Rules in so far as it relates to the appointment of professionals. I think it often results in unnecessary, costly and arbitrary disqualifications. Generally applicable ethical rules, including conflict of interest rules, are adequate in bankruptcy proceedings.