

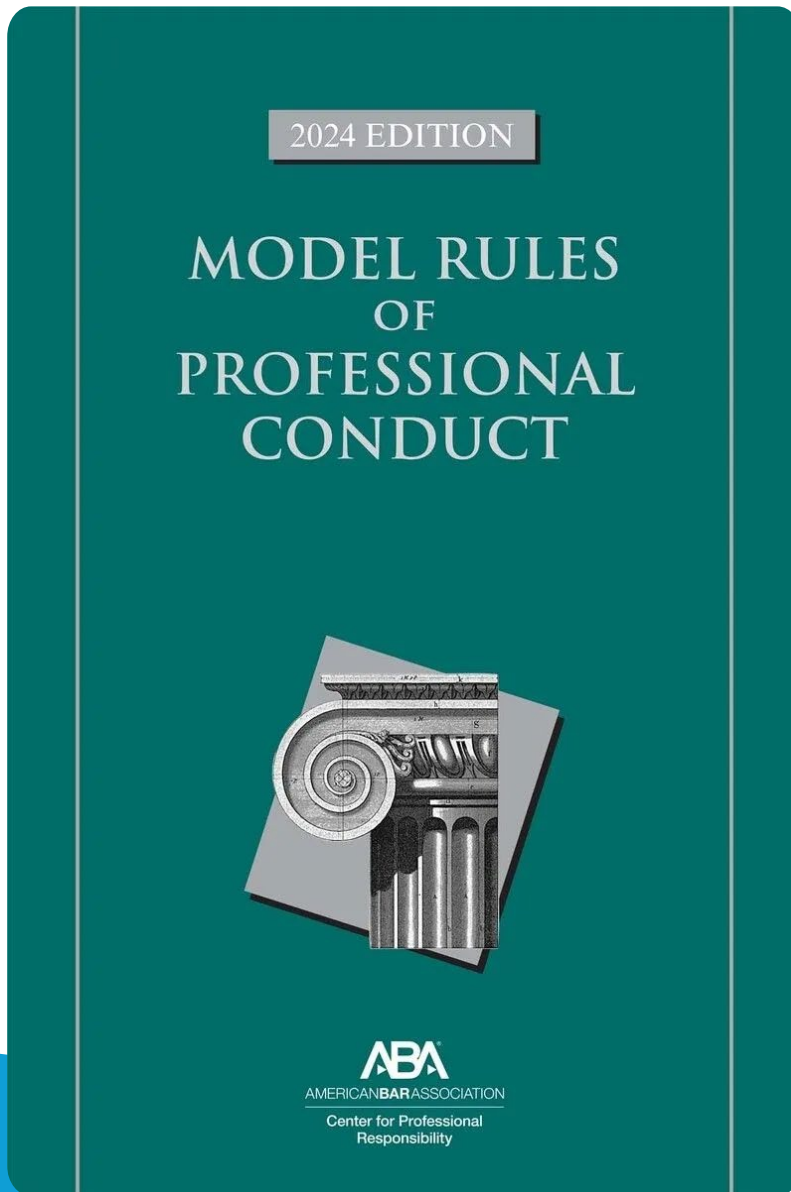
A group of business professionals in a meeting. A man in a suit and tie is on the left, gesturing with his hand. A woman in a grey blazer is in the center, holding a smartphone. Another person is on the right, holding a white coffee cup. In the foreground, a tablet displays a document with text and diagrams. The background is a bright, out-of-focus office space.

Legal Ethics in Bankruptcy and Commercial Litigation - Navigating the Model Rules of Professional Conduct



Origin and Development of the MRPC

The original 32 Canons of Professional Ethics were adopted by the American Bar Association in 1908. They were based principally on the Code of Ethics adopted by the Alabama State Bar Association in 1887, which in turn has been borrowed largely from the lectures of Judge George Sharswood, published in 1854 under the title of *Professional Ethics*, and from the fifty resolutions included in David Hoffman's *A Course of Legal Study* (2d ed. 1836).



Modern Era

1969

- The Model Code of Professional Responsibility was adopted, which was a more organized and detailed version of the Canons of Professional Ethics.

1983

- The ABA Model Rules of Professional Conduct were adopted, serving as models for ethics rules in most jurisdictions.

Present

- The ABA has amended the Model Rules and associated Comments several times since their promulgation in 1983.



Core Ethical Principles in Bankruptcy and Commercial Litigation



Competence (Rule 1.1)

Lawyer competence, as outlined in professional ethics, means a lawyer must possess the necessary legal knowledge, skill, thoroughness, and preparation to provide effective representation, and should also maintain this competence through ongoing study and education

Confidentiality of Information (Rule 1.6)



Attorney Client privilege generally protects all communications between a client and their lawyer, including emails, phone calls, and in-person conversations, as long as they are intended to be confidential and for the purpose of seeking legal advice.

Conflicts of Interest (Rules 1.7-1.9)



*"My fees are quite high, and yet you say you have little money.
I think I'm seeing a conflict of interest here."*

A conflict of interest arises when the attorney's own interests, or the interests of another client or third party, potentially interfere with their duty to represent a client's best interests, requiring either declining or withdrawing from representation or obtaining informed consent from all affected clients



Candor and Duty of Fair Dealing (Rules 3.3 & 4.1)

A lawyer's duty of candor to the court, means lawyers must be truthful in their interactions with the court, including not making false statements, correcting false statements, and disclosing adverse legal authority.



Attorney-Client Relationship and Fiduciary Duties in Bankruptcy Cases



Scope of Representation (Rule 1.2)

Managing expectations in debtor and creditor representation involves clear communication, realistic outcomes, and understanding the legal landscape, ensuring both parties are informed and prepared for potential outcomes

Communication and Transparency (Rule 1.4)



The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

Fees and Compensation (Rule 1.5 & 1.15)

(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.

Withdrawal and Termination of Representation (Rule 1.16)



A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.



Responsibilities to the Court, Creditors, and Other Parties

Duty of Candor Toward the Tribunal (Rule 3.3)

In bankruptcy court, candor (truthfulness and honesty) is a crucial ethical duty for attorneys, requiring them to be truthful and avoid misleading the court, including disclosing adverse authority and not omitting information that could mislead the court



Fairness to Opposing Party and Third Parties (Rule 3.4)

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.



"I love my testimony. You've really captured my voice."

Trial Publicity and Media Relations (Rule 3.6)



Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence.



Special Ethical Considerations for Bankruptcy Practitioners

Duties to the Bankruptcy Estate and Creditors

- **Honesty and Candor**

Counsel must be truthful and honest in all dealings with the court, including in pleadings, motions, and testimony.

- **Integrity**

Counsel must maintain the highest standards of integrity and professionalism in representing their clients.

- **Fairness**

Counsel must ensure the bankruptcy process is fair to all parties involved, including creditors and debtors.

- **Adherence to Rules**

Counsel must comply with all applicable rules of the Bankruptcy Code, Federal Rules of Bankruptcy Procedure, and local court rules.

- **No Misleading Conduct**

Counsel must not engage in any conduct that is misleading or deceptive to the court or other parties.

- **Duty to the Court**

Counsel is an officer of the court and must act in a manner that upholds the integrity of the court system.

Fraudulent Conduct and Bad Faith Filings

Ethical issues in advising businesses on bankruptcy strategies include maintaining transparency, avoiding conflicts of interest, adhering to fiduciary responsibilities, and ensuring compliance with legal standards, while also considering the potential for strategic bankruptcy and the implications for creditors and stakeholders.



Third-Party Payments and Dual Representation



When fees are paid by a third party, ethical considerations revolve around maintaining the lawyer's independent professional judgment and ensuring the client's informed consent, preventing the third party from influencing the representation or interfering with the attorney-client relationship, and preserving confidentiality.



Ethical Challenges in Commercial Litigation

Settlement Negotiations and Alternative Dispute Resolution



A win-win negotiation aims to create a mutually beneficial agreement where both parties feel they have achieved a satisfactory outcome. This requires active listening, understanding each other's interests, and finding creative solutions that address both parties' needs.

Technology, E-Discovery, and Attorney Conduct



The principle of the maxim *Omnia proesumuntur in odium spoliatoris*, as applicable to the destruction or suppression of a written instrument, is that such destruction or suppression raises the presumption that the document, if produced, would militate against the party destroying it, and that his conduct is attributable to this fact. *Bott v. Wood*, 56 Miss. 136, 1878 WL 7352 (Miss.1878).



If the party who failed to preserve ESI did so due to a **reasonable belief that the information was not relevant to the litigation**, sanctions are limited to those necessary to cure the prejudice caused by the lost information.

If the party failed to preserve ESI with the **intent to deprive** the other party of its use in the litigation, more severe sanctions may be imposed, including:

- Presuming that the lost information was unfavorable to the non-preserving party.
- Issuing a mandatory or permissive adverse inference instruction.
- Dismissing the action or entering a default judgment.
- Prohibiting the disobedient party from supporting or opposing designated claims or defenses.
- Striking pleadings.
- Staying further proceedings.
- Requiring the party failing to act to pay reasonable expenses.



Conclusion and Key Takeaways

Thank you.

Ted Hamilton

Wetherington Hamilton P. A

Tampa, Florida

Email: info@whhlaw.com

Phone: (813) 225-1918



Ben Farrow

Anderson, Williams & Farrow, LLC

Montgomery, Alabama & Jackson,
Mississippi

Email: bfarrow@AWF.law

Phone: (334) 272-9880

