

Good afternoon. My name is Nancy Rapoport, and I am the Dean of the University of Nebraska College of Law. My academic area is bankruptcy ethics, and I am here this afternoon to discuss two specific problems that bankruptcy attorneys face. The first problem relates, in most cases, to attorneys representing the non-debtors in a bankruptcy case, and the second problem relates to professionals hired by the bankruptcy estate (primarily in chapter 11 cases).

The Model Rules relating to advocacy presuppose the standard two-party model in which plaintiffs are always pitted against defendants and the attorneys, at the onset of the case, can predict where conflicts are likely to arise. Even in class actions, it is relatively easy to tell that the class action plaintiffs will always be “against” the defendants. Bankruptcy practice differs from the standard two-party model. It probably most closely resembles family law practice in terms of the variety of conflicts issues that can arise. Depending on the issues involved in a particular bankruptcy case for example, (1) the debtor may not always be on the opposite side of an issue from the creditors; (2) the secured creditors may be on the same side of one issue as the unsecured creditors, opposed to the unsecured creditors on another issue, and fighting among themselves on yet a third issue; and (3) unsecured creditors, as well, will coalesce on one or more issues and divide on others. Unlike traditional litigation, attorneys at the onset of a bankruptcy case cannot always predict potential conflicts of interest, as those conflicts may arise only if certain issues rear their heads. See, e.g., Nancy B. Rapoport, *Turning and Turning in the Widening Gyre The Problem of Potential Conflicts of Interest in Bankruptcy*, 26 Conn. L. Rev. 913 (1994). Complicating the matter is the fact that the only way to be “sure” of avoiding a conflict of interest is to avoid taking on simultaneous representation of more than one client in a bankruptcy case. If there were enough bankruptcy-trained lawyers to go around in bankruptcy cases, that might be the end of the problem. Unfortunately, not all lawyers are skilled at handling bankruptcy cases and clients – particularly in bankruptcy cases – seek the economies of scale that accompany using a lawyer already familiar with the bankruptcy case. Moreover, the ability to represent even one client in a given bankruptcy case is complicated by the fact that, *depending on how the issues in that case play out*, that single client’s interests may be adverse to the lawyer’s other current (or former) clients. Because some potential conflicts never arise – based on choices that the parties in the case make – basing a decision to represent a client on the facts established at the onset of the case may result in the under-representation of clients by skilled bankruptcy lawyers. I suggest to this Committee that you consider how best to handle what I term “dormant, temporary, actual conflicts (DTACs)”: conflicts

that may arise, if at all, for one issue only in the bankruptcy case and then, when resolved, never reappear. A rule that determines when a client can elect to have a particular lawyer's representation in the face of a DTAC (in essence, treating the DTAC as a temporary issue that might have to be resolved with separate representation for that issue only) would go a long way toward clarifying the matter.

The second ethics problem that is peculiar to bankruptcy practice involves the question of what, exactly, is the bankruptcy "estate." Under 11 U.S.C. § 327, the bankruptcy estate may hire professionals (e.g., attorneys, accountants). In most chapter 11 cases, the estate is managed by the debtor-in-possession. 11 U.S.C. § 1107. The professionals appointed under § 327, then, work with the debtor-in-possession but are responsible for working in the best interest of the estate. Although Model Rule 1.13 governs an organization as the client, Model Rule 1.13 presupposes that the lawyer has a clear line of reporting authority when ethics issues arise. Chapter 11 debtors-in-possession, however, do not have such clear lines. The "estate" is considered by some courts, simply to be the bundle of rights that the debtor possessed on the date that the petition was filed. Other courts view the estate as representing the interests of the creditors (specifically the unsecured creditors). Complicating this matter is traditional corporate law, which assumes that the ultimate owners of a company are the shareholders and links the corporate lawyer's ultimate duty to the shareholders' interests. For debtors-in-possession that are insolvent, the ultimate owners are likely *not* to be the shareholders. Bankruptcy law considers the unsecured creditors to be the residual owners of insolvent companies. For any insolvent company – in or out of bankruptcy – Model Rule 1.13 needs to clarify the nature of the client. Is the client the shareholders only if the company is solvent? Is the client the unsecured creditors if the company is not solvent? What if the lawyer cannot tell whether the company is solvent? See, e.g., Bruce A. Markell, *The Folly of Representing Insolvent Corporations: Examining Lawyer Liability and Ethical Issues Involved in Extending Fiduciary Duties to Creditors*, 6 J. Bankr. L. & P. 403 (1997); C.R. Bowles, Jr. & Nancy B. Rapoport, *Has the DIP's Attorney Become the Ultimate Creditors' Lawyer in Bankruptcy Reorganization Cases?*, 5 Am. Bankr. Inst. L. Rev. 47 (1997).

I am on record for suggesting that a separate, uniform code of bankruptcy ethics rules be adopted, Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics*, 6 Am. Bankr. Inst. L. Rev. 45 (1998), and I am in the process of conducting empirical research designed to discover whether commercial (corporate) bankruptcy ethics

issues are so different from consumer bankruptcy ethics issues that a single, separate code of bankruptcy ethics might not resolve some of these problems. In the meantime, however, I request that the Committee examine both the problem of DTACs and the question of how to know who the client is in a chapter 11 case. Thank you.