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FORE!

Beware Ethical Traps in Bankruptcy Practice.

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Context.

PROFESSIONAL RESPONSIBILITY
IN BANKRUPTCY PRACTICE.

Context: Ethics in Bankruptcy Court.

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Kansas Rules of Professional Conduct apply in Bankruptcy Court in the District of Kansas.

D. Kan. Rule 83.6.1(a): "The Kansas Rules of Professional Conduct as adopted and amended by the Supreme Court of Kansas are adopted by this court as the applicable standards of professional conduct, except as otherwise provided by a specific rule of this court."

Context: Ethics in Bankruptcy Court.

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Local Rules also govern bankruptcy practice in the District of Kansas.

LBR 1001.1(a): "These supplemental rules are promulgated under the authority of Fed. R. Bankr. P. 9029 and D. Kan. Rule 83.8.12. Practice before this court is governed by applicable D. Kan. Rules, unless there is a more specific Fed. R. Bankr. P. or D. Kan. LBR. See D. Kan. Rule 83.8.2."

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Context: Ethics in Bankruptcy Court.

D. Kan. Rule 83.8.2: "These local district court rules govern practice and procedure in this district of all cases under Title 11 United States Code and of all civil proceedings arising under, in or related to Title 11. They implement and complement Title 11 United States Code, . . . and other local rules of this court."

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Pitfalls in Limited
Scope
Representation.

PERMITTED.
PRUDENT?

Pitfalls in Limited Scope Representation

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Limited scope representation is *permitted*, but remains subject to professional responsibility constraints.

New D. Kan. Rule 83.5.8(c): "Participation. The United States District Court for the District of Kansas allows any attorney registered as active to practice before this court to offer limited scope representation."

Pitfalls in Limited Scope Representation

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The District of Kansas adopted certain of the State of Kansas' professional responsibility restrictions on limited scope representation.

New D. Kan. Rule 83.5.8(a) adopted language from KRPC 1.2(c) verbatim:

"A lawyer may limit the scope of the representation if the limitation is **reasonable under the circumstances** and the client gives **informed consent in writing**."

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Pitfalls in Limited Scope Representation

The District of Kansas also adopted new procedural requirements based on those used by the State of Kansas.

New D. Kan. Rule 83.5.8(b):

"(b) Procedures. A lawyer who provides limited representation must comply with Kansas Supreme Court Rule 115A, as later amended or modified, with **two exceptions**.

"First, the lawyer must **use the federal forms** rather than the Kansas State Court forms.

"Second, **Rule 115A(c) does not apply** in the District of Kansas. Any attorney preparing a pleading, motion or other paper for a specific case **must enter a limited appearance and sign the document. . . .**"

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Pitfalls in Limited Scope Representation

New D. Kan. Rule 83.5.8(b) expressly allows the Bankruptcy Court rules governing limited scope representation to differ from the District Court rules.

- ▶ *"The Bankruptcy Court may have additional Local Rules that govern its limited scope practice."* (italics added)

The Bankruptcy Court for the District of Kansas recently issued an "additional" rule governing limited scope practice.

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Pitfalls in Limited Scope Representation

New Bankruptcy Standing Order No. 14-1:

"IT IS HEREBY ORDERED that D. Kan. Rule 83.5.8, except to the extent ordered below, shall not apply in the United States Bankruptcy Court for the District of Kansas without further order of the Court. The purpose of this Standing Order is to preserve the status quo of bankruptcy practice, without adding the additional pleadings required by D. Kan. Rule 83.5.8."

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Pitfalls in Limited Scope Representation

HOWEVER, Standing Order No. 14-1 does NOT suspend:

- ▶ Rules of Professional Conduct or
- ▶ Standards of practice established by the Court.

Standing Order No. 14-1: "IT IS FURTHER ORDERED that no provision of this Standing Order in any way negates or avoids a lawyer's duty to abide by the Rules of Professional Conduct and any standards of practice established by this Court."

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Pitfalls in Limited Scope Representation

Consequently you should continue to ask yourself key questions relating to limited scope representation arrangements, such as:

- ▶ Did you specify the limited scope of your representation with adequate clarity and specificity in writing?

D. Kan. Rule 83.5.8(a) and KRPC 1.2(c): "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives **informed consent in writing**."

11 U.S.C. § 528(a)(1): "A debt relief agency shall- (1) . . . Execute a **written contract** with such assisted person **that explains clearly and conspicuously**—(a) the **services** such agency will provide to such assisted person; and (b) the **fees** or charges"

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Pitfalls in Limited Scope Representation

- ▶ Did you fully advise your client on all matters necessary to give informed consent to enter a limited scope representation agreement?

KRPC 1.4(b): "A lawyer shall **explain** a matter to the extent reasonably necessary to **permit the client to make informed decisions** regarding the representation."

Comment [1]: "The client should have sufficient information to **participate intelligently in decisions concerning the objectives of the representation** and the means by which they are to be pursued, to the extent the client is willing and able to do so."

Comment [2]: "Adequacy of communication depends in part on the kind of advice or assistance involved. . . . In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should **consult the client on tactics that might injure or coerce others**."

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Pitfalls in Limited Scope Representation

- ▶ Is this matter even appropriate for limited scope representation?
- ▶ Is this the kind of case that you can handle competently if you only represent the client in a limited scope?
- ▶ Have you fully checked for conflicts?

KRPC 1.16(b)(4): "Except as stated in paragraph (c), a lawyer **may withdraw** from representing a client **if** withdrawal can be accomplished **without material adverse effect** on the interests of the client"

Comment [1]: "A lawyer should **not accept representation** in a matter **unless** it can be performed **competently**, promptly, **without improper conflict of interest** and **to completion**."

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Pitfalls in Limited Scope Representation

- ▶ In this case, do the professional rules require more than purely technical legal advice on the limited range of legal issues covered by your limited scope agreement?
- ▶ Are you sufficiently aware of issues outside the scope of your representation to give candid and complete advice that considers all relevant factors?

KRPC 2.1: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer **may refer not only to law but to other considerations** such as moral, economic, social and political factors, that may be **relevant to the client's situation**."

Comment [2]: "Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as **cost or effects on other people**, are predominant. **Purely technical legal advice, therefore, can sometimes be inadequate**."

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Pitfalls in Limited Scope Representation

- ▶ Are you willing to accept the risk in this case that you might not be permitted to withdraw, despite your limited scope representation agreement?

KRPC 1.16(c): "When **ordered to do so by a tribunal**, a lawyer shall **continue representation** notwithstanding good cause for terminating the representation."

Comment [7]: "A lawyer **may withdraw** from representation **in some circumstances**. The lawyer has the option to withdraw if it can be accomplished **without material adverse effect** on the client's interests."

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Pitfalls in Limited Scope Representation

- ▶ Throughout the progress of the case and at the conclusion of your representation, are you monitoring matters carefully enough to provide your client sufficient advance notice that:
 - ▶ other counsel may be needed to address matters outside the scope of your representation (e.g., an appeal, a recently filed adversary proceeding, etc.)?
 - ▶ the client needs certain papers or property in your (the attorney's) possession to respond to matters outside the scope of your representation?

KRPC 1.16(d): "**Upon termination** of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving **reasonable notice to the client**, allowing **time for employment of other counsel**, **surrendering papers and property** to which the client is entitled and refunding any advance payment of fee that has not been earned."

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Pitfalls in Limited Scope Representation

- ▶ Did you communicate unambiguously (preferably in writing) to your client when your representation ended?

Comment [3] to KRPC 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."):

"Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter."

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Pay the Filing Fees.

PROFESSIONAL
RESPONSIBILITY
IMPLICATIONS.

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Pay Filing Fees in a Timely Manner.

Paying filing fees on time can help you avoid ethical problems.

Delayed payment could prejudice a client and leave you professionally vulnerable.

For example, if you fail to timely pay the new fee for a Motion to Sell Free and Clear:

- ▶ the Judge may deny the motion or make it contingent upon first paying the fee.
- ▶ The sale may be delayed or fall through.
- ▶ Ethics complaint and discipline. *Cf. Matter of Metz*, 266 Kan. 118, 965 P.2d 821 (Kan. 1998) (1 year suspension for bankruptcy filing fee "paid" with bounced check drawn on trust account).

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Do Not Misfile Documents to Avoid Applicable Filing Fees.

Some attorneys have filed motions using events in CM/ECF that do not apply to the motion being filed.

If this was done to avoid an applicable fee, it could be considered an ethical violation.

KRPC 3.1: "A lawyer shall **not** bring or defend a proceeding, or **assert or controvert an issue** therein, **unless there is a basis** for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

Do Not Misfile Documents to Avoid Applicable Filing Fees.

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KRPC 3.3(a)(1): "A lawyer shall **not knowingly**: . . . make a **false statement of fact or law** to a tribunal or **fail to correct a false statement of material fact or law** previously made to the tribunal by the lawyer;"

Comment [3]: "An **advocate is responsible for pleadings** and other documents prepared for litigation"

Comment [3.1]: ". . . an **assertion purporting to be on the lawyer's own knowledge**, as in an affidavit by the lawyer or in a statement in open court, **may properly be made only when the lawyer knows the assertion is true or believes it to be true** on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation."

Your CM/ECF
Account.

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REMEMBER RULE 9011.

Do Not File Documents Using Another Attorney's CM/ECF Account.

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All documents must be filed electronically in Bankruptcy Court (unless specifically excepted).

LBR 5005.1(c): "All petitions, motions, memoranda of law, or other pleadings and documents filed with the court in a case assigned to the Electronic Filing System **must be filed electronically** unless otherwise permitted in these rules, the administrative procedures guide, or court authorization. Electronic filing must be consistent with this Rule and *Appendix 1-01, Administrative Procedures for Filing, Signing, and Verifying Pleadings and Documents by Electronic Means.*"

Do Not File Documents Using Another Attorney's CM/ECF Account.

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All documents filed by attorneys must be signed.

Your CM/ECF Account login is your electronic signature.

LBR 9011.4(a): "The original of every pleading, motion or other paper filed by an attorney **must bear the genuine signature of at least one attorney** of record. The **user log-in and password** required to submit documents to the Electronic Filing System **serve as the Filing User's signature** on all electronic documents filed with the court. They also serve as a signature for purposes of the Federal Rules of Bankruptcy Procedure, **including Fed. R. Bankr. P. 9011**, the local rules of this court, and any other purpose for which a signature is required." (emphasis added).

Do Not File Documents Using Another Attorney's CM/ECF Account.

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If you use another attorney's CM/ECF login and password for a document you filed, that causes two problems:

1. The document is not signed by the attorney who filed it.
2. There has been either a mistaken representation or a misrepresentation to the court because
 - ▶ the CM/ECF login says one attorney signed the document pursuant to Fed. R. Bankr. P. 9011, but
 - ▶ a different attorney signed (using "s/" signature) and filed it.

Do Not File Documents Using Another Attorney's CM/ECF Account.

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KRPC 3.3(a)(1) "A lawyer shall **not knowingly**: . . . **make a false statement** of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;"

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Inactive Attorneys and CM/ECF Accounts.

CM/ECF accounts may not be "mixed and matched," especially when an attorney is not an active member of the bar.

- ▶ DO NOT file documents for inactive attorneys using your CM/ECF account.
- ▶ DO NOT file your documents under the CM/ECF account of an inactive attorney.

In addition to the problems of filing under another's CM/ECF account (noted above), you could be held responsible for violating other ethical rules.

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Inactive Attorneys and CM/ECF Accounts.

Kansas S. Ct. Rule 208(e): "It shall be the duty of each member of the judiciary of this state to prohibit any attorney who has been suspended from the practice of law from appearing or practicing in any court, and it shall be the **duty of each member of the bar and judiciary to report to the Disciplinary Administrator any attempt by an attorney to practice law after his or her suspension.** The practice of law after suspension constitutes a violation of Kansas Rule of Professional Conduct 5.5."

KRPC 5.5(a): "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, **or assist another in doing so.**"

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Ghostwriting.

LIVING ON THE EDGE IN
STATE COURTS.

CONDEMNED IN FEDERAL
BANKRUPTCY COURT.

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Ghostwriting: Not in Bankruptcy!

Kansas State court ethical rules do not explicitly prohibit ghostwriting.

Compare Kan. S. Ct. R. 115A(c), countenancing document preparation assistance from attorney, but requiring the notation "prepared with assistance of a Kansas licensed attorney".

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Ghostwriting: Not in Bankruptcy!

However, there is little question that ghostwriting is disapproved in Bankruptcy Court in the District of Kansas.

- ▶ District Court case law and new rules are inconsistent with ghostwriting.
- ▶ New Bankruptcy Court Standing Order 14-1 is inconsistent with ghostwriting.
- ▶ The Tenth Circuit has unambiguously condemned ghostwriting. *Duran v. Carris*, 238 F.3d 1268 (10th Cir. 2001).

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Ghostwriting: Not in Bankruptcy!

District of Kansas case law disapproves ghostwriting:

Kear v. Kohl's Dept. Stores, Inc., No. 12-1235-JAR-KGG, 2012 WL 5417321 (D. Kan. 2012): "The Kansas ethical rules do not expressly prohibit the practice of ghostwriting pleadings without disclosure. Notably, the KBA opinion expressly disagrees with American Bar Association's Formal Opinion 07-446 on the same subject. Although the KBA opinion is advisory, there is evidence that the Kansas Supreme Court is in accord in its District Court Rule 115A (applicable in state court) covering limited representation which requires a similar disclosure for pleadings filed pro se but written by an attorney. This Court has previously disapproved the practice of undisclosed ghostwriting. *Wesley v. John Stein Buick, Inc.*, 897 F.Supp. 884 (D.Kan.1997)."

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Ghostwriting: Not in Bankruptcy!

New D. Kan. Rule 83.5.8(b) suggests that ghostwriting would not be condoned by the District Court:

"[Kansas Supreme Court] Rule 115A(c) does not apply in the District of Kansas. Any **attorney preparing** a pleading, motion or other paper for a specific case **must enter a limited appearance and sign** the document. . . ."

Although this subparagraph is not applicable in the Bankruptcy Court, Standing Order 14-1 also contains language antagonistic to ghostwriting.

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Ghostwriting: Not in Bankruptcy!

New Standing Order 14-1 governing practice in Bankruptcy Court in Kansas leaves little ambiguity that ghostwriting would not be condoned.

USBC Orders, Bankr. D. Kan. ECF 14-00001, Doc. 10: "IT IS FURTHER ORDERED that any **attorney preparing** a pleading, motion or other paper for a specific case or matter in the United States Bankruptcy Court for the District of Kansas **must enter an appearance and sign the document.**"

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Ghostwriting: Not in Bankruptcy!

The Tenth Circuit condemned ghostwriting and identified the following concerns:

- ▶ Potential violation of the duty candor to the tribunal under Model Rule 3.3.
- ▶ “Undisclosed ghostwriting would also likely qualify as professional misconduct under Model Rules 8.4(c) and (d), prohibiting conduct involving a misrepresentation, and conduct that is prejudicial to the administration of justice, respectively.”
- ▶ Danger of circumventing Fed. R. Civ. P. 11 (analog to Fed. R. Bankr. P. 9011)
- ▶ Possibility that more generous interpretive standards will be applied to what appear to be, but are not, *pro se* pleadings.
- ▶ “We determine that the situation as presented here constitutes a misrepresentation to this court by litigant and attorney.”

Duran v. Carris, 238 F.3d 1268 (10th Cir. 2001); *see also Kear*, 2012 WL 5417321.

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Ghostwriting: Not in Bankruptcy!

“We hold that the participation by an attorney in drafting an appellate brief is *per se* substantial, and must be acknowledged by signature. In fact, we agree with the New York City Bar’s ethics opinion that ‘an attorney must refuse to provide ghostwriting assistance unless the client specifically commits herself to disclosing the attorney’s assistance to the court upon filing.’” *Duran*, 238 F.3d at 1273 (citations omitted).

“. . . when a brief labeled as ‘pro se’ is actually authored by an attorney, that attorney absolutely must identify himself by name and sign the brief. *See Duran*, 238 F.3d at 1272.” *Barnett v. LeMaster*, 12 Fed. Appx. 774, 779, 10th Cir. 2011 (Apr. 27, 2001).

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Ghostwriting: Not in Bankruptcy!

Limited scope representation is not a sanctioned backdoor to allow ghostwriting.

The Tenth Circuit chided an attorney for claiming “the high ground for ‘representing’ [appellant] on appeal at a reduced fee. He suggests that his representation of [appellant] in the trial court afforded him enough familiarity with the case to be able to offer . . . assistance with his appeal at a much reduced fee. We note the **irony** in [the attorney’s] rationalization that he should be commended for **assisting [appellant] on appeal at a reduced rate and yet failing to continue that representation on appeal**, or to even acknowledge that some form of assistance was given. . . . Therefore, we **admonish [the attorney] that this behavior will not be tolerated by this court, and future violations of this admonition will result in the possible imposition of sanctions.**” *Duran*, 238 F.3d at 1273.

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David Zimmerman

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