THE HON. JAMES G. MIXON TRIAL PRACTICE SYMPOSIUM

Presented by

THE UNITED STATES BANKRUPTCY COURT

EASTERN AND WESTERN DISTRICTS OF ARKANSAS

May 17, 2024

William H. Bowen School of Law, Little Rock

CLE Credit Hours: 6 (Including 1 hour of ethics and 1 hour domestic relations credit)

PROGRAM AGENDA

AND

HANDOUT MATERIALS

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PROGRAM

6 AR CLE hours (5 general hours and 1 ethics hour and 1 domestic relations credit)
Materials: (link to be provided)

8:00-8:30 Registration

8:30 - 8:40 Welcome
Hon. Phyllis M. Jones, *U.S. Bankruptcy Chief Judge for the Eastern and Western Districts of Arkansas*

8:40-9:40 Ethics: James G. Mixon Remembered
Priscilla Gibbs Harvey
John B. Buzbee, Nixon, Light & Buzbee, PLLC

9:45-10:45 Trial Practice in Domestic Relations Cases
Lauren White Hoover, LaCerra, Dickson, Hoover, & Rogers PLLC

10:45-11:00 Break

11:00-12:00 Recent Eighth Circuit Cases of Interest to the Bar
Hon. Lavenski R. Smith, *United States Circuit Judge, Eighth Circuit Court of Appeals*

12:00-1:00 Lunch (provided at cost - select box lunch choice on registration form)

1:00-2:00 Magistrate Judges on Best Trial Practices
Hon. Barry Bryant, *U.S. Magistrate Judge for the Western District of Arkansas*
Hon. Joe J. Volpe, *U.S. Magistrate Judge for the Eastern District of Arkansas*
Hon. Patricia S. Harris, *U.S. Magistrate Judge for the Eastern District of Arkansas*
Moderator: Hon. Phyllis M. Jones, *U.S. Bankruptcy Chief Judge, Eastern and Western Districts of Arkansas*

2:05-3:05 Ruminations on Trial Practice
Hon. Billy Roy Wilson, *U.S. District Judge for the Eastern District of Arkansas*
Hon. J. Leon Holmes (Ret.), *U.S. District Judge for the Eastern District of Arkansas*
Hon. Chris Piazza (Ret.), *Circuit Judge, Sixth Judicial Circuit, Pulaski and Perry Counties, Arkansas*
Moderator: Hon. Richard D. Taylor, *U.S. Bankruptcy Judge for the Eastern and Western Districts of Arkansas*

3:05-3:15 Break

3:15-4:15 The Intersection of State and Bankruptcy Law in Practice
Hon. Phyllis M. Jones, *U.S. Bankruptcy Chief Judge for the Eastern and Western Districts of Arkansas*
Hon. Richard D. Taylor, *U.S. Bankruptcy Judge for the Eastern and Western Districts of Arkansas*
Hon. Bianca M. Rucker, *U.S. Bankruptcy Judge for the Eastern and Western Districts of Arkansas*

THE HON. JAMES G. MIXON TRIAL PRACTICE SYMPOSIUM

May 17, 2024

Presentation from 8:40 to 9:40

Ethics: James G. Mixon Remembered

Priscilla Gibbs Harvey

John B. Buzbee

Nixon, Light & Buzbee, PLLC

Handout Materials

Ethical Issues

Hypothetical 1. The Unexperienced Practitioner

Delta Donna was born and raised in Helena, Arkansas. After graduating from the Bowen School of Law, she decided to go back home and hang out a shingle. She found a small office for rent and set up a solo practice in her hometown. Donna tried her hand at some divorces, joined the court-appointed criminal defense list, and even drafted some wills. Her practice was going pretty well for being in such a small town and a new lawyer.

One day, Farmer Frank came into her office. He had run into some troubles with the Arkansas Department of Finance & Administration and the IRS. He managed to "sort out" the issues on his own, but he fell behind on his operating loans. Now the local bank was threatening a foreclosure action and Frank wanted Donna to find a way for him to keep his tractor and farm.

Donna, being ever resourceful, googled "how to get out of debt and save your farm" and discovered a Chapter 12 bankruptcy filing. Donna had never taken a bankruptcy course in law school, but how hard could it be?

Any second thoughts Donna had about taking this case were forgotten when Frank offered to pay a large cash retainer that morning.

Question 1. Is Donna qualified to represent Farmer Frank in a Chapter 12 filing?

A. Yes B. No

Answer: Maybe, but probably not.

Rule 1.1: Competence

"[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Comment on Rule 1.1 [1]: "In determining whether a lawyer employs the requisite knowledge and skill in a particular matter; relevant factors include the relative complexity and specialized nature of the matter; the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most

fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

Question 2. Donna is so excited about this large retainer because she can use the money to buy a nice desk and some rugs to decorate her office space and have a fancy professional sign made instead of using the shingle she initially hand painted and hung. Can Donna immediately go buy all these items with the retainer?

Answer: Not until she has earned her fees and her fees must be reasonable.

Rule 1.5. Fees.

(a) A lawyer's fee shall be reasonable. A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. 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) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

Rule 1.15. Safekeeping Property and Trust Accounts

(a) Safekeeping property.

(1) A lawyer shall hold property of clients or third persons, including prospective clients, that is in a lawyer's possession in connection with a representation separate from the lawyer's own property.

(2) Property, other than funds of clients or third persons, shall be identified as such and appropriately safeguarded.

(3) Complete records of trust account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after the termination of the representation or the last contact with a prospective client.

(4) A lawyer shall maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any record keeping rules established by law, rule, or court order.

(5) 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 in writing. 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 person is entitled to receive and, upon request by the client or third person, shall promptly render a full written accounting regarding such property to the client or third persons.

The ABA provided Formal Opinion 505 in May of 2023 regarding a lawyer's obligations with respect to fees paid in advance for future legal work to be performed by the lawyer. According to the rules and as explained in the opinion, Donna must place the retainer in a client trust account and funds may be withdrawn only when earned by performance of services. The fees must be reasonable and any unearned fees must be returned to the client.

Question 3. What if Donna said this was a "nonrefundable advance"? Can she use the funds?

Answer: There is no magic language that will change the fact that lawyers must earn their fees for services rendered and all fees not earned must be returned.

Question 4. What can Donna do to ensure that she can provide competent representation to Frank?

Answer: Found in [2] of the comments to **Rule 1.1**: A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

Donna begins to study Chapter 12 filings by picking up a Bankruptcy for Dummies book and realizes that this might be a little more complicated than she realized so Donna seeks guidance from Lawyer Larry, an experienced debtors' lawyer with an office in the big city of Little Rock.

Donna doesn't want Farmer Frank to think less of her as an attorney, so she decides not to tell him about this little arrangement. Besides, the retainer Frank paid her was large enough to go around.

Question 5. Does this raise any ethical implications?

A. Yes B. No

Answer: Yes.

Comment on **Rule 1.1**[6]: "Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client.

Rule 1.5 (e) A division of 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.

See also **Rules 1.2** (allocation of authority), **1.4** (communication with client), **1.6** (confidentiality), and **5.5**(a) (unauthorized practice of law).

Alternate facts: Donna decided against partnering with Lawyer Larry. Her Bankruptcy for Dummies was providing her plenty of insight and she recently hired legal assistant, Helpful Hannah. Hannah was very proficient at using Google. Hannah searched for and located a Voluntary Petition and Schedules, a Statement of Affairs, and some other forms that looked official to Donna. Since Hannah found the forms so easily, Donna figured Hannah could work with Frank to complete the forms. Besides, it looked like filling in boxes was all that was required.

Frank was busy farming, so Hannah communicated with him by email to obtain the information about his assets and liabilities. Once Hannah completed the forms, Hannah emailed them to Frank for his review. Frank signed the forms and returns them a few minutes later. Donna was thrilled her new bankruptcy practice was taking off with so little effort on her part! Donna and Hannah gave each other a high five, and Hannah filed the forms with the Bankruptcy Court.

Question 6. Has Donna satisfied her obligations to her client?

A. Yes B. No

Answer: No.

Rule 1.4: Communication –

"(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules.

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

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

Question 7. Has Donna satisfied her obligations to the Bankruptcy Court?

A. Yes B. No

Answer: No.

Rule 3.3: Candor Toward the Tribunal

"(a) A lawyer shall not knowingly:

(1) 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;

(2) 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

(3) offer evidence that the lawyer knows to be false."

Federal Rule of Bankruptcy Procedure Rule 9011(b) also provides: "By presenting to the court (whether by signing, filing, submitting, or later advocating a petition, pleading, written motion, or other paper) an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of a new law:

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief."

Question 8. Are there any other actions Donna should be (or not be) taking?

A. Yes B. No

Answer: Yes. Donna needs to take a more active role in the preparation of the schedules and Donna must look over anything Hannah is preparing, as she is the lawyer not Hannah.

Rule 5.3: Responsibilities Regarding Nonlawyer Assistance

"With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has the direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."

Hypothetical 2. Working from Home

Ashley is a bankruptcy lawyer with a new baby who is working from home for the first year of the baby's life. She is keeping her files in her home office in an unlocked drawer, which she sometimes shares with her husband Ralph, who is also a lawyer who often works from home.

The house is a small Hillcrest bungalow, and when she's on call and Ralph is there, he can hear her calls, including calls with clients.

Ashley is working on a debtor case with her supervisor, Sam, and frequently has video calls with the debtor's executives to discuss strategy.

Question 9. Has Ashley violated the duty of confidentiality?

A. Yes B. No

Answer: Ashley is likely making "reasonable efforts" if she wears headphones and closes the door. In addition, putting the documents in a drawer rather than leaving them out for Ralph to see is likely a "reasonable effort."

Rule 1.6(c) Confidentiality of Information

"A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of or unauthorized access to, information relating to the representation of a client."

Comments to Rule 1.6 (c): Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules.

THE HON. JAMES G. MIXON TRIAL PRACTICE SYMPOSIUM

May 17, 2024

Presentation from 9:45 to 10:45

Trial Practice in Domestic Relations Cases

Lauren White Hoover

LaCerra, Dickson, Hoover & Rogers PLLC

Handout Materials

THE HON. JAMES G. MIXON TRIAL PRACTICE SYMPOSIUM

May 17, 2024

Presentation from 11:00 to 12:00

Recent Eighth Circuit Cases of Interest to the Bar

Hon. Lavenski R. Smith

United States Circuit Judge, Eighth Circuit Court of Appeals

Handout Materials

Recent Eighth Circuit Cases of Interest

- ***Connelly v. United States Dep't of Treasury, Internal Revenue Serv.*, 70 F.4th 412 (8th Cir.), *cert. granted sub nom. Connelly v. United States*, 144 S. Ct. 536 (2023).**
  - **Overview:** This case is about the tax treatment of life insurance policies that closely held corporations use to manage the death of a shareholder. To help keep the business in the family upon the shareholder's death, businesses frequently purchase a life insurance policy on the life of an aging shareholder. Upon the shareholder's death, the corporation uses the proceeds of that life insurance policy to purchase the shares from the shareholder's estate. This enables the remaining shareholders (often family members) to own the company without having to come up with money out of pocket to purchase the shares.
  - **Facts:** Michael Connelly owned about 75% of a family corporation that was worth a bit less than $4 million shortly before he died. The corporation received life insurance proceeds on his death, including about $3 million that would be spent to redeem his shares. The corporation was worth slightly less than $4 million when it received the $3 million. The $3 million was paid to Michael's survivors for his share in the company. When Michael died, the IRS assessed taxes on his estate, which included his stock interest in the corporation. According to the IRS, the corporation's fair market value included the life insurance proceeds intended for the stock redemption. Michael's estate argued otherwise and sued for a tax refund.
  - **Eighth Circuit Holding:** The Eighth Circuit held that the IRS did not err in including the insurance proceeds as part of the corporation's fair market value as the proceeds were a significant asset of the corporation at the time of Michael's death.
  - **Question Presented to Supreme Court:** Whether the proceeds of a life-insurance policy taken out by a closely held corporation on a shareholder in order to facilitate the redemption of the shareholder's stock should be considered a corporate asset when calculating the value of the shareholder's shares for purposes of the federal estate tax.
- ***In re Goetz*, 95 F.4th 584 (8th Cir. 2024)**
  - **Facts:** On August 19, 2020, the debtor filed a chapter 13 bankruptcy petition and plan. At the time of the filing, the debtor owned a residence worth $130,000 and claimed the full $15,000 homestead exemption under Missouri law. The lender held a $107,460.54 lien against the residence. Had the trustee liquidated the residence on the date of the petition, the estate would have received nothing net of the exemption, the lien, and the sales expenses. On April 5, 2022, the debtor converted her case from chapter 13 to chapter 7. Between the chapter 13 filing and the date of the conversion order, the residence had increased in value by $75,000. Had the trustee liquidated the residence on the conversion date, more than $62,000 net of the exemption, the lien, and the sale expenses would have been produced. The debtor moved to compel the trustee to abandon the residence. The bankruptcy court held that, pursuant to 11 U.S.C. § 348(f)(1)(A) and § 541, the post-petition, pre-conversion increase in equity in the debtor's residence became property of the debtor's converted bankruptcy estate. The Bankruptcy Appellate Panel for the Eighth Circuit affirmed. The debtor appealed.
  - **Issue:** Whether the post-petition, pre-conversion increase in equity in a Chapter 13 debtor's residence became property of the Chapter 7 estate upon conversion.
  - **Eighth Circuit Holding:** The court looked to the text of § 348(f)(1)(A) that states, for a chapter 13 case converted to chapter 7, the "property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion." The court held that the post-petition, pre-conversion increase in the debtor's equity was property of the converted estate, as proceeds "from property of the estate" under § 541(a)(6), and the debtor had effective control of the equity because she still possessed her residence on the date of conversion.

THE HON. JAMES G. MIXON TRIAL PRACTICE SYMPOSIUM

May 17, 2024

Presentation from 1:00 to 2:00

Magistrate Judges on Best Trial Practices

Hon. Barry Bryant

U.S. Magistrate Judge for the Western District of Arkansas

Hon. Joe J. Volpe

U.S. Magistrate Judge for the Eastern District of Arkansas

Hon. Patricia S. Harris

U.S. Magistrate Judge for the Eastern District of Arkansas

Handout Materials

28 U.S. Code § 636 - Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate judge serving under this chapter shall have within the district in which sessions are held by the court that appointed the magistrate judge, at other places where that court may function, and elsewhere as authorized by law—

(1)all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2)the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions;

(3)the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section;

(4)the power to enter a sentence for a petty offense; and

(5)the power to enter a sentence for a class A misdemeanor in a case in which the parties have consented.

(b)

(1) Notwithstanding any provision of law to the contrary—

(A)a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

(B)a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial[1] relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C)the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

(2)A judge may designate a magistrate judge to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate judge to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3)A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrate judges shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate judge or a part-time United States magistrate judge who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate judge may exercise such jurisdiction, if such magistrate judge meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate judge is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate judge is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate judge to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate judge may again advise the parties of the

availability of the magistrate judge, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court. The consent of the parties allows a magistrate judge designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate judge under this subsection.

(5) The magistrate judge shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

(d) The practice and procedure for the trial of cases before officers serving under this chapter shall conform to rules promulgated by the Supreme Court pursuant to section 2072 of this title.

(e)CONTEMPT AUTHORITY.—

(1)IN GENERAL.—
A United States magistrate judge serving under this chapter shall have within the territorial jurisdiction prescribed by the appointment of such magistrate judge the power to exercise contempt authority as set forth in this subsection.

(2)SUMMARY CRIMINAL CONTEMPT AUTHORITY.—
A magistrate judge shall have the power to punish summarily by fine or imprisonment, or both, such contempt of the authority of such magistrate judge constituting misbehavior of any person in the magistrate judge's presence so as to obstruct the administration of justice. The order of contempt shall be issued under the Federal Rules of Criminal Procedure.

(3)ADDITIONAL CRIMINAL CONTEMPT AUTHORITY IN CIVIL CONSENT AND MISDEMEANOR CASES.—
In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge shall have the power to punish, by fine or imprisonment, or both, criminal contempt constituting disobedience

or resistance to the magistrate judge's lawful writ, process, order, rule, decree, or command. Disposition of such contempt shall be conducted upon notice and hearing under the Federal Rules of Criminal Procedure.

(4)CIVIL CONTEMPT AUTHORITY IN CIVIL CONSENT AND MISDEMEANOR CASES.—
In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge may exercise the civil contempt authority of the district court. This paragraph shall not be construed to limit the authority of a magistrate judge to order sanctions under any other statute, the Federal Rules of Civil Procedure, or the Federal Rules of Criminal Procedure.

(5)CRIMINAL CONTEMPT PENALTIES.—
The sentence imposed by a magistrate judge for any criminal contempt provided for in paragraphs (2) and (3) shall not exceed the penalties for a Class C misdemeanor as set forth in sections 3581(b)(8) and 3571(b)(6) of title 18.

(6)CERTIFICATION OF OTHER CONTEMPTS TO THE DISTRICT COURT.—Upon the commission of any such act—

(A) In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, or in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, that may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection, or

(B) In any other case or proceeding under subsection (a) or (b) of this section, or any other statute, where—

(i)the act committed in the magistrate judge's presence may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection,

(ii)the act that constitutes a criminal contempt occurs outside the presence of the magistrate judge, or

(iii)the act constitutes a civil contempt,

the magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the

same manner and to the same extent as for a contempt committed before a district judge.

(7) APPEALS OF MAGISTRATE JUDGE CONTEMPT ORDERS.— The appeal of an order of contempt under this subsection shall be made to the court of appeals in cases proceeding under subsection (c) of this section. The appeal of any other order of contempt issued under this section shall be made to the district court.

(f) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate judge may be temporarily assigned to perform any of the duties specified in subsection (a), (b), or (c) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate judge shall perform any of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate judge so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635.

(g) A United States magistrate judge may perform the verification function required by section 4107 of title 18, United States Code. A magistrate judge may be assigned by a judge of any United States district court to perform the verification required by section 4108 and the appointment of counsel authorized by section 4109 of title 18, United States Code, and may perform such functions beyond the territorial limits of the United States. A magistrate judge assigned such functions shall have no authority to perform any other function within the territory of a foreign country.

(h) A United States magistrate judge who has retired may, upon the consent of the chief judge of the district involved, be recalled to serve as a magistrate judge in any judicial district by the judicial council of the circuit within which such district is located. Upon recall, a magistrate judge may receive a salary for such service in accordance with regulations promulgated by the Judicial Conference, subject to the restrictions on the payment of an annuity set forth in section 377 of this title or in subchapter III of chapter 83, and chapter 84, of title 5 which are applicable to such magistrate judge. The requirements set forth in subsections (a), (b)(3), and (d) of section 631, and paragraph (1) of subsection (b) of such section to the extent such paragraph requires membership of the bar of the location in which an individual is to serve as a magistrate judge, shall not apply to the recall of a retired magistrate judge under this subsection or section 375 of this title. Any other requirement set forth in section 631(b) shall apply to the recall of a retired magistrate judge under this subsection or section 375 of this title unless such retired magistrate judge met such requirement upon appointment or reappointment as a magistrate judge under section 631.

Duties of Magistrates Judges in the Eastern District of Arkansas
See Local Rule 72.1 (online at www.are.uscourts.gov)

I. Criminal Matters:
   A. Conduct all initial appearances and plea-and-arraignment hearings
   B. Conduct all bond hearings and revocation of pretrial release after referral
   C. Issue search warrants and arrest warrants
   D. Conduct initial appearances for supervised release revocations

II. Prisoner Cases (Habeas Corpus and § 1983)
   A. Issue recommended disposition reports in habeas corpus cases
   B. Handle all pretrial matters in cases brought under 42 U.S.C. §1983
   C. Preside over habeas and 1983 cases upon consent of the parties

III. Social Security Cases
   A. Preside over most social security cases with consent
   B. Issue recommendations for non-consent social security cases

IV. Settlement Conferences upon request

V. Regular Civil Cases on Referral (without consent of the parties)

   A. discovery disputes
   B. non-case-dispositive motions
   C. issue recommendations on referred case-dispositive motions

VI. Preside over regular civil cases with parties' consent

VII. Conduct naturalization proceedings

VIII. Participate on court governance committees

Table M-4.
U.S. District Courts—Criminal Pretrial Matters Handled by U.S. Magistrate Judges Under 28 U.S.C. § 636(b)
During the 12-Month Period Ending June 30, 2023

Circuit and District	Total	Non-Dispositive Motions	R&Rs on Dispositive Motions	Pretrial Conferences	Evidentiary Hearings	Guilty Plea Proceedings	Probation Revocation Hearings	Supervised Release Revocation Hearings	Mental Competency Proceedings	Motion Hearings	Reentry / Drug Court Proceedings	Writs
8th	29,323	22,431	568	1,464	362	1,664	2	121	97	888	129	1,597
AR,E	1,333	789	0	4	5	22	0	0	0	1	0	512
AR,W	237	183	7	1	2	25	0	0	4	15	0	0

Circuit and District	Total	Search Warrants	Arrest Warrants	Summonses	Complaints	Initial Appearances	Detention Hearings	Preliminary Hearings	Arraignments	Bail Reviews / Forfeitures / Nebbia Hearings	Attorney Appointment Hearings	Material Witness Hearings
8th	34,988	8,889	4,018	305	818	7,984	4,721	1,373	5,344	1,096	434	6
AR,E	2,988	427	684	104	74	685	151	5	633	224	1	0
AR,W	913	196	294	19	34	97	63	2	185	11	12	0

LOCAL RULE 72.1
UNITED STATES MAGISTRATE JUDGES

The duties and jurisdiction of United States Magistrate Judges shall be as provided for in 28 U.S.C. Sec. 636 and in Rules 5 and 5.1 of the Federal Rules of Criminal Procedure.

I. MISDEMEANOR JURISDICTION

Under the conditions required by law, the full-time Magistrate Judges are designated to try persons accused of, and to sentence persons convicted of, misdemeanors as defined by U.S.C. Sec. 3401. They are authorized to direct the United State Probation Office to conduct presentence investigations, render reports, and provide other necessary services. The Clerk shall automatically refer all misdemeanor cases that are initiated by information or indictment or are transferred to this district under Rule 20 of the Federal Rules of Criminal Procedure to a Magistrate Judge for plea and arraignment. If the defendant in such cases consents to the Magistrate Judge's jurisdiction, further proceedings shall be conducted before the Magistrate Judge. All part-time Magistrate Judges in both districts are also designated to try misdemeanor cases. In the Eastern District, the part-time Magistrate Judges shall exercise this jurisdiction when specifically referred a case by a District Judge or a full-time Magistrate Judge.

II. FORFEITURE OF COLLATERAL

The full-time Magistrate Judge shall oversee the Forfeiture of Collateral system. (Also, see a general order of the Court of each district for more details.)

III. COMMITMENT TO ANOTHER DISTRICT

The Magistrate Judge shall conduct proceedings pursuant to Federal Rules of Criminal Procedure 40.

IV. CRIMINAL PRETRIAL

A Magistrate Judge may conduct post-indictment arraignments. In felony cases, he shall accept not guilty pleas and refer pleas of guilty to a District Judge, or if no District Judge is immediately available, the Magistrate Judge shall enter a not guilty plea for the defendant and schedule a time for the defendant to appear before a District Judge and enter a change of plea.

V. SUBPOENAS AND WRITS

A Magistrate Judge may issue subpoenas, writs of habeas corpus ad testificandum or ad prosequendum or other orders necessary to obtain the presence of parties or witnesses or evidence needed for court proceedings, either civil or criminal.

VI. MOTIONS TO DISMISS

A Magistrate Judge may hear and decide motions by the government to dismiss an indictment, information or complaint without prejudice to further proceedings.

VII. REFERENCE OF NON-DISPOSITIVE MATTERS

A. Reference

When designated by a District Judge, and as limited by 28 U.S.C. Sec. 636(b)(1)(A), a Magistrate Judge may hear and determine any pretrial matters pending before the Court, including, but not limited to, procedural and discovery motions, pretrial conferences, omnibus hearings, docket calls, settlement conferences, and related proceedings.

B. Appeal

In all matters delegated under authority of 28 U.S.C. Sec. 636(b)(1)(A), a Magistrate Judge's decision is final and binding and is subject only to a right of appeal to the District Judge to whom the case has been assigned. A party may appeal the Magistrate Judge's ruling by filing a motion within fourteen (14) days of the Magistrate Judge's

decision unless a shorter period is set by the District Judge or Magistrate Judge. Copies shall be served on all other parties and the Magistrate Judge from whom the appeal is taken. The motion shall specifically state the rulings excepted to and the basis for the exceptions. The Court may reconsider any matter sua sponte. The District Judge shall affirm the Magistrate Judge's findings unless he finds them to be clearly erroneous or contrary to law. In all matters referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(c) (consent jurisdiction), an aggrieved party may appeal only to the Court of Appeals in the same manner as on appeal from any other judgment of a district court.

VIII. DISPOSITIVE MATTERS

A. Reference - General

A District Judge may designate a Magistrate Judge to conduct hearings, including evidentiary hearings, and to submit proposed findings of fact and recommendations for the resolution of any dispositive matters, including, but not limited to, the following:

1. Motions by the defendant to dismiss or quash an indictment or information;
2. Motions to suppress evidence;
3. Applications to revoke probation, including the conduct of the "final" probation revocation hearing;
4. Motions for temporary restraining orders and preliminary injunctions;
5. Motions to dismiss for failure to state a claim upon which relief may be granted;
6. Motions to dismiss an action and to review default judgment;
7. Motions to dismiss or to permit the maintenance of a class-action;
8. Motions for judgment on the pleadings or for summary judgment;
9. Cases involving the granting of benefits to claimants under the Social Security

Act and the "black lung" benefit laws;

10. Cases involving the adjudication by the Civil Service Commission of adverse employee actions, retirement eligibility and benefits questions; and the rights of employees in situations such as reductions in force.

B. Reference - Prisoner Petitions

A Magistrate Judge shall have the following responsibilities with regard to prisoner petitions:

1. Review of prisoner correspondence and petitions concerning 28 U.S.C. Sec. 2241, 28 U.S.C. Sec. 2254 and 42 U.S.C. Sec. 1983 matters;
2. Review of prisoner correspondence and petitions concerning conditions of confinement which are submitted by federal prisoners;
3. Preparation and distribution of forms required by the Rules Governing Sec. 2254 Cases (28 U.S.C. Sec. 2254);
4. Entry of orders authorizing the petitioner to proceed in forma pauperis without the prepayment of costs or fees;
5. Issuance of all necessary orders to answer or to show cause or any other necessary orders or writs to obtain a complete record;
6. Taking of depositions, conducting pretrial conferences, and conducting evidentiary hearings or other necessary proceedings in order to obtain a complete record.

C. Objection

When a Magistrate Judge files proposed findings or recommendations with the Court, he shall mail a copy to all parties. Within fourteen (14) days after being served with

a copy, any party may serve and file written objections to such proposed findings, recommendations or order. The District Judge must make a de novo determination of any matters which have been specifically objected to by the litigants, but this does not necessarily require the Judge to conduct a hearing on contested issues. In some instances, it may be necessary for the District Judge to modify or reject the findings of the Magistrate Judge, to take additional evidence, recall witnesses, or recommit the matter to the Magistrate Judge for further proceedings.

D. Statement of Necessity

A party objecting to the Magistrate Judge's proposed findings and recommendations who desires to submit new, different, or additional evidence and to have a hearing for this purpose before the District Judge will file a "statement of necessity" at the time he files his written objections, and which shall state:

1. why the record made before the Magistrate Judge is inadequate;
2. why the evidence to be proffered (if such a hearing is granted) was not offered at the hearing before the Magistrate Judge; and
3. the details of any testimony desired to be introduced in the form of an offer of proof, and a copy, or the original, of any documentary or other non- testimonial evidence desired to be introduced.

From this submission, the District Judge shall determine the necessity for an additional evidentiary hearing, either before the Magistrate Judge or before the District Judge.

IX. MASTER REFERENCES

When designated by a District Judge, a Magistrate Judge may:

A. serve as a special master in accordance with the provisions of Rule 53 of the Federal

Rules of Civil Procedure, or, upon consent of the parties, without regard to the provisions of Rule 53. He may also hear testimony and submit a report and findings on complicated issues in jury and non-jury cases;

B. conduct evidentiary hearings and prepare findings in employment discrimination cases as a master under 42 U.S.C. Sec. 2000(e)(5); and

C. conduct hearings and resolve specific issues in patent, antitrust and other complex cases where there are a great many issues, claims and documents, or in multiple disaster and class-action cases where there are numerous claimants and diverse claims.

X. CIVIL CONSENT JURISDICTION

A. Special Designation

The full-time Magistrate Judges of both districts are specially designated by the District Court to conduct any or all proceedings in jury or non-jury civil matters upon the consent of the parties.

B. Reference

1. Notice. The clerk shall give the plaintiff notice of the Magistrate Judge's consent jurisdiction, in a form approved by the Court, when a civil suit is filed. The Clerk shall also attach the same notice to the summons for service on the defendant.

2. Consent. Any party may obtain a "Consent to Magistrate Judge's Jurisdiction" form from the Clerk's office.

3. The Clerk shall furnish the party with Consent Form A, which shall provide that any appeal in the case shall be taken directly to the Circuit Court of Appeals.

4. Transfer. Once the completed forms have been returned to the Clerk, he shall then draw by lot the name of the Magistrate Judge and forward the Consent

forms for final approval to the District Judge to whom the case is assigned. When the District Judge has approved the transfer and returned the Consent forms to the Clerk's office for filing, the Clerk shall forward a copy of the Consent forms to the Magistrate Judge to whom the case is assigned. The Clerk shall also indicate on the file that the case has been assigned to the Magistrate Judge.

C. Appeal

Appeal to the Court of Appeals. The final judgment, although ordered by the Magistrate Judge, is deemed a final judgment of the District Court and will be entered by the Clerk under Rule 58 Fed. R. Civ. P. Any appeal shall be taken to the Court of Appeals in the same manner as an appeal from any other judgment of the District Court.

XI. OTHER REVIEWABLE MATTERS

Rulings, orders, or other actions by a Magistrate Judge in the District, review of which is not otherwise specifically provided for by law or these rules, shall, nevertheless, be subject to review by the District Court as follows:

A. Any party may file and serve, not later than fourteen (14) days thereafter an application for review of the Magistrate Judge's action by the District Judge having jurisdiction. Copies of such application shall be served promptly upon the parties, the District Judge, and the Magistrate Judge.

B. After conducting whatever further proceedings he or she deems appropriate, the District Judge may adopt or reject, in whole or in part, the action taken by the Magistrate Judge, or take such other action he or she deems appropriate.

XII. REFERRALS

Notwithstanding any provision in this Local Rule, the District Court may by General Order

authorize referral to Magistrate Judges of any matters consistent with 28 U.S.C. § 636.

Note: Attorneys practicing in the Western District of Arkansas should consult General Order 40 for instructions for the acceptance of guilty pleas by magistrate judges.

I through X Adopted and effective May 1, 1980
XI Adopted and effective June 26, 1981
VIII (B)(6) Adopted and effective October 1, 1982
X Revised and effective January 1-2, 1988 Amended January 2, 1990
VIII (B)(1) Revised and approved April 1, 1999
Amended effective November 10, 2009
Amended effective August 5, 2010
Amended effective November 1, 2012

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

IN RE ALTERNATIVE DISPUTE RESOLUTION

GENERAL ORDER NO. 50

Purpose. In accordance with the Alternative Dispute Resolution Act of 1998, the United States District Court for the Eastern District of Arkansas has established an alternative Dispute Resolution (ADR) program. This program is designed to afford litigants an opportunity to reach a satisfactory resolution of disputes before litigation.

The ADR Administrator. The Clerk of Court is appointed "ADR Administrator." While attached administratively to the Clerk's office, the ADR Administrator reports directly to the Chief Judge of this Court. The ADR Administrator must:

(1) Prepare any applications for funding fo the ADR program by the United States Government and other entities, and prepare reports required by the United States Government or other parties on the use of funds in the operation and evaluation of the ADR program;

(2) Develop and maintain such forms, records, docket controls, and data as may be necessary to administer and evaluate the program, and,

(3) Periodically evaluate the ADR program and submit the resulting evaluation to the Court, along with any recommendations for changes, if needed.

The ADR Program. On the date of the enactment of the Alternate Dispute Resolution Act of 1998, the Court had an ADR program, the provision of settlement conferences conducted by a United States Magistrate Judge who has been trained to serve as a neutral in alternative dispute

resolution processes. Upon examination and review, the existing program is adopted as the ADR process of the court.

(1) Exempted cases. Unless otherwise ordered by the court, the following cases are excluded from the program:

(a) Appeals from rulings of administrative agencies;

(b) Social Security Cases;

(c) Bankruptcy appeals;

(d) Habeas corpus and extraordinary writs; and

(e) Prisoner civil rights cases.

Consideration of the Alternative Dispute Resolution process. Litigants in all civil cases, except as exempted above, shall consider the use of the Alternative Dispute Resolution process provided by this Court at an appropriate stage in the litigation.

Procedure:

(1) This district's United States Magistrate Judges are authorized to conduct settlement conferences in each civil case other than those cases exempted above. Such settlement conferences may be conducted if all parties consent to the same, or if all parties so request and the district judge assigned to the case believes that such would be useful.

(2) All settlement conferences will be conducted at such times and under the procedures as may be established by the respective United States Magistrate Judges.

(3) The rules governing disqualification, as set forth in 28 U.S.C. 455 and Canon 3 of

Code of Conduct for the United States Judges, will apply to a Magistrate Judge to whom a case is referred.

Confidentially. Communications of litigants, attorneys and magistrate judges during the ADR process are confidential, and disclosure of these communications is prohibited. However, the magistrate judge shall be permitted to inform the presiding judge and/or Clerk's office of the outcome of the process.

Other ADR Processes. The litigants must not be prohibited or discouraged from utilizing other ADR processes to assist in the resolution of issues in controversy, such as mediation, minitrial, and arbitration. However, these procedures are not available in this Court's ADR program.

IT IS SO ORDERED this 31ST day of July, 2000.

/s/ Susan Webber Wright
SUSAN WEBBER WRIGHT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

Amended August 16, 2012

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

IN RE MAGISTRATE DUTIES
AND RESPONSIBILITIES

GENERAL ORDER NO. 17

Under the Rules of this Court, the full-time United States Magistrates of this district are authorized to conduct debtor examinations. On occasion, persons who have been summoned to appear at such examinations fail to do so, and it appears that there is a need to direct such persons to show cause why they should not be held in contempt of court.

THEREFORE, the Court hereby authorizes the full-time Magistrates of this district to issue show cause orders, conduct necessary hearings on such matters, and to report and recommend to the District Court the action they feel should be taken.

IT IS SO ORDERED.

DATED this 24th day of February, 1981.

/s/ Garnett Thomas Eisele
GARNETT THOMAS EISELE, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
EASTERN AND WESTERN DISTRICTS OF ARKANSAS

IN RE FULL-TIME UNITED STATES MAGISTRATES

GENERAL ORDER NO. 19

Pursuant to the authorization of the Judicial Conference of the United States at its September, 1980, meeting, the full-time United States magistrates in both the Eastern and Western Districts of Arkansas are hereby authorized to perform the duties of a magistrate in either district of the state.

DATED this 21st day of August, 1981.

FOR THE COURT

/s/ Garnett Thomas Eisele
G. Thomas Eisele, Chief Judge
Eastern District of Arkansas

/s/ Paul X. Williams
Paul X. Williams, Chief Judge
Western District of Arkansas

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
RICHARD SHEPPARD ARNOLD UNITED STATES COURTHOUSE
500 WEST CAPITOL AVENUE, ROOM 381
LITTLE ROCK, ARKANSAS 72201

EDIE R. ERVIN
UNITED STATES MAGISTRATE JUDGE

(501) 604-5200
FAX# 604-5389

ORDER SCHEDULING SETTLEMENT CONFERENCE

January 30, 2024

Delivered by mail to:

Mr. Christopher W. Burks — chris@whlawoffices.com
Mr. Stewart Whaley — stewart@wh.law
WH Law
One Riverfront Place, Suite 745
North Little Rock, AR 72114

Mr. Clint W. Lancaster — clint@thelancasterlawfirm.com
The Lancaster Law Firm
Post Office Box 1295
Benton, AR 72018

Re: *Dillinger v. Jamell Contractors LLC*, No. 4:22-CV-01097-DPM

Dear Counsel:

We have all agreed that I will conduct a settlement conference in the above case, starting at 9:30 a.m. on **March 7, 2024,** in courtroom 389 of the Federal Courthouse in Little Rock, Arkansas.

This Letter-Order sets forth requirements that the parties must address **before** the settlement conference. Please review it carefully.

It is my understanding that **both** sides have requested this settlement conference and are prepared to negotiate in good faith to reach a full and complete settlement in this case. Please let me know immediately if this is not the case.

Counsel should ensure the presence of representative[s] with **complete authority** to agree to a full and complete settlement in this case.

No later than noon, **February 29, 2024**, each party must submit an *ex parte*, confidential settlement statement that openly and honestly discusses the topics listed below. The confidential statements should not be filed with the Clerk of the Court, nor served on another party. The settlement statements are for my review only and will remain confidential. Parties should hand deliver to chambers or email (erechambers@ared.uscourts.gov) their confidential statement.

Your confidential letters should include:

(1) an honest summary of the major weaknesses in each side's case, both factual and legal;

(2) an honest assessment of the obstacles to reaching settlement and your best ideas for overcoming these obstacles;

(3) a complete evaluation of the maximum and minimum damage awards likely to be awarded if the case goes to trial;

(4) the impact of any applicable fee-shifting provisions;

(5) the history of any settlement negotiations to date; and

(6) the name and title of all parties, party representative(s) and counsel who will attend the conference.

There is very little to review in the case file. If you want me to review anything that arguably supports your view of the case, attach a hard copy to your confidential letter.[1] Additionally, if you want me to review any cases (or other legal authority) supporting your evaluation of the case, please provide citations or copies.

In addition to submitting *ex parte* letters, the parties **must** exchange written settlement demands/responses before the settlement conference. If this has already been done, please note it in your confidential letters. If this has not been done, it **must** be done before the settlement conference.

[1] Attachments *exceeding 15 pages* should be hand delivered to chambers.

Three hours should be sufficient for this settlement conference. However, if we are making good progress, we may go longer.

The settlement process and our communications before or during the conference are confidential. See General Order 50.

Feel free to contact me directly or my courtroom deputy, Melanie Beard, with any questions or ideas for increasing settlement prospects.

I look forward to seeing everyone on March 7 and working together to resolve this case.

Sincerely,

Edie R. Ervin

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
RICHARD SHEPPARD ARNOLD UNITED STATES COURTHOUSE
500 WEST CAPITOL AVENUE, ROOM 244
LITTLE ROCK, ARKANSAS 72201

BENECIA B. MOORE
UNITED STATES MAGISTRATE JUDGE

(501) 604-5120
FAX# (501) 435-3821

ORDER SCHEDULING SETTLEMENT CONFERENCE

November 13, 2023

Delivered by mail to:

Mr. Joshua Sanford — josh@sanfordlawfirm.com
Mr. Sean Short — sean@sanfordlafirm.com
Sanford Law Firm, PLLC
10800 Financial Centre Parkway
Little Rock, AR 72211

Mr. William Stuart Jackson — wjackson@wlj.com
Ms. Regina Ann Young — ryoung@wlj.com
Wright, Lindsey & Jennings
200 West Capitol Avenue, Suite 2300
Little Rock, AR 72201

Re: *Alexis Brown v. Independent Case Management, Inc.*,
Case No. 4:22-CV-00502-DPM

Dear Counsel:

This case is scheduled for a settlement conference on Tuesday, December 12, 2023, at 10am in courtroom 4B of the Federal Courthouse in Little Rock, Arkansas. This Letter-Order sets forth requirements that the parties must address before the settlement conference. Please review it carefully.

Counsel are instructed to bring with them to the settlement conference the client or client representative with authority to agree to a full and complete settlement in this case.

To assist me in preparing for this settlement conference, I am requesting that each party submit an *ex parte*, confidential settlement statement that openly and honestly discusses the topics listed below. The confidential statements should not be filed with the Clerk of the Court, nor served on another party. The settlement statements are for my review only and will remain confidential.

Your confidential statements should address the following issues:

(1) The current status of settlement negotiations, including the most recent settlement demand and settlement offer exchanged between counsel;

(2) An honest summary of the major weaknesses in each side's case, both factual and legal;

(3) Each side's current realistic assessment of the actual range within which this case should be settled; and

(4) An honest assessment of the obstacles to reaching settlement and your best ideas for overcoming these obstacles.

Please email your settlement statements to chambers at bbmchambers@ared.uscourts.gov no later than noon on Tuesday, December 5, 2023. Please also include a list of all parties, party representatives and counsel who will attend the conference. If there is anything else you'd like me to review that supports your case, please attach it to your confidential settlement statement.

In addition to submitting *ex parte* settlement statements, the parties **must** exchange written settlement demands/responses before the settlement conference. If this has already been done, please note that in your settlement statement.

If you have any questions or ideas for increasing settlement prospects, please contact Kristy Rochelle at (501) 604-5124. I look forward to seeing you all on December 12 and working together to get this case resolved.

Sincerely,

Benecia Moore

Benecia B. Moore
U.S. Magistrate Judge

Re: Crutchfield, et al. v. Fred Dawson, 4:20-cv-01488 JM

Dear Counsel:

As you know, this case is scheduled for a settlement conference at 9:30 a.m. on Tuesday, January 4, 2022 in courtroom 1B of the Federal Courthouse in Little Rock.

Counsel are instructed that they must bring with them to the settlement conference the client or client representative who has the authority to agree to a full and complete settlement in this case.

To assist me in preparing for this settlement conference, I am requesting that each of you provide me with a confidential letter (**not** to be exchanged with opposing counsel or filed with the Clerk's office). The Court will **not** disclose anything contained in this confidential letter to opposing counsel before, during, or after the settlement conference.

Each of your confidential letters to the Court should candidly discuss the following issues:

(1) The current status of settlement negotiations, including the most recent
settlement demand and settlement offer exchanged between counsel.

(2) Each side's current realistic assessment of the actual range within which
this case should be settled, including a breakdown of the dollar settlement

value that should be assigned to each element of Plaintiff's damages.

(3) Each side should identify the major obstacles to reaching settlement; discuss
how each of these obstacles impacts settlement; and, set forth your best
ideas on how each of these obstacles can be overcome.

(4) Defense counsel should identify and explain all legal issues that may bar
the Plaintiff from recovering on its claim.

(5) Plaintiff's counsel should identify and explain why Defendant's primary defenses to Plaintiff's claim will fail.

In order for me to prepare for the January 4th settlement conference, please send
your confidential letter to me, via email, at
pshchambers@ared.uscourts.gov,
colleen_dubose@ared.uscourts.gov

Magistrate Judge Patricia S. Harris
Richard Shepard Arnold United States Courthouse,
500 W. Capitol Avenue, Suite C163
Little Rock, AR 72201

no later than 12 noon, on December 28, 2021.

If you have any questions, feel free to call my law clerk, Doug Ward, at (501) 604-5181.

Patricia S. Harris
U.S. Magistrate Judge

THE HON. JAMES G. MIXON TRIAL PRACTICE SYMPOSIUM

May 17, 2024

Presentation from 2:05 to 3:05

Ruminations on Trial Practice

Hon. Billy Roy Wilson

U.S. District Judge for the Eastern District of Arkansas

Hon. J. Leon Holmes (Ret.)

U.S. District Judge for the Eastern District of Arkansas

Hon. Chris Piazza (Ret.)

Circuit Judge, Sixth Judicial Circuit, Pulaski and Perry Counties, Arkansas

Handout Materials

THE FIRST PRINCIPLE OF EFFECTIVE ADVOCACY[1]

by Leon Holmes

Speak the truth: that is the first principle of effective advocacy. A lawyer engaged as an advocate must find some truth that can form the centerpiece of a theory of the case which, given the facts and the law, has the potential to yield the best attainable result for the client. That truth might be a fact or set of facts, a legal principle, a procedural point, a period of limitations, an interpretation of case law, or some combination of those things. That truth is the pearl of great price, the treasure buried in a field, for which the lawyer must search by investigating the facts and researching the law. Of course, methods and techniques of presentation have an important place in advocacy; but the methods and techniques of presentation, whether oral or written, are secondary to this first principle: speak the truth.

The alternative is to ascertain what positions, if adopted by the court or jury, would yield the result that the client desires and then to search for arguments that support those positions. No doubt, this alternative is often adopted by lawyers; but, even aside from the moral ambiguities inherent in this approach to advocacy, it is not the approach that is most likely to persuade the court or jury. Speaking the

[1] This article was previously published by https://www.americanbar.org/groups/litigation/resources/newsletters/appellate-practice/spring2024-first-principle-effective-advocacy-speak-truth/ and is used here by permission.

truth—the truth that has the potential to yield the best result for the client possible given the facts and applicable law—is not only the right thing to do, it is also more effective. That approach is more likely to persuade the court or the jury.

If speaking the truth is the first principle of effective advocacy, conviction is advocacy's most important ingredient. Again, while a good advocate will use methods and techniques of persuasion, no method or technique will make the argument as convincing as will conviction. The advocate who wants to convince must speak with conviction. The advocate who is speaking the truth, and knows it, will speak with more conviction than the advocate who has adopted a position and then searched for arguments to support that position.

Every lawyer has been taught the importance of candor. That speaking the truth is necessary for candor is self-evident. Adopting positions and then searching for arguments to support those positions tempts the advocate to a lack of candor. Persuasion depends not only on the points for which the advocate argues, but also on the points that the advocate is willing to concede. The advocate who speaks the truth *ipso facto* will have the candor to concede points on which the opponent is correct. The advocate who adopts positions favorable to the client and then searches for arguments to support those positions will find it more difficult to concede points that should be conceded.

Finding the truth that can form the centerpiece of a theory of the case, rather than adopting positions and then searching for arguments, has a further consequence, namely, that it produces a more focused and more concise argument. In the vast majority of cases, the decisive issues are very few; usually, no more than two or three. Adopting positions and then searching for supporting arguments is an approach that lends itself to contesting every possible point. A complaint with nine or ten counts, or a brief arguing nine or ten issues, usually results from one of two causes: either the lawyer is arguing points that are not decisive (which distracts the decisionmaker from the issues on which the case turns); or the arguments on some points lack merit; or both. But the lawyer who speaks the truth as the centerpiece of a theory of the case which, given the facts and the law, has the potential to yield the best attainable result will be more candid, that lawyer also will focus the argument on the decisive issues. Such a lawyer is less likely to argue points on which the case does not turn or to argue positions that lack merit.

It follows from what has been said that speaking the truth which, given the facts and the law, might yield the best attainable result makes the advocate more credible. The advocate's credibility flows, obviously, from the advocate's candor and conviction. But that credibility also flows from the fact that the advocate focuses the argument on decisive issues and does not assert arguments on multiple points that are not decisive or as to which the arguments lack merit. Credibility is

gold for an advocate; without it, the advocate is destitute. Credibility and speaking the truth, needless to say, go hand in hand.

It also follows that speaking the truth which, given the facts and the law, might yield the best attainable result leads to greater clarity. At a minimum, that approach makes clear what are the decisive points; it focuses the court or jury on the centerpiece of the advocate's theory of the case rather than on peripheral or secondary issues. More than that, the advocate who is speaking the truth will strive to make clear what that truth is and why it is true. If only the judge or jury understands, the advocate will think, they will be persuaded; which focuses the advocate on clarity. Too often, lawyers (and, I should add, judges) fail to make clear precisely what is their contention and why that contention is true. Confusion is the mortal enemy of persuasive advocacy; clarity is its best friend. Taking positions and then searching for supportive arguments is more likely to produce confusion than is speaking the truth; speaking the truth is more likely to produce clarity.

In summary, speaking the truth is not only the right approach, morally and ethically, but also the approach to advocacy that is most likely to be persuasive. It results in the five C's of effective advocacy: Candor, Conviction, Conciseness, Credibility, and Clarity.

THE HON. JAMES G. MIXON TRIAL PRACTICE SYMPOSIUM

May 17, 2024

Presentation from 3:15 to 4:15

The Intersection of State and Bankruptcy Law in Practice

Hon. Phyllis M. Jones

U.S. Bankruptcy Chief Judge for the Eastern and Western Districts of Arkansas

Hon. Richard D. Taylor

U.S. Bankruptcy Judge for the Eastern and Western Districts of Arkansas

Hon. Bianca M. Rucker

U.S. Bankruptcy Judge for the Eastern and Western Districts of Arkansas

Handout Materials

THE HON. JAMES G. MIXON TRIAL PRACTIC SYMPOSIUM

WILLIAM H. BOWEN SCHOOL OF LAW
May 17, 2024

DOMESTIC SUPPORT OBLIGATIONS – FROM STATE COURT TO BANKRUPTCY COURT – WHAT HAPPENS NOW?

Hon. Phyllis M. Jones

Scenario One: During the state court divorce proceedings, your client's ex-spouse became significantly delinquent in his court ordered child support payments. Your client filed appropriate motions to compel him to pay the arrearage. Instead of paying the arrearage in full, the parties agreed to the entry of a consent judgment for the amount of the arrearages and to a payment plan for the arrearages to be paid over a ten year period of time. What happens when the ex-spouse responsible for making the child support payments files a Chapter 13 petition with 7 years left on the court ordered repayment plan? Can the debtor treat this pre-petition consent order as a continuing long term debt or does the Chapter 13 plan need to propose to pay this pre-petition child support arrearage in full in order to be confirmed?

Law (from *In re Little*, 634 B.R. 784 (Bankr. E.D. Ark. 2021)

The Bankruptcy Code's treatment of domestic support obligations differs depending on whether the obligation was due prepetition or whether it becomes due postpetition. *See Young v. Young (In re Young)*, 497 B.R. 904, 916 (Bankr. W.D. Ark. 2013).

As it concerns prepetition domestic support obligations, Section 507(a)(1)(A) gives first priority status to:

> [a]llowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition in a case under this title, are owed to or recoverable by a spouse, former spouse, or child of the debtor, or such child's parent, legal guardian, or responsible relative, without regard to whether the claim is filed by such person or is filed by a governmental unit on behalf of such person ...."

11 U.S.C. § 507(a)(1)(A).

A creditor may file a proof of claim for a prepetition domestic support obligation. *Young*, 497 B.R. at 917. In a chapter 13 case, the obligation must generally be paid in full over the life of the debtor's plan, unless the creditor agrees to different treatment.[6] 11 U.S.C. § 1322(a)(2); *see also Young*, 497 B.R. at 917–18.

Postpetition domestic support obligations are treated differently. In a Chapter 13 case, the Debtor must remain current on domestic support obligations that "first become[ ] payable after the date of the filing of the petition," or his case may be converted or dismissed. 11 U.S.C. § 1307(c)(11).

A creditor may not file a proof of claim for a postpetition domestic support obligation. Such claims are disallowed under Section 502(b)(5). *See, e.g., Young*, 497 B.R. at 917 ("Because postpetition domestic support obligations are not part of the debt owed as of the date of the petition, such debts qualify as unmatured." (citing *Burnett v. Burnett (In re Burnett)*, 646 F.3d 575, 582 (8th Cir. 2011))); *see also Pawtucket Credit Union v. Haase (In re Haase)*, 306 B.R. 415, 419 (B.A.P. 1st Cir. 2004) (explaining that the word "unmatured" is not defined in the Bankruptcy Code, but is often construed to mean "postpetition" (citing *IRS v. Cousins (In re Cousins)*, 209 F.3d 38, 41 (1st Cir. 2000))); ***793** *McKinney v. McKinney (In re McKinney)*, 507 B.R. 534, 541 (Bankr. W.D. Pa. 2014) ("Postpetition domestic support obligations fall into the category of 'unmatured' claims, because they are not due at the time the debtor files for bankruptcy." (citing *Young*, 497 B.R. at 917)).

Scenario Two: Your client was awarded attorney's fees in connection with a state court divorce action. Her ex-husband then files a Chapter 13 petition. What does this mean for your fee award? Does your client's ex-husband get to discharge his debt for attorney fees or will he be required to pay them in his Chapter 13 plan?

Law (from *In re Armstrong*, 2024 WL 1161458 (Bankr. E.D. Ark. Mar. 18, 2024)

The Bankruptcy Code defines a "domestic support obligation" in relevant part as a "debt ... that is owed to ... a spouse, former spouse, or child of the debtor ... in the nature of alimony, maintenance, or support ... of such spouse, former spouse, or child of the debtor ... established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of a separation agreement, divorce decree, or property settlement agreement [or] an order of a court of record ... not assigned to a nongovernmental entity." 11 U.S.C. § 101(14A)(A)–(D).

Domestic support obligations are nondischargeable in bankruptcy and are entitled to priority treatment. *See* 11 U.S.C. §§ 523(a)(5), 1328(a), 507(a)(1)(A). Conversely, debts owed to a spouse, former spouse, or child of the debtor that do not qualify as domestic support obligations are dischargeable in Chapter 13 cases and are not entitled to priority status. *See* 11 U.S.C. §§ 523(a)(15), 1328(a); *Phegley v. Phegley (In re Phegley)*, 443 B.R. 154, 157 (B.A.P. 8th Cir. 2011).

In the Eighth Circuit, whether a debt is a domestic support obligation or a property settlement is a question of federal law. *Williams v. Williams (In re Williams)*, 703 F.2d 1055, 1056 (8th Cir. 1983). "When deciding whether a debt should be characterized as one for support or property settlement, the crucial question is the function the award was intended to serve." *In re Phegley*, 443 B.R. at 157 (first citing *Adams v. Zentz*, 963 F.2d 197, 200 (8th Cir. 1992); then citing *Boyle v. Donovan*, 724 F.2d 681, 683 (8th Cir. 1984); and then citing *Kruger v. Ellis (In re Ellis)*, 149 B.R. 925, 927 (Bankr. E.D. Mo. 1993)).

Courts consider a multitude of factors when determining whether a debt is a domestic support obligation, including:

> the language and substance of the agreement in the context of surrounding circumstances, using extrinsic evidence if necessary; the relative financial conditions of the parties at the time of the divorce; the respective employment histories and prospects for financial support; the fact that one party or another receives the marital property; the periodic nature of the payments; and whether it would be difficult for the former spouse and children to subsist without the payments.

In re Phegley, 443 B.R. at 158 (first citing *Morgan v. Woods (In re Woods)*, 309 B.R. 22, 27 (Bankr. W.D. Mo. 2004); then citing *Tatge v. Tatge (In re Tatge)*, 212 B.R. 604, 608 (B.A.P. 8th Cir. 1997); and then citing *Schurman v. Schurman (In re Schurman)*, 130 B.R. 538, 539 (Bankr. W.D. Mo. 1991)).

"A liberal construction governs the analysis of what constitutes support to fulfill the legislative purpose of § 523(a)(5)." *Amos v. Carpenter (In re Amos)*, 624 B.R. 657, 660 (B.A.P. 8th Cir. 2021) (citing *In re Phegley*, 443 B.R. at 158 (finding "policy ... favors the enforcement of familial obligations over a fresh start for the debtor")).

Attorney's fees and costs awarded in connection with divorce proceedings can constitute domestic support obligations if "the award is in the nature of support." *Rump v. Rump (In re Rump)*, 150 B.R. 450, 453 (Bankr. E.D. Mo. 1993) (citing *In re Williams*, 703 F.2d at 1057). Likewise, attorney's fees and costs incurred in litigating child support issues qualify as domestic support obligations if "the obligation is in the nature of support of the child." *Howard v. Sullivan (In re Sullivan)*, 423 B.R. 881, 883 (Bankr. E.D. Mo. 2010) (citing *Holliday v. Kline (In re Kline)*, 65 F.3d 749, 751 (8th Cir. 1995)). In such case, the court must analyze "whether the action which gave rise to the debt has a tangible relationship to the child's welfare." *Id.* (citing *Adams*, 963 F.2d at 199).

THE HON. JAMES G. MIXON TRIAL PRACTICE SYMPOSIUM

WILLIAM H. BOWEN SCHOOL OF LAW

MAY 17, 2024

INTERSECTION OF STATE AND FEDERAL LAW-DISCHARGEABILITY

Hon. Richard D. Taylor

I. INTERSECTION

State and bankruptcy law often intersect when a state court claimant's pursuit of a defendant is interrupted by the defendant filing bankruptcy. Of course, that claim may thereafter be pursued in the bankruptcy to the extent of any distribution. Additionally, sometimes the claim or judgment is of a nature not amenable to a bankruptcy discharge. There are three nondischargeability causes of action that most closely mirror state law causes of action that form the basis for liability and damages. Litigants must be careful to appreciate and understand that the causes of action enumerated in the Bankruptcy Code concern dischargeability, not liability or damages. The Bankruptcy Code bases for nondischargeability may look and sound like tort causes of action, but they are not. The misleading unity is simply a reflection that certain causes of action which sound in tort should form the basis for a denial of discharge as to that particular debt.

II. THE CODE

Intersection is common with respect to sections 523(a)(2), (4), and (6) of the Bankruptcy Code:

> (a) A discharge under section 727, 1141, 1192 [1] 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt— . . .
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
>
> (B) use of a statement in writing—
>
> (i) that is materially false;
>
> (ii) respecting the debtor's or an insider's financial condition;
>
> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
>
> (iv) that the debtor caused to be made or published with intent to deceive; . . .

> (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny; . . .
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity . . . .

11 U.S.C. § 523(a).

III. THE LAW

As stated above, these three common bases for nondischargeability are not the basis for liability or damages, and the elements and proof may differ. Accordingly, any state law judgment the claimant may have will not be res judicata but can be used as collateral estoppel. As this court has previously stated:

> Specifically, judgments in other courts are not necessarily res judicata in subsequent bankruptcy proceedings concerning dischargeability. Dischargeability actions are unique to bankruptcy and arise only at the filing of the debtors' petition. As stated in this court's prior order denying the debtors' request for summary judgment:
>
> > Expressly, "[t]he United States Supreme Court in *Brown v. Felsen* determined res judicata does not apply in nondischargeability proceedings." *Pulvermacher v. Pulvermacher (In re Pulvermacher)*, 567 B.R. 881, 886 (Bankr. W.D. Wis. 2017) (citing *Brown v. Felsen*, 442 U.S. 127, 138–39 (1979)); see also *Thomas v. Pine Creek II Apartments, Ltd. (In re Pine Creek II Apartments, Ltd.)*, 182 B.R. 36, 37 (Bankr. W.D. Ark. 1995) ("Brown's rationale was that it was solely for the bankruptcy court to determine the dischargeability of debts; such matters of federal law could not be determined by the state courts such that res judicata could not be applied to preclude relitigation of issues in dischargeability proceedings."). "Since Brown, 'there is a general rule that state court judgments do not have res judicata effect on nondischargeability actions under § 523.'" *Pulvermacher*, 567 B.R. at 886 (citations omitted).
>
> > Section 523(a) of the Bankruptcy Code enumerates several alternative bases to deny the dischargeability of a debt to a specific creditor. Although many of these grounds sound in contract or tort—typical state law causes of actions—they are not causes of action for the purpose of establishing a debt or damages. The purpose of each is to determine if the debt or damages are nondischargeable. The obvious and apparent reason that so many of the nondischargeability causes of action mirror state or federal causes of action such as fraud, embezzlement, misrepresentation, and the like, is that those causes of action that do establish a debt or damages are of the type or nature that Congress wished to deny dischargeability. But, the grounds for nondischargeability are discrete and not necessarily the same causes of

> action as those for establishing the underlying debt or damages. Accordingly, res judicata is generally not the appropriate basis for determining the conclusive nature of the prior judgment in another court.

Brown v. Rouse (In re Rouse), Ch. 7 Case No. 5:17-bk-72254, Adv. No. 5:18-ap-07075, at *3-4 (Bankr. W.D. Ark. Dec. 30, 2021), ECF No. 88 [hereinafter *Brown Summary Judgment Order*]. Accordingly, the breach of contract cause of action forming the basis of the Amended Judgment is not conclusive as respects dischargeability, and the debtors conduct is reviewable based upon the elements of the unique causes of action enumerated in 11 U.S.C. § 523 concerning dischargeability.

In re Rouse, 655 B.R. 750, 770-71 (Bankr. W.D. Ark. 2023).

Further,

> [T]he sole basis stated for the Amended Judgment award is breach of contract. Equally, and as discussed above, this does not prevent an independent inquiry into whether the debt is dischargeable in bankruptcy. Brown properly argued in closing a recent Eighth Circuit Court of Appeals decision also referenced in this court's prior order concerning summary judgment, to wit:
>
> > In *Luebbert v. Global Control Systems*, the Eighth Circuit Court of Appeals considered a nondischargeability action based on a willful and malicious injury regarding a state court breach of contract judgment. *Luebbert v. Glob. Control Sys.*, 987 F.3d 771, 776 (8th Cir. 2021). In doing so, the court held that "a judgment for an intentional tort is not necessary to find judgment debt for a breach of contract nondischargeable. The willfulness requirement is met when the bankruptcy court finds facts showing that the debtor's conduct accompanying the breach of contract amounted to an intentional tort against the creditor." *Id.* at 782. Further, "[e]ven if a judgment debt is for breach of contract, bankruptcy courts are not required to blind themselves to a willful and malicious injury inflicted on the judgment creditor." *Id.* at 783. "The mere fact that recovery for wrongful conduct was based in contract and not in tort—despite being possible in both under the same set of facts—does not prevent the resulting judgment debt from being exempt from discharge under § 523(a)(6)." *Id.* at 783–84. Thus, a judgment does not have to "sound in tort." *Id.* at 784. Rather, "[i]t is enough to show that the conduct amounting to an intentional tort accompanied the breach of contract for a creditor to meet the willful injury requirement of § 523(a)(6)." *Id.* at 783.
>
> Thus, this matter may be tried and examined based on the now available dischargeability causes of action.

Brown Summary Judgment Order, at *4-5, ECF No. 88.

> The court in *Luebbert* agreed with the bankruptcy court in "conclud[ing] the facts underlying Mr. Luebbert's breach of contract judgment show that he caused a willful and malicious injury." *In re Luebbert*, 987 F.3d at 776. Thus, further inquiry is warranted.

Id. at 771-73.

THE HON. JAMES G. MIXON TRIAL PRACTICE SYMPOSIUM

WILLIAM H. BOWEN SCHOOL OF LAW

May 17, 2024

Hon. Bianca M. Rucker

TIMING CONSIDERATIONS WHEN YOUR CLIENT NEEDS TO FILE FOR BANKRUPTCY AND DIVORCE

I. APPROACHES

1. Overlapping proceedings
2. One proceeding at a time

II. CONSIDERATIONS

1. Merits/detriments of a joint petition
    a. Joint income, joint ownership of property
    b. Exemptions
    c. Eligibility for chapter 7/13

2. Non-filing spouse's role as a creditor
    a. DSO proceedings
    b. Other actions/litigation

3. Length of a chapter 7 vs. chapter 13

4. Effect of a divorce decree/property settlement agreement on property interests, exemptions, and debt in bankruptcy case

III. CASE LAW

1. *In re Pipes*, 78 B.R. 981 (Bankr. W.D. Mo. 1987)(holding joint petition could proceed under § 302 although joint debtors' divorce finalized after filing and before § 341 meeting).

2. *In re Valentine*, 611 B.R. 622 (Bankr. E.D. Mo. 2020)(finding that debtor's former spouse and attorney willfully violated the automatic stay, and stating "[a] creditor, who has put a collection effort into motion must affirmatively act to stop, stay, or hold the collection effort in abeyance or risk incurring liability once a bankruptcy commences.").

3. *In re Christakos*, 553 B.R. 371, 380 (Bankr. W.D. Mo. 2016)(finding that child support is not property of the estate but discussing *Mehlhaff v. Allred* (*In re Mehlhaff*), 491 B.R. 898, 902 (8th Cir. BAP 2013)(finding that pre-petition claim of alimony was property of the estate under § 541(a)) and *Kelly v. Jeter* (*In re Jeter*), 257 B.R. 907 (8th Cir. B.A.P. 2001)(finding that post-petition alimony payments were not after-acquired property of the estate under § 541(a)(5)(B)).