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Attorney Retention and Disqualification in Bankruptcy

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Introduction

Two essential issues to bankruptcy practitioners are attorney retention and the threat of disqualification.[1] These issues are closely related and are governed by several ethical rules and bankruptcy statutes. Generally, all legal professionals must abide by the standards imposed by their states' ethical code, which are largely adapted from the American Bar Association Model Rules of Professional Conduct (the "Model Rules").[2] Bankruptcy practitioners, however, must also abide by section 327 of the United States Bankruptcy Code (the "Code"), which only permits the retention of "disinterested" professionals in a proceeding.[3] If the attorney does not meet these standards, the presiding court must disqualify him from the proceeding.

The Model Rules and the Code are frequently applied together in bankruptcy practice to determine whether an attorney should be disqualified from a proceeding. However, this can be confusing and frustrating because there are inconsistencies and ambiguities between the Model Rules and the Code. As such, attorneys and courts may waste time and resources attempting to

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[1] *See In re* Duke Invs., Ltd., 454 B.R. 414, 422 (Bankr. S.D. Texas 2011).
[2] STEPHEN GILLERS ET. AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS 3 (Aspen Publishers 2010).
[3] *See* 11 U.S.C. § 327(a) (2006).

rationalize the two.[4] This memo will discuss the Model Rules and the Code provisions applicable to attorney retention and disqualification to clarify their implications on bankruptcy practice and to help bankruptcy practitioners determine whether they are eligible to represent a client. Part I will analyze the relevant provisions of the Model Rules. Part II will analyze the relevant sections of the Code. Finally, Part III will conclude by identifying avoidable disqualification scenarios and suggesting methods for bankruptcy practitioners to limit the threat of disqualification.

I. The Model Rules

The Model Rules are the primary source of ethical guidance in the United States' court system and apply to all practicing attorneys.[5] While the Model Rules are not binding on any jurisdiction, most states have adopted their language, numbering structure, and comments into their own ethical codes.[6] As of September 14, 2011, forty-five states and the District of Columbia have adopted the Model Rules in their most recent form.[7] Currently, California is the only state that has not adopted the Model Rules in any form.[8] Federal courts identify the Model Rules as the applicable national standard to consider disqualification motions and consistently apply them together with the state's ethical code in their decisions.[9] There are three Model Rules particularly relevant to attorney retention and disqualification: Rules 1.7, 1.9, and 3.7.

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[4] *See* Lois R. Lupica, *Business Bankruptcy Practice, Sophisticated Clients and Rules of Professional Conduct*, 30 AM. BANKR. INST. J. 1, 66 (2011).
[5] Model Rules of Professional Conduct | The Center for Professional Responsibility, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Feb. 10, 2012).
[6] *See* Lupica, *supra* note 4, at 66.
[7] *See* American Bar Association, *Status of State Review of Professional Conduct Rules* (2011), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/ethics_2000_status_chart.authcheckdam.pdf.
[8] GILLERS ET. AL., *supra* note 2, at 3.
[9] *See In re* ProEducation Int'l, Inc., 587 F.3d 296, 299 (5th Cir. 2009).

Model Rule 1.7 addresses conflicts of interest among current clients and prohibits the attorney from serving in a representation involving a concurrent conflict of interest.[10] A concurrent conflict exists in two circumstances: where the representation of two clients would be directly adverse or where there is a "significant risk" the attorney's representation of a client would be "materially limited" by the attorney's personal interest or the attorney's responsibilities to a current or former client or another third person.[11] However, an attorney may continue with the representation if he reasonably believes that he can provide both clients with diligent, competent representation, applicable law permits the representation, the clients are not directly asserting claims against one another, and both clients consent to the representation in writing.[12]

Model Rule 1.9 addresses duties that an attorney owes to former clients. It prevents an attorney from representing a new client if the representation creates a conflict of interest with a former client. The attorney is barred from the representation if the new client and the former client's interests are materially adverse and if their matters are either the same or substantially related to one another.[13] Rule 1.9 similarly prohibits an attorney from knowingly representing a client with materially adverse interests to a former client that the attorney represented or received privileged information about through his previous work at another firm.[14] However, both of these conflicts can be resolved if the former client consents in writing to the new representation.[15]

[10] MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2009).
[11] MODEL RULES OF PROF'L CONDUCT R. 1.7(a).
[12] MODEL RULES OF PROF'L CONDUCT R. 1.7(b).
[13] MODEL RULES OF PROF'L CONDUCT R. 1.9(a) (2009).
[14] MODEL RULES OF PROF'L CONDUCT R. 1.9(b).
[15] MODEL RULES OF PROF'L CONDUCT R. 1.9.

Finally, Model Rule 3.7 prevents an attorney from acting as both an advocate for a client and a necessary witness in the same trial.[16] The rule prevents prejudice to the opposing party where the factfinder may be confused over the weight that should be given to the attorney's testimony.[17] An attorney may, however, testify in a client's case under three exceptions. The attorney may continue the representation if his testimony concerns an uncontested issue, if it relates to legal services rendered in the case, or if the attorney's disqualification would impose a "substantial hardship on the client."[18] As long as the representation would not be precluded under Rule 1.7 or 1.9, Rule 3.7 also permits representation where another lawyer from the attorney's firm is likely to be called as a witness in the same case.[19]

For an attorney to be disqualified under Rule 3.7, the movant must establish that the attorney's testimony is both required and substantially adverse to the attorney's client's interests.[20] Some bankruptcy courts have followed a three-part test to determine if the attorney's testimony warrants disqualification: the testimony must be relevant, material, and unobtainable elsewhere.[21] If the testimony is merely cumulative or capable of corroboration, then no disqualification is warranted under Rule 3.7.[22]

[16] MODEL RULES OF PROF'L CONDUCT R. 3.7(a) (2009).
[17] MODEL RULES OF PROF'L CONDUCT R. 3.7 cmt. 2.
[18] MODEL RULES OF PROF'L CONDUCT R. 3.7(a).
[19] MODEL RULES OF PROF'L CONDUCT R. 3.7(b).
[20] *In re* Duke Invs., Ltd., 454 B.R. 414, 422–26 (Bankr. S.D. Tex. 2011).
[21] *In re* Demois, No. 06-02024-DRD, 2006 WL 1168674, at *2 (Bankr. W.D. Mo. Apr. 27, 2006). *See also* Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell, 239 F. Supp. 2d 1170, 1173 (D. Colo. 2003).
[22] *In re Duke*, 454 B.R. at 422–23.

II. The Code's "Disinterestedness" Requirement

In addition to the Model Rules, an attorney retained in a bankruptcy proceeding must meet the Code's requirements under section 327.[23] Under section 327, a trustee or a debtor in possession ("DIP") may hire professional persons – including attorneys – to represent or assist the trustee or DIP in carrying out their duties in the bankruptcy case.[24] However, the court must approve the attorney's retention. Once approved, the attorney has a continuing obligation to comply with section 327's statutory requirements for the duration of the case.[25] The court, therefore, retains the power and discretion to review the attorney's compliance with the statute throughout the proceeding.[26] The court will only approve the attorney's appointment if he lacks a conflict of interest under the statute's two-pronged test. First, the attorney must "not hold or represent an interest adverse to the estate."[27] Second, the attorney must be a "disinterested person[]."[28]

Under section 327's first prong, an attorney must not have or represent an adverse interest to the estate. However, the Code lacks a definition for an "adverse interest" or "interest adverse to the estate." Many courts[29] apply the standard set forth in *In re Roberts*:

> To "hold an interest adverse to the estate" means (1) to possess or assert any economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or

[23] 11 U.S.C. § 327 (2006).
[24] *Id.* § 327(a).
[25] 11 U.S.C. § 328(c) (2006). *See also In re* Vebeliunas, 231 B.R. 181, 187 (Bankr. S.D.N.Y. 1999).
[26] *In re Vebeliunas*, 231 B.R. at 187. *See also* Rome v. Braunstein, 19 F.3d 54, 58–59 (1st Cir. 1994) (stating court can disqualify attorney for conflict of interest once relevant information is discovered).
[27] 11 U.S.C. § 327(a).
[28] *Id.*
[29] *See, e.g.*, *In re* AFI Holding, Inc., 530 F.3d 832, 845 (9th Cir. 2008); *In re* West Delta Oil Co., 432 F. 3d 347, 356 (5th Cir. 2005); *In re* AroChem Corp., 176 F.3d 610, 623 (2d Cir. 1999); *Rome*, 19 F.3d at 58 n.1 (1st Cir. 1994).

> potential dispute in which the estate is a rival claimant; or (2) to possess a predisposition under circumstances that render such a bias against the estate.[30]

While the *In re Roberts* standard seems to exclude an attorney with even the slightest possible interest in the proceeding, the applicable case law only permits disqualification where an actual or a potential conflict of interest exists. If the attorney's circumstances present only a mere appearance of impropriety, that basis is insufficient to warrant disqualification.[31]

To define an "adverse interest" under section 327, courts distinguish between an attorney with an actual versus only a potential conflict of interest.[32] If the attorney has an actual conflict, he must be disqualified.[33] Where the attorney only has a potential conflict, the court has the discretion whether or not to grant the disqualification.[34] While there is a general presumption against approving an attorney with a potential conflict, the court may allow his retention where the possibility of maturation into an actual conflict "is remote and the reasons for employing the [attorney] . . . are particularly compelling."[35] This presumption prevents future prejudice to the attorney's party. Where the potential conflict is likely to become an actual conflict, the court's early disqualification of the attorney will save the parties the expenses and delay associated with obtaining new counsel once the conflict matures and disqualification becomes required.

Under section 327's second prong, the appointed attorney must be a "disinterested person" to avoid disqualification. "Disinterested person" is defined under section 101(14)(C) of the Code as someone lacking an interest materially adverse to the interests of the estate, equity

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[30] *In re* Roberts, 46 B.R. 815, 827 (Bankr. D. Utah 1985), *aff'd*, 75 B.R. 402 (D. Utah 1987).
[31] *In re* Marvel Entm't Group, Inc., 140 F.3d 463, 477 (3d Cir. 1998).
[32] *Id.* at 476.
[33] *Id.*
[34] *In re* BH & P, Inc., 103 B.R. 556, 566 (Bankr. D.N.J. 1989).
[35] *Id.*

security holders, or any class of creditors.[36] The materially adverse interest may arise from any relationship or connection with the debtor.[37] Applying the "disinterested" standard is more of an exercise of exclusion over inclusion as the statute lists several parties that can *per se* never be disinterested, and thus must always be disqualified. Among the statutory *per se* categories are creditors, equity security holders, insiders, and anyone who, within the two years prior to the filing of the bankruptcy petition, served as the debtor's director, officer, or employee.[38]

Certainly, the *per se* categories defined under the Code help to easily identify and disqualify interested persons from participating in the bankruptcy proceeding. While most of these categories are straightforward, at least one is interpreted to go beyond the pure text of the statute to facilitate normal, everyday practice. For example, an attorney may generally be disqualified as a creditor for attorney's fees or any other debt owed to him by the estate amassed before the bankruptcy proceeding.[39] However, the attorney is not disqualified as a creditor under the Code due to attorney's fees for the current bankruptcy proceeding.[40] Other *per se* categories that are listed, but otherwise undefined, usually only add to the confusion associated with attorney disqualification. Some problematic undefined categories include "officer" and "director". Courts must determine these categories' definitions individually on a case-by-case basis, deriving workable definitions from external sources, such as the state's corporate law.[41]

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[36] 11 U.S.C. § 101(14)(C) (2006).
[37] *Id.*
[38] *See* 11 U.S.C. § 101(14)(A); 11 U.S.C. § 101(14)(B).
[39] *In re* Martin, 817 F.2d 175, 180 (1st Cir. 1987).
[40] *Id.* (describing such an interpretation as nonsensical and overbroad).
[41] *Compare In re* Foothills Texas, Inc., 408 B.R. 573, 583 (Bankr. D. Del. 2008) (holding defendant's title established rebuttable presumption defendant was an officer) *with In re* NMI Syss., Inc., 179 B.R. 357, 370 (Bankr. D.D.C. 1995) (requiring demonstration of control and title to identify defendant as an officer). *See also In re* S.S. Retail Stores Corp., 211 B.R. 699, 701 (B.A.P. 9th Cir. 1997) (applying California Corporation Code to define "officer").

Occasionally, an undefined category under the Code does not cause confusion in the courts. For example, while "employee" is undefined, sections 327(c) and 1107(b) nullify some of the possible confusion.[42] Absent an actual conflict of interest, these sections prevent a court from granting an attorney's disqualification based *solely* upon the attorney's previous employment by a creditor or DIP.[43] In addition to the presence of an actual conflict of interest, section 327(c) also requires an objection by another creditor or the United States Trustee.[44] Since the court is barred from granting disqualification due to an attorney's previous employment absent an actual conflict of interest, the precise definition of "employment" is rarely, if ever, at issue.

Both prongs of the Code's test contain similar language relating to the disqualified attorney's "adverse interest." Under section 327(a), an attorney participating in the bankruptcy proceeding shall not hold or represent an "interest adverse" to the estate. Similarly, under section 101(14)(C), a disinterested person must lack an "interest materially adverse" to the estate or any class of creditors or equity security holders.[45] While some courts deem that this overlap creates "one hallmark" to evaluate attorney retention,[46] other courts have recognized the standalone "adverse interest" language under section 327(a) as a more restrictive prohibition.[47]

III. Analysis

If an attorney retained in a bankruptcy proceeding knows the particular Model Rules and Code provisions relevant to attorney retention and disqualification, then he has taken the first

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[42] 11 U.S.C. § 327(c) (2006); 11 U.S.C. § 1107(b) (2006).
[43] 11 U.S.C. § 327(c); 11 U.S.C. § 1107(b).
[44] 11 U.S.C. § 327(c). *See also In re* Blue Coal Corp., 152 B.R. 710, 714 (Bankr. M.D. Pa. 1993).
[45] *See In re Martin*, 817 F.2d at 180; *In re* White Glove, Inc., No. 98–12493DWS, 1998 WL 226781, at *2 (Bankr. E.D. Pa. Apr. 29, 1998).
[46] *In re Martin*, 817 F.2d at 180 (recognizing, however, the existence of both "easy to spot situations" and more ambiguous areas that cannot be easily categorized); *In re* Vebeliunas, 231 B.R. 181, 189 (Bankr. S.D.N.Y. 1999).
[47] *In re White Glove*, 1998 WL 226781, at *2.

step to determine whether or not he is able to represent his client. However, understanding how those provisions are applied is challenging and requires an in-depth exploration of relevant case law. Bright line rules are rare in attorney disqualification because each case is necessarily fact-sensitive. Fortunately for bankruptcy practitioners, courts view attorney disqualification as a severe remedy that should rarely be invoked.[48] However, this does not prevent the court from imposing other available remedies, including fee denial or disgorgment.[49]

Courts carefully consider motions to disqualify because judges know that these motions may be brought as tactical maneuvers to disadvantage the opposing party.[50] Even when a motion to disqualify is not used as a tactical maneuver, courts are especially sensitive to prejudice that will befall a disqualified attorney's party, who is charged with the responsibility to find new counsel before the action can proceed. Courts also face a particular challenge when weighing potential conflicts of interest, which requires the courts to balance deference to the party's choice of counsel against the risk that the potential conflict could develop into an actual conflict of interest.[51] If the court denies the attorney's disqualification and an actual conflict of interest later develops, then the party will suffer the prejudice the court originally sought to avoid.

Another important consideration for attorneys is how the relevant provisions interact – and sometimes overlap – when they are applied. For example, Rules 1.7 and 1.9 are closely related in practice, especially when it is unclear whether the attorney-client relationship is

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[48] *See, e.g.*, *In re* Thomas Consol. Indus., Inc., 289 B.R. 647, 653 (Bankr. N.D. Ill. 2003); *In re* Kaiser Group International, Inc., 272 B.R. 846, 850 (Bankr. D. Del. 2002); Alliedsignal Recovery Trust v. Alliedsignal, Inc., 934 So.2d 675, 678 (Fla. 2d DCA 2006).
[49] Rome v. Braunstein, 19 F.3d 54, 58 (1st Cir. 1994).
[50] *See In re* Miller, Nos. CO-10-073, 10-25453, 2011 WL 1807015, slip op. at *6 (B.A.P. 10th Cir. May 12, 2011), rev'd on other grounds No. 11-1232, 2012 WL 286865 (10th Cir. 2012); Sec. Investor Prot. Corp., 246 B.R. 582, 587 (Bankr. N.D. Ill. 2000); Leaseamerican Corp. v. Stewart, 876 P.2d 184, 191 (Kan. Ct. App. 1994).
[51] *See In re* S.S. Retail Stores Corp., 211 B.R. 699, 701 (B.A.P. 9th Cir. 1997); *In re* Creative Restaurant Mgmt., 139 B.R. 902, 909 (Bankr. W.D. Mo. 1992).

ongoing or had previously concluded.[52] Assuming the attorney is otherwise able to provide competent legal representation, both rules permit the affected clients to waive a concurrent conflict of interest through informed, written consent.[53] Under the Model Rules, informed consent requires the attorney to fully disclose to the parties "the material risks and reasonably available alternatives" to the attorney's proposed course of action.[54] At least one court has held that consent could alternatively be obtained through the former client's request to firewall the affected attorneys.[55] The Code, however, is more restrictive: waiving an actual conflict of interest is not permitted because consent cannot overcome section 327's statutory requirements.[56]

Similarly, the Code shares some overlap with Rule 1.7, which provides that disqualification can only be granted if there is an actual, concurrent conflict of interest between two clients.[57] However, the Model Rules were designed to reflect the traditional adversarial model where there is one plaintiff and one defendant with relatively static roles.[58] In contrast, parties' positions and relationships in a bankruptcy proceeding, and thus, under the Code, may

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[52] *See In re* Meridian Auto. Syss.-Compcsite Operations, Inc., 340 B.R. 740, 744–45 (Bank. D. Del. 2006) (indicating Rule 1.7 was inapplicable because representation ended two months before attorney accepted representation of new client).
[53] MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(4) (2009); MODEL RULES OF PROF'L CONDUCT R. 1.9(a), (b) (2009). *See also* MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2009) (providing the definition for "informed consent").
[54] MODEL RULES OF PROF'L CONDUCT R. 1.0(e)
[55] *In re Kaiser Group*, 272 B.R. at 851–52 (holding waiver occurred when plaintiff seeking disqualification requested the firewall, and firm instituted the measure three days later).
[56] *See In re* Diamond Mortgage Corp. of Illinois, 135 B.R. 78, 90 (Bankr. N.D. Ill. 1990) (stating the Code does not permit concurrent client conflict waiver where an attorney represents both the debtor and a creditor in an action). *See also In re* Project Orange Assocs, LLC, 431 B.R. 363, 374–75 (Bankr. S.D.N.Y. 2010).
[57] *In re* Adam Furniture Indus., Inc., 191 B.R. 249, 260 (Bankr. S.D. Ga. 1996).
[58] Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics*, 6 Am. Bankr. Inst. L. Rev. 45, 66–67 (1998).

constantly shift.[59] Difficulties arise when applying Rule 1.7 and the Code where a bankruptcy attorney is representing a class of creditors that, while sharing substantially similar claims, still suffer from conflicting interests, either within or outside of the bankruptcy proceeding.[60] Similar to Rule 1.7, the Code strictly prohibits representation by an attorney with an actual conflict of interest.[61] However, unlike Rule 1.7, the Code permits the court to disqualify an attorney within its discretion if there is only a potential conflict of interest based upon the relevant facts.[62]

Rule 1.9 and the Code also overlap regarding an attorney's previous employment. When courts decide disqualification under Rule 1.9, many apply a four-step analysis.[63] First, the moving party and opposing counsel must have a previous attorney-client relationship. Second, the attorney's present and former clients' interests must be adverse. Third, the present client's matters must be substantially related to the attorney's representation of the former client.[64] Finally, the former client must not have consented to the attorney's representation of his present client. If an actual conflict is found under Rule 1.9, the affected former client may usually waive

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[59] *Id.*

[60] *See* Lupica, *supra* note 4, at 1 (indicating a Model Rules' weakness is assumption of single party representation).

[61] *See In re* AroChem Corp., 176 F.3d 610, 624 (2d Cir. 1999); *In re* Marvel Entm't Group, Inc.,140 F.3d 463, 476 (3d Cir. 1998); *In re* Interwest Bus. Equip., Inc., 23 F.3d 311, 315–16 (10th Cir. 1994).

[62] *See, e.g.*, *In re AroChem*, 176 F.3d at 627; *In re* First Jersey Sec., Inc., 180 F.3d 504, 509 (3d Cir. 1999); *In re* Martin, 817 F.2d 175, 182 (1st Cir. 1987).

[63] Touchcom, Inc. v. Bereskin & Parr, 299 Fed. Appx. 953, 954 (Fed. Cir. 2008); Pearson v. First NH Mortgage Corp., 200 F.3d 30, 36 (1st Cir. 1999); *In re* Blue Coal Corp., 152 B.R. 710, 713 (Bankr. M.D. Pa. 1993).

[64] The term "substantially related" can apply to matters either involving the same transaction or legal dispute or when information obtained in the previous representation would materially advance the present client's position. Disqualification under Rule 1.9 is possible even without a breach of a client's confidences. *In re* Meridian Auto. Syss.-Compcsite Operations, Inc., 340 B.R. 740, 747 (Bankr. D. Del. 2006). *See also* MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 2 (2009).

the conflict and consent to the representation in writing.[65] Under section 327 of the Code, however, an attorney cannot be disqualified solely because of his previous employment by the debtor or a creditor unless there is an actual conflict of interest.[66] Additionally, if an actual conflict is discovered, the Code does not permit a waiver under any circumstances.

If an attorney changes firms, Rule 1.9 determines when an attorney should be disqualified for a conflict of interest with his former firm's client. Here, an attorney may only be disqualified if he personally represented the former firm's client or if the attorney acquired confidential information about the client.[67] The movant can establish the attorney's actual knowledge through witness testimony and physical evidence, including e-mails or attendance records from meetings where the confidential information was discussed. The defending attorney's burden of proof to defeat a Rule 1.9 disqualification motion is relatively low. At least one court has held that an attorney's uncontradicted testimony that he did not receive confidential information about his former firm's client was sufficient to prevent the attorney's disqualification.[68]

Occasionally, an attorney must testify in their client's case. This may cause the attorney to be disqualified under Rule 3.7 if he has first-hand, exclusive knowledge about the subject of the attorney's testimony.[69] One method to avoid disqualification on this ground is to secure another, preferably superior source of the same information. For example, one court held that an

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[65] MODEL RULES OF PROF'L CONDUCT R. 1.9.
[66] *In re AroChem*, 176 F.3d at 620–21. *See also* 11 U.S.C. 1107(b).
[67] *In re* Proeducation Int'l, Inc., 587 F.3d 296, 301 (5th Cir. 2009).
[68] *Id.* at 303.
[69] *In re* Duke Invs., Ltd., 414, 424 (Bankr. S.D. Tex. 2011). *Compare* Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell, 239 F. Supp. 2d 1170, 1173–74 (D. Colo. 2003) (granting disqualification where issue was client's commercially reasonable behavior disposing of collateral, but attorney was primary actor regarding collateral's storage, dealings with the storage company, payment of storage fees, and collateral's sale) *with* Leaseamerica Corp. v. Stewart, 876 P.2d 184, 193 (Kan. Ct. App. 1994) (denying disqualification where attorney lacked first-hand knowledge regarding his client's disposal of property and whether or not the client had done so in a commercially reasonable manner).

attorney could not be disqualified on the contents of a proof of claim that he prepared, signed, and filed on behalf of his client because the proof of claim was prepared with assistance and contributions from his client's officers.[70] However, another court granted disqualification where the attorney prepared and filed bankruptcy petitions for two separate defendants that each "inadvertently omitted" the same plaintiff from their Schedule D list of creditors.[71]

Attorney disqualification under Rule 3.7 is only possible when there is a trial-type proceeding.[72] When an attorney is disqualified from representing his client at trial under Rule 3.7, he may still participate in pretrial activities that would not reveal the attorney's dual role at trial.[73] Examples of pretrial activities that a disqualified attorney may still participate in include "strategy sessions, pretrial hearings, settlement conferences, . . . [and] motions practice."[74] A disqualified attorney is also occasionally permitted to take part in depositions.[75]

Conclusion

Attorney disqualification in bankruptcy, either sought under the Model Rules or the Code, is a complex issue that is not entirely reconcilable. One solution proposed by scholars and bankruptcy attorneys is to reevaluate the Model Rules to incorporate ethical issues common in multi-client, big business, and class actions.[76] Another proposed solution is to create an ethical

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[70] *In re Duke*, 454 B.R. at 417, 423, 427.
[71] Foley, Inc. v. Fevco, Inc., No. L-11302-98, 2006 WL 1223143, at *2 (N.J. Super. Ct. App. Div. May 9, 2006); Foley, Inc. v. Fevco, Inc., 379 N.J. Super. 574, 577, 579 (2005).
[72] MODEL RULES OF PROF'L CONDUCT R. 3.7(a) (2009) ("A lawyer shall not act as an advocate **at a trial** in which the lawyer is likely to be a necessary witness…") (emphasis added). *See also In re* Fuller, 204 B.R. 894, 898 (Bankr. W.D. Pa.) (holding state ethical rule that is identical to Model Rule 3.7 as inapplicable where no trial will occur).
[73] *Merrill Lynch*, 239 F. Supp. 2d at 1174 (disqualified attorney not excluded from depositions). *See also In re* Thomas Consol. Indus., Inc., 289 B.R. 647, 653 (N.D. Ill. 2003).
[74] *Merrill Lynch*, 239 F. Supp. 2d at 1174.
[75] *Compare id. with* World Youth Day, Inc. v. Famous Artists Merchandising Exchange, Inc., 866 F. Supp. 1297, 1304 (D. Colo. 1994).
[76] *See* Lupica, *supra* note 4, at 66.

code exclusively for bankruptcy.[77] Others propose that Congress substitute section 327's "disinterested" requirement for the Model Rules' "substantial risk" standard.[78] While all of these solutions have merit, Congress and the American Bar Association remain silent. Who qualifies as a permissible advocate in a bankruptcy proceeding? Until either body takes action, courts and practitioners must struggle to answer this all too common question that, unfortunately, continues to evade any satisfying resolution.

[77] Rapoport, *supra* note 58, at 49–50.
[78] Charles W. Wolfram, *The Boiling Pot of Lawyer Conflicts in Bankruptcy*, 18 MISS. C. L. REV. 383, 392–93 (1998).