

HOW TO EFFECTIVELY INTERACT WITH THE COURT

Table of Contents

1. Federal Rules of Bankruptcy Procedure	1
2. Case Law and Ethics Opinions	1
a. <i>Delaware</i>	1
b. <i>Texas</i>	2
c. <i>New York</i>	2
d. <i>Pennsylvania</i>	2
e. <i>West Virginia</i>	2
f. <i>Florida</i>	3
g. <i>Tennessee</i>	3
3. Code of Conduct for United States Judges	3
4. ABA Model Rules.....	4
5. Model Code of Judicial Conduct	9
6. Articles	10

1. Federal Rules of Bankruptcy Procedure

a. Fed. R. Bankr. P. 9003 - Prohibition of Ex Parte Contacts

- a) GENERAL PROHIBITION. Except as otherwise permitted by applicable law, any examiner, any party in interest, and any attorney, accountant, or employee of a party in interest shall refrain from ex parte meetings and communications with the court concerning matters affecting a particular case or proceeding.
- b) UNITED STATES TRUSTEE. Except as otherwise permitted by applicable law, the United States trustee and assistants to and employees or agents of the United States trustee shall refrain from ex parte meetings and communications with the court concerning matters affecting a particular case or proceeding. This rule does not preclude communications with the court to discuss general problems of administration and improvement of bankruptcy administration, including the operation of the United States trustee system.

2. Case Law and Ethics Opinions

a) Delaware

1. *In re Poliquin*, 49 A.3d 1115, 1145 (Del. 2012).
 - a. The Delaware Supreme Court held an attorney's pattern of failing to conduct discovery and to meet court deadlines, along with his violation of his duty of candor to the Court, warranted a sanction of suspension for six months and one day, where the attorney's acts were knowing rather than negligent.
2. *In re Hurley*, No. 383, 2017, 2018 WL 1319010, at *3 (Del. March 14, 2018).
 - a. Lawyer violated the rule prohibiting a lawyer from using means that have no substantial purpose other than to embarrass delay or burden a third person (Prof. Cond. Rule 4.4(a)), as offensive portions of lawyer's letters to opposing counsel were unprofessional and had no substantial purpose other than to embarrass, delay, or burden opposing counsel by disparaging and demeaning opposing counsel.
3. *In re Henriksen*, C.J. Nos. 1 & 2, 2011, 2012 WL 1672242, at *2 (Del. May 3, 2012).
 - a. Judge's e-mail to female attorney for whom he had developed and expressed romantic feelings, in which he offered advice regarding attorney's preparation of a legal memorandum that was to address a contested issue then before judge, constituted an inappropriate ex parte communication, in violation of judicial ethics rule prohibiting judges from "initiat[ing] ex parte communication [on the merits] concerning a pending proceeding.

b) **Texas**

1. *Tex. Extrusion Corp. v. Lockheed Corp. (In re Texas Extrusion Corp.)*, 844 F.2d 1142, 1164 (5th Cir. 1988).
 - a. Trial judge may, without violating Fed. R. Bankr. P 9003(a), permit counsel for prevailing creditors in Chapter 11 reorganization strongly opposed by debtors to draft findings of fact and conclusions of law on confirmation hearing, where judge has already verbally ruled that he is confirming plan.

c) **New York**

1. *Niesig v. Team I*, 558 N.E.2d 1030, 1031 (N.Y. 1990).
 - a. Plaintiff's counsel is permitted to conduct ex parte interviews of employees of the corporate defendant who were merely witnesses to the underlying accident because they are not considered a "party" to the action.
2. N.Y. Bar Ass'n Comm. on Prof. Ethics Op. 101 (7-69) (1969).
 - a. Canon 9 provides: "A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel."
 - b. Direct communication with the bankrupt by lawyer trustee in bankruptcy is improper because it violates Canon 9.

d) **Pennsylvania**

1. *Enos v. DeHart (In re Metro. Metals, Inc.)*, 206 B.R. 89, 92 (Bankr. M.D. Pa. 1996).
 - a. Telephone communication between bankruptcy judge and attorney for bankruptcy trustee was primarily to discuss judge's possible status as witness in transferred case in which judge had served as trustee and attorney as counsel to trustee. The communication was brief and had no conceivable effect on administration of case at hand and any discussion of whether the relationship the judge had with trustee should cause his recusal was perfunctory and properly resulted in attorney addressing judge in written correspondence while copying other parties in interest.

e) **West Virginia (note: Chapter 13 case)**

1. *In re Endicott*, 157 B.R. 255, 257 (W.D. Va. 1993).
 - a. Chapter 13 trustee's preparation and submission of proposed confirmation order to bankruptcy judge is not an impermissible ex parte communication prohibited by Fed. R. Bankr. P 9003(a), since no judicial act is involved in actions of trustee, where the nature of the confirmation order is administrative in form, and the judge had already made his decision either orally or in writing, in presence of all objecting parties. Thus, the trustee's actions were ethical.

f) **Florida**

1. *Bilzerian v. Shinwa Co.*, 184 B.R. 389, 392–95 (M.D. Fla. 1995).

- a. As a matter of “administrative convenience,” the court asked one of the parties to draft an order to be entered by the court. In providing the order to the court, the drafting party failed to serve a copy on opposing counsel. The non-drafting party alleged that the order was supplied in violation of Fed. R. Bankr. P. 9003. However, the reviewing court disagreed, noting that there was no pending matter because the judge had already announced his decision and the non-drafting party was put on notice of the court’s request for the drafting party to supply the order and did not object at that time.

g) **Tennessee**

1. *Hancock v. Bd. of Pro. Resp.*, 447 S.W.3d 844, 852 (Tenn. 2014).

- a. When an attorney e-mailed a bankruptcy judge, who had denied the attorney’s fee application, calling the judge a bully and clown and demanding that the judge provide a written apology for denying the fee application, the attorney’s e-mail violated Fed. R. Bankr. P. 9003(a).

3. Code of Conduct for United States Judges

a. CODE OF CONDUCT FOR U.S. JUDGES Canon 3 (JUD. CONF. OF THE U.S. 2019): A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently

- a) (4) A judge should accord to every person who has a legal interest in a proceeding, and that person’s lawyer, the full right to be heard according to law. Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested. A judge may:
1. initiate, permit, or consider ex parte communications as authorized by law;
 2. when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication;
 3. obtain the written advice of a disinterested expert on the law, but only after giving advance notice to the parties of the person to be consulted and the subject matter of the advice and affording the parties reasonable opportunity to object and respond to the notice and to the advice received; or

4. with the consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

4. ABA Model Rules

a. MODEL RULES OF PRO. CONDUCT r. 1.4 (AM. BAR ASS'N 2020). – 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 MODEL RULES OF PRO. CONDUCT r. 1.0(e) (AM. BAR ASS'N 2020) is required by these ABA Model 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 with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the ABA Model 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.
- c) Comment 5 to MODEL RULES OF PRO. CONDUCT r. 1.4 (AM. BAR ASS'N 2020).
 1. The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.
- d) Comment 6 to MODEL RULES OF PRO. CONDUCT r. 1.4 (AM. BAR ASS'N 2020).
 1. Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See MODEL RULES OF PRO. CONDUCT r. 1.14 (AM. BAR ASS'N 2020). When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See MODEL RULES OF PRO. CONDUCT r. 1.13 (AM. BAR ASS'N 2020).

b. MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2020). – Meritorious Claims and Contentions

- a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in

incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

c. MODEL RULES OF PRO. CONDUCT r. 3.3 (AM. BAR ASS'N 2020). – 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. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- c) The duties stated in paragraph (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2020).
- d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.
- e) Comment 6 to MODEL RULES OF PRO. CONDUCT r. 3.3 (AM. BAR ASS'N 2020).
 1. If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.
- f) Comment 10 to MODEL RULES OF PRO. CONDUCT r. 3.3 (AM. BAR ASS'N 2020).
 1. Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness

called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2020). It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

d. MODEL RULES OF PRO. CONDUCT r. 3.4 (AM. BAR ASS'N 2020) – Fairness to Opposing Party and Counsel

a) A lawyer shall not:

1. unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
2. falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.
3. knowingly disobey an obligation under the ABA Model Rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;
4. in pretrial procedure, make a frivolous discovery requests or fail to make reasonably diligent efforts to comply with a legally proper discovery requests by an opposing party;
5. in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
6. request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - a. the person is a relative or an employee or other agent of a client; and

- b. the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.
- e. **MODEL RULES OF PRO. CONDUCT r. 3.5 (AM. BAR ASS’N 2020). - Impartiality and Decorum of the Tribunal**
 - a) A lawyer shall not:
 - 1. seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
 - 2. communicate or cause another to communicate ex parte with such a person or members of such person’s family during the proceeding unless authorized to do so by law or court order; or
 - 3. communicate with a juror or prospective juror after discharge of the jury unless the communication is permitted by court ABA Model Rule; or
 - 4. engage in conduct intended to disrupt a tribunal or engage in undignified or discourteous conduct that is degrading to a tribunal.
- f. **MODEL RULES OF PRO. CONDUCT r. 4.1 (AM. BAR ASS’N 2020). – Truthfulness in Statements to Others**
 - a) In the course of representing a client a lawyer shall not knowingly:
 - 1. make a false statement of material fact or law to a third person; or
 - 2. fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS’N 2020).
 - b) Comment 1 to MODEL RULES OF PRO. CONDUCT r. 4.1 (AM. BAR ASS’N 2020).
 - 1. A lawyer is required to be truthful when dealing with others on a client’s behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS’N 2020).
- g. **MODEL RULES OF PRO. CONDUCT r. 4.2 (AM. BAR ASS’N 2020). – Communication with Person Represented by Counsel**
 - a) In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.
 - b) Comment 7 to MODEL RULES OF PRO. CONDUCT r. 4.2 (AM. BAR ASS’N 2020).

1. In the case of a represented organization, this ABA Model Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization’s lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this ABA Model Rule. Compare MODEL RULES OF PRO. CONDUCT r. 3.4(f) (AM. BAR ASS’N 2020). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See MODEL RULES OF PRO. CONDUCT r. 4.4 (AM. BAR ASS’N 2020).

h. MODEL RULES OF PRO. CONDUCT r. 4.4 (AM. BAR ASS’N 2020). – Respect for Rights of Third Persons

- a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
- b) A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.
- c) Comment 2 to MODEL RULES OF PRO. CONDUCT r. 4.4 (AM. BAR ASS’N 2020)
 1. Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that a such a document was sent inadvertently, then this ABA Model Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these ABA Model Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this ABA Model Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this ABA Model Rule, “document” includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

i. MODEL RULES OF PRO. CONDUCT r. 6.2 (AM. BAR ASS'N 2020). – Judicial and Legal Officials

- a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or a candidate for election or appointment to judicial or legal office.

j. MODEL RULES OF PRO. CONDUCT r. 8.3 (AM. BAR ASS'N 2020). – Reporting Professional Misconduct

- a) A lawyer who knows that another lawyer has committed a violation of the ABA Model Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
- b) A lawyer who knows that a judge has committed a violation of applicable ABA Model Rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.
- c) This ABA Model Rule does not require disclosure of information otherwise protected by MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2020) or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

k. MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS'N 2020). – Misconduct

- a) It is professional misconduct for a lawyer to:
- a) violate or attempt to violate the ABA Model Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another;
- b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- d) engage in conduct that is prejudicial to the administration of justice;
- e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the ABA Model Rules of Professional Conduct or other law; or
- f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable ABA Model Rules of judicial conduct or other law.

5. Model Code of Judicial Conduct

a. MODEL CODE OF JUD. CONDUCT Canon 2 r. 2.9 (AM. BAR ASS'N 2010). - Ex Parte Communications

- a) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:
1. When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

- a. the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
 - b. the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.
2. A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.
3. A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge’s adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.
4. A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.
5. A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law* to do so.
- b) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.
- c) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.
- d) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge’s direction and control.

6. Articles

- a. [Guidelines for Communicating with the Court | SOUTHERN DISTRICT OF IOWA | United States Bankruptcy Court \(uscourts.gov\)](https://www.iasb.uscourts.gov/guidelines-communicating-court) – *Guidelines for Communicating with the Court*, U.S. BANKR. CT. S.D. IOWA, <https://www.iasb.uscourts.gov/guidelines-communicating-court> (last visited July 11, 2024).
 - a) “Ex parte” is a Latin phrase meaning “on one side only; by or for one party.” An ex parte communication occurs when a party to a case or a person affiliated with a party to a case communicates with a judge without the knowledge of other parties to the case.
 - b) For example, a letter addressed to the judge is considered an ex parte communication because the other party does not have access to it.

Conversely, formal court filings are not considered ex parte communications because all parties in the case have access to and the ability to contest them.

- b. [The Practice: Dealing with Threatening, Demanding Opposing Counsel – Above the Law](#) – Brian Tannebaum, *The Practice: Dealing with Threatening, Demanding Opposing Counsel*, ABOVE THE LAW (June 10, 2013, 4:15 PM) <https://abovethelaw.com/2013/06/the-practice-dealing-with-threatening-demanding-opposing-counsel/>.
- c. [The Role of Communications in a Successful Bankruptcy | PRSA](#) – Vic Svec, *The Role of Communications in a Successful Bankruptcy*, PRSA (Feb. 2021) <https://www.prsa.org/article/the-role-of-communications-in-a-successful-bankruptcy>.
- d. [Email and Ex-Parte Communications | New York Law Journal](#) – Joel R. Brandes & Chris McDonough, *Email and Ex-Parte Communications*, N.Y. L. J. (June 16, 2021, 11:30 AM) <https://www.law.com/newyorklawjournal/2021/06/16/email-and-ex-parte-communications/>.