

ABC Update

BY SAMUEL D. HODSON

ABC-Certified Jurists Discuss Professionalism and Competence at ABI's Annual Spring Meeting

The American Board of Certification (ABC) is the nation's premier legal specialty certification organization. As part of its 25th anniversary celebration, ABC hosted a panel of distinguished judges to discuss professionalism and competence at ABI's Annual Spring Meeting last April in Washington, D.C. ABC certifies specialists in business bankruptcy law, consumer bankruptcy law and creditors' rights law. The entire panel (as well as the moderators and producer) was certified by ABC.

The panel included Hon. **James M. Carr** (business bankruptcy law, 1993) of the U.S. Bankruptcy Court for the Southern District of Indiana, Hon. **David W. Hercher** (business bankruptcy law, 1993) of the U.S. Bankruptcy Court for the District of Oregon, Hon. **Jerry C. Oldshue, Jr.** (creditors' rights law, 2001) of the U.S. Bankruptcy Court for the Southern District of Alabama, Hon. **James J. Tancredi** (business bankruptcy law, 1994) of the U.S. Bankruptcy Court for the District of Connecticut and Hon. **Mary F. Walrath** (business bankruptcy law, 1992) of the U.S. Bankruptcy Court for the District of Delaware. The discussion was moderated by ABC Chair **Craig M. Geno** (Craig M. Geno, PLLC; Ridgeland, Miss.) and ABC President **J. Scott Bovitz** (Bovitz & Spitzer; Los Angeles). ABC Secretary **Patricia B. Fugée** (FisherBroyles, LLP; Cleveland and Toledo, Ohio) produced the program.

How Should Judges React When They Discover Incompetence?

Judge Carr started this discussion with the observation that competence is often difficult to define given the nature of bankruptcy practice. Bankruptcy attorneys must be well versed in bankruptcy law, but must also have knowledge of many other areas of law. He described bankruptcy practice as the "last refuge of the generalist."

Bankruptcies often involve questions of family law, real estate law, finance, tort law, intellectual property and taxation. Litigation skills are needed for hearings and trials. Judge Carr professed his admiration for the consumer bar attorneys who regularly appear before him and confront these issues without access to a deep bench of narrowly focused partners. Judge Carr has encountered situations in

which greater knowledge of the underlying subject matter by the participating attorneys would have been helpful. He encouraged the entire bankruptcy bar to seek help inside or outside of their firms when dealing with difficult questions beyond their normal areas of practice.

Judge Tancredi described judges' roles as being "gatekeepers" who "contribute to learning" but "cannot tolerate incompetence." He recalled a matter in which the performance of one of the attorneys was so lacking that he felt compelled to tell him that he was a "significant impediment" to resolution in the presence of his client. The client appreciated the significance of the comment and found a more competent attorney.

He also relies on help from the U.S. Trustee and his state's bar association to police unprofessional conduct. Judge Tancredi expressed a reluctance to use in-chamber conferences to deal with competence and civility problems. He believes that these private meetings raise questions from both the bar and public about the fairness and transparency of the process.

How Are Competence and Professionalism Affected by a Lack of Civility?

Judge Oldshue observed that civility and competence go "hand in hand." Incivility diminishes the court's confidence in, trust in and respect for the misbehaving attorneys. These attitudes impact areas in which the court has broad discretion, especially when a question of good faith is in the mix.

Judge Carr observed that in most every matter, a bankruptcy judge serves the trial of fact. It is not wise to annoy someone tasked with weighing conflicting evidence. He also highlighted an attribute of bankruptcy practice that creates the need for a higher level of trust from the bar. Bankruptcy cases require courts to make critical (and often very expensive) decisions with little or no time for formal discovery and often without much time for evidence. In the absence of weeks of testimony and mountains of exhibits, bankruptcy judges must rely on the good faith and honesty of the attorneys who appear and make rep-

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Hon. Jerry C. Oldshue, Jr. (S.D. Ala.; Mobile), Hon. James M. Carr (S.D. Ind.; Indianapolis), ABC President J. Scott Bovitz (Bovitz & Spitzer; Los Angeles), Hon. James J. Tancredi (D. Conn.; Hartford), ABC Chair Craig M. Geno (Craig M. Geno, PLLC; Ridgeland, Miss.), Hon. Mary F. Walrath (D. Del.; Wilmington) and Hon. David W. Hercher (D. Ore.; Portland) (l-r) were among those who participated in the special ABC panel session at ABI's Annual Spring Meeting in April.

representations before them. An attorney who is not trusted by the court will have a very difficult time being effective in the fast-paced world of bankruptcy. Judge Carr remarked that the system could not work at the required pace if the bar were not competent and trustworthy. Judge Walrath reminded the audience that judges “talk to each other,” so the problems caused by a bad reputation in one court might seep into others.

Judge Tancredi discussed his success in interrupting stints of uncivil behavior by taking a recess and letting the offending attorneys reflect on their shortcomings. He encouraged attorneys who encounter incivility to “not take the bait” and remain above the fray. The best revenge is to win the case. He remarked that the best training he has encountered for controlling uncivil behavior is “raising your kids.”

Judge Hercher makes a practice of scheduling more frequent pre-trial conferences when he is faced with problematic behavior by attorneys. He believes that addressing issues early before they fester and become more difficult problems is wise. Judge Walrath also encouraged attorneys who encounter abusive behavior to deal with them early.

Unlike the other panelists, Judge Walrath's calendar is filled with business bankruptcy cases with well-funded firms on each side of most disputes. Her regulars tend to practice at a high level and respect the practices preferred by the court. However, she has experienced challenges from attorneys unfamiliar with her court.

The participation of experienced local counsel assists her in policing the quality of services provided in her court. She told the story of a prominent Delaware attorney serving as local counsel (now a judge) using a “stage whisper” to encourage a misbehaving attorney from another jurisdiction that he needed to sit down and be quiet. Judge Walrath will raise her hand and signal to attorneys that their conduct is not acceptable, and has found that they respond well to the warnings.

Although the topic was not directly addressed in the question about civility, the panel was enthusiastic about discussing discovery problems. There was unanimity among the panelists about their disdain for discovery disputes. When the panel

was asked how it felt about motions for discovery sanctions, Judge Oldshue's response of “disappointed, frustrated and angry” was met with affirmative nods from the panel.

There was a general consensus among the panelists for the need for more meaningful communication between attorneys before court appearances. Judge Walrath remarked about the effective use made of nasty emails from opposing counsel in discovery disputes. Her remark prompted a discussion about the need for actual conversations (and the inherent danger of fighting via email). Judge Carr remarked that he had no patience for failing to talk before a hearing.

What Advice Would You Give to Those Seeking Success in the Bankruptcy Bar?

Judge Carr reflected on what he learned about in his decades of high-level bankruptcy work about building a career. He observed that “careers are long” and people play different roles over the course of their careers. The young associate whose life you might be making miserable in a discovery dispute could be a judge in a few years. Your client's mid-level receivables manager might advance to be the company's chief financial officer. The workout officer at a banking client might become the troubled-asset manager at the bank down the street.

He warned against assuming that being uncivil to anyone is wise: “People who didn't impress me ended up in impressive positions down the road.” Judge Walrath stressed the importance of finding an effective mentor and seeking guidance. Judge Tancredi compared career-building to creating impressionist art. The best way to build your career is to join professional organizations like ABI, ABC and local bar associations. In addition, be active in your communities.

What Benefits Do You Perceive from Board Certification?

Judge Hercher remarked that the most obvious benefit of ABC certification was marketing. Becoming certified enables attorneys to differentiate themselves from other attorneys in the eyes of potential clients.

In his firm, the established insolvency attorneys were certified, and he felt an “expectation” that younger attorneys also demonstrate their commitment to the area of expertise by completing the certification process. In his experience from the bench, Judge Hercher found certified attorneys to be “honest and prepared.”

Judge Oldshue felt the certification process gave him a “competitive advantage” when he was an attorney seeking work from institutional clients and also assisted him in the judicial selection process. Judge Tancredi observed that business bankruptcy had become “faster, sharper, more subtle and more complex.” These attributes create a barrier to entry. He opined that it was important to be a specialist to thrive in the current environment. Judge Walrath praised the level of continuing legal education required to obtain and maintain certification and the rigor of the entrance examination. **abi**