



# Bankruptcy Grab Bag: Limited Scope of Representation, Fees, Connections/2014, and Civility

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# The two ABI Reports:

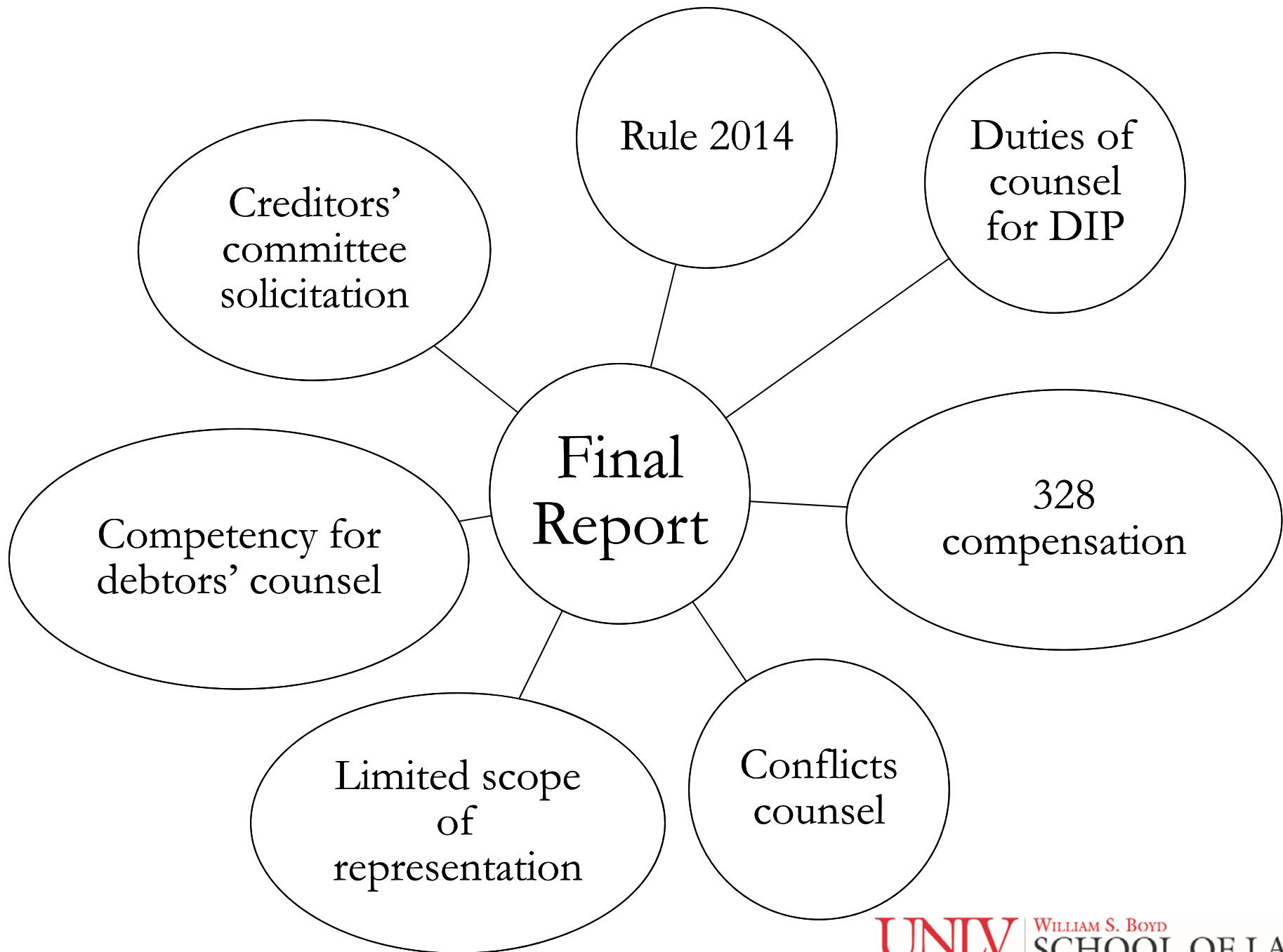
- National Ethics Task Force:  
[http://materials.abi.org/sites/default/files/2013/Apr/Final\\_Report\\_ABI\\_Ethics\\_Task\\_Force.PDF](http://materials.abi.org/sites/default/files/2013/Apr/Final_Report_ABI_Ethics_Task_Force.PDF).
- Civility:  
[http://materials.abi.org/sites/default/files/2013/Sep/Report\\_on\\_Standards\\_of\\_Professional\\_Conduct.pdf](http://materials.abi.org/sites/default/files/2013/Sep/Report_on_Standards_of_Professional_Conduct.pdf).

# National Ethics Task Force

- Created in May 2011 by ABI President Geoffrey L. Berman; report issued in April 2013.
- Task force included:
  - Academics
  - Judges
  - Former ABI Ethics Committee Co-Chairs
  - Professionals involved in ethics education
  - Representatives of the U.S. Trustee Program

# National Ethics Task Force

- Mission: To consider ethics issues in bankruptcy practice and make recommendations for uniform standards, where appropriate.



# Among the things we didn't cover (time constraints):

- Competency of creditors' counsel.
- Ghostwriting.

# LSR/unbundling:

- Let's put this issue into context:
  - It's NOT “how little can we get away with doing so that we can make enough profit on each case?”
  - It's “if a debtor can't afford any lawyer, then is the next best thing some guidelines on unbundling, so that the debtor can get a little bit of legal help?”

# LSR:

- LSR sometimes useful in chapter 7 cases; we did not suggest LSR in chapter 13 cases.
- There's a Model Rule that courts might want to adopt.
- There's a model agreement providing simple, plain-language disclosures to clients as to what is and what is not covered in the initial representation.
- Don't forget state ethics rules about reasonable fees.
- Can't unbundle if you can see an obvious issue on the horizon.



# The Task Force's “Best Practices” recommendations on unbundling:

1. The **initial client interview** and counseling should **make clear the expected scope of representation and the expected limited fee.**
2. Attorneys counseling unsophisticated consumer debtors must be mindful, when gathering initial information to assess a case, to **avoid the formation of the debtor's perception that a full-scale attorney-client relationship is being formed.**

# The Task Force's “Best Practices” recommendations on unbundling:

3. An **engagement letter and informed consent should be prepared in plain language and carefully reviewed with the debtor.** This letter must **clearly and conspicuously set forth the services being provided, the services *not* being provided, and the potential consequences** of the limited services arrangement.
4. The engagement letter must also **clearly describe the fee arrangement, including a statement of how fees for additional services will be charged.**

# The Task Force's “Best Practices” recommendations on unbundling:

5. All documents and disclosures filed with the bankruptcy court should be done with **full candor consistent with the attorney's duty of confidentiality, disclosing the exact nature of the representation and the calculation of fees for services being provided.**
6. In the event that **withdrawal from the unbundled representation** becomes warranted, attorneys must be **mindful of protecting their client's interests to the fullest extent practical when exiting** the case.

# The Task Force's “Best Practices” recommendations on unbundling:

7. As is the case with all legal representation, **if the attorney becomes aware of a legal remedy, problem, or alternative outside of the scope of his or her representation, the client must be promptly informed.** The attorney has the **further obligation to provide his or her client with a thorough explanation of the potential benefits and harms implicated,** in order for the client to make an informed decision as to how to proceed.

# The Task Force's “Best Practices” recommendations on unbundling:

8. There are always **risks with asking the client to pay, post-petition, for fees incurred pre-petition as part of the engagement.** If the Proposed Rule suggested in this Best Practices Statement is not enacted, then perhaps a better approach would be that taken by a case in the Middle District of Florida. In that case, the court approved a payment system in which “the client execute[d] **separate fee agreements for prepetition and postpetition services.**”

# Fees:

- New UST Guidelines for attorneys in mega-cases:  
[http://www.justice.gov/ust/eo/rules\\_regulations/guidelines/docs/Fee\\_Guidelines.pdf](http://www.justice.gov/ust/eo/rules_regulations/guidelines/docs/Fee_Guidelines.pdf).
- Guidelines in other cases:  
[http://www.justice.gov/ust/eo/rules\\_regulations/guidelines/docs/1996\\_Fee\\_Guidelines.pdf](http://www.justice.gov/ust/eo/rules_regulations/guidelines/docs/1996_Fee_Guidelines.pdf).
- Lupica & Rapoport, *Best Practices for Working With Fee Examiners*: <http://journal.abi.org/content/best-practices-for-working-with-fee-examiners>.

# Fees:

- Fee examiners don't have a [dog in the hunt](#). We're there to help the court with what can be a massive amount of data to review.
- Explain / disclose / plan ahead (staffing, mission creep).

# Compensation under 11 U.S.C. § 328:

- 327/1103: getting retained.
- 328: alternative methods of compensation (non-lodestar) (fees will be allowed unless “such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and condition.”).



# Compensation under 11 U.S.C. § 328:

1. Be clear about the Bankruptcy Code provision under which approval is being sought—are you being retained under 327, with unusual compensation approved under 328?
2. Remember that it's up to the bankruptcy court to decide whether a proposed arrangement is OK.
3. The party seeking approval of a professional's employment has the burden of proof.

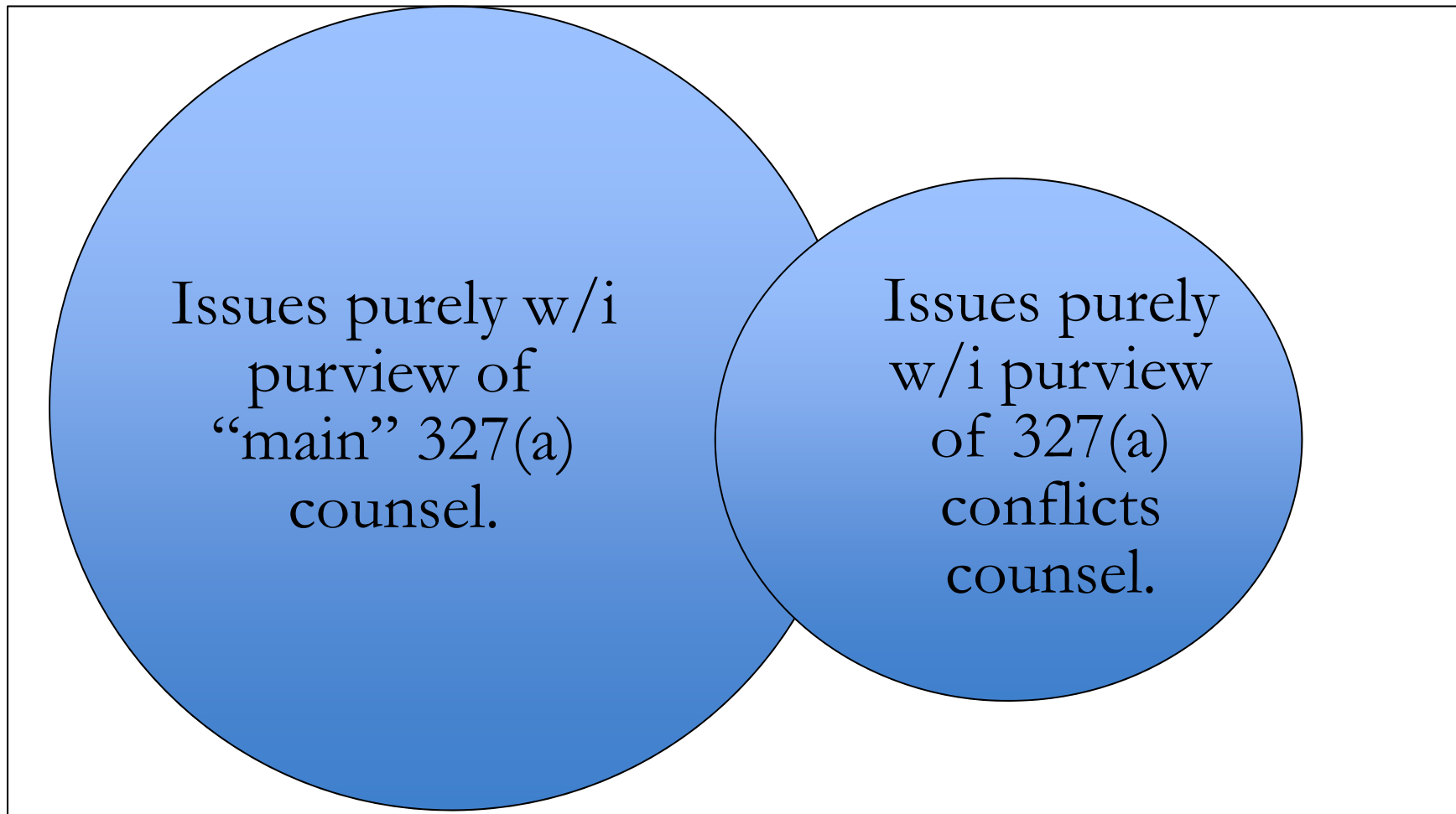
# Compensation under 11 U.S.C. § 328:

4. Don't forget your state ethics rules.
5. Make truthful assertions supporting the sec. 328 compensation method—avoid the “everyone does it this way” assertion.

# Conflicts counsel in business reorganization cases:

- The idea is to get main counsel to be able to satisfy “disinterestedness” by spinning off non-pervasive, non-key types of conflicts to “conflicts counsel.”
- Can sometimes use conflicts counsel as convenience counsel.
- Spell out, in employment orders, who’s supposed to do what.
- As new professionals are added, update the orders authorizing employment regarding who’s doing what.

# Conflicts counsel in business reorganization cases:



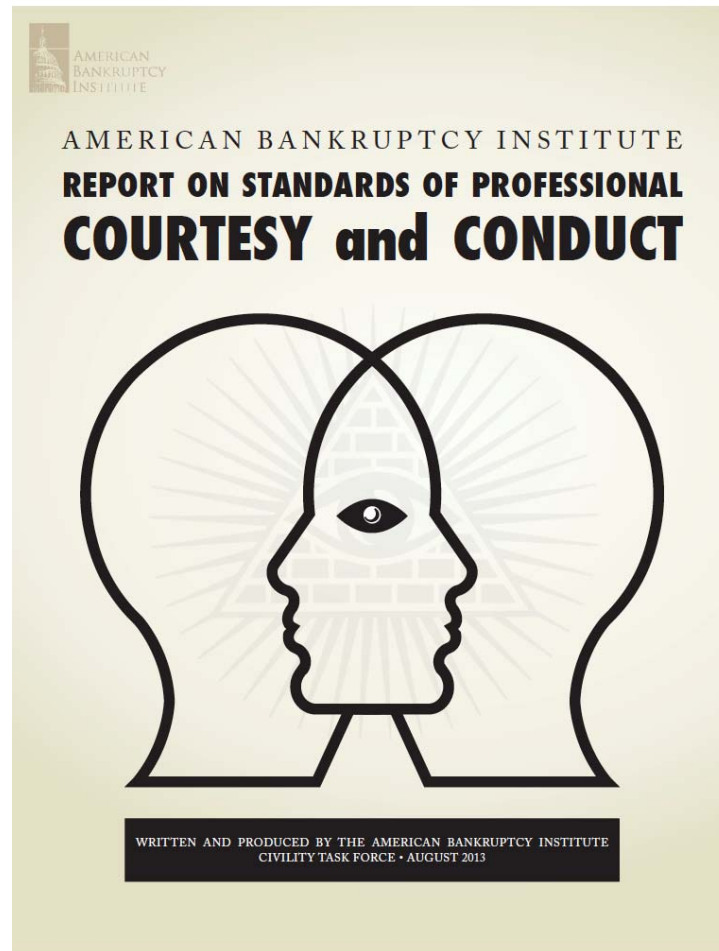
# Proposed amendments to Rule 2014

- 327/1103 + Rule 2014
- Current Rule 2014: must disclose “. . . to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.”

# Proposed amendments to Rule 2014

- “Connections” is a muddy and confusing concept.
- Task Force Proposed New Rule 2014 is longer, but it delineates what we think is the type of information that a court would want to know.
- New “grid” helps to link the type of “Relevant Connections” with the statements in the disclosure itself.
- Rules Committee has the draft.

# Now--what about civility?



# From the *ABA Journal*:

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## TRIALS & LITIGATION

### BigLaw partner used his briefcase 'as a weapon' to bash opposing counsel, lawsuit says

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Posted Mar 5, 2014 3:39 PM CST

By **Martha Neil**

[http://www.abajournal.com/news/article/biglaw\\_partner\\_used\\_his\\_briefcase\\_as\\_a\\_weapon\\_to\\_bash\\_opposing\\_counsel\\_laws/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=ABA+Journal+Top+Stories](http://www.abajournal.com/news/article/biglaw_partner_used_his_briefcase_as_a_weapon_to_bash_opposing_counsel_laws/?utm_source=feedburner&utm_medium=feed&utm_campaign=ABA+Journal+Top+Stories).



# General duties of all professionals:

1. Professionals should be **courteous and civil in all professional dealings** with other persons.
2. When not inconsistent with their clients' interests, professionals should **cooperate** with other professionals in an effort to avoid litigation and to resolve litigation that already has commenced.
3. Professionals should **respect the schedule and commitments of others**, consistent with the protection of the client's interests.

# General duties of all professionals:

4. A professional **should not initiate communications with the intention of gaining undue advantage from the recipient's lack of immediate availability.**
5. A professional should **return telephone calls promptly and respond to communications** that reasonably require a response, with **due consideration of time zone differences and other known circumstances affecting availability.**

# General duties of all professionals:

6. The **timing and manner of the servicing of papers should not be designed to cause disadvantage** or embarrassment to the party receiving the papers.
7. A professional **should not use any aspect of the litigation process**, including discovery and motion practice, **as a means of harassment** or for the purpose of unnecessarily prolonging litigation or increasing litigation expenses.

# General duties of all professionals:

8. In **out-of-court** proceedings, professionals **should not engage in any conduct that would not be appropriate in the presence of a judge.**
9. A professional should **keep his or her word.**
10. A professional **should not mislead others** involved in the bankruptcy process.

# General duties of lawyers:

1. **Lawyers should be respectful of the schedules** and commitments of others.
2. In examinations and other proceedings, as well as in meetings and negotiations, **lawyers should conduct themselves with dignity** and refrain from displaying rudeness and disrespect.
3. **Lawyers should not mislead others** involved in the bankruptcy process.

# Lawyers' duties to the court and court personnel:

1. A lawyer is both an officer of the court and an advocate. As such, a lawyer should always strive to uphold the honor and dignity of the profession, **avoid disorder and disruption in the courtroom, and maintain a respectful attitude toward the court and its personnel.**
2. **Court personnel** are an integral part of the justice system and should be **treated with courtesy** and respect at all times.

# Duties of judges and court personnel to lawyers, parties, and witnesses:

1. A judge should be patient, courteous, and civil to lawyers, parties, and witnesses.
2. Court personnel should be courteous, patient, and respectful while providing prompt, efficient, and helpful service to all persons having business with the courts.