MARICOPA LAWYER

OFFICIAL PUBLICATION OF THE MARICOPA COUNTY BAR ASSOCIATION

MARCH 2024 VOLUME 43, NUMBER 3 maricopabar.org

INSIDE

WHERE THE LEGAL COMMUNITY CONNECTS

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BANKRUPTCY LAW SECTION

Subchapter V

Andrew O'Keefe

"The new subchapter V of Chapter 11 works wonders for a small business or family needing to reorganize financially. This variety of Chapter 11 can be faster and less expensive than a Classic Chapter 11." – Lamar Hawkins, Partner at Guidant Law.

In late 2019, Congress enacted the Small Business Reorganization Act ("SBRA"). The SBRA provides a mechanism for small businesses with less than $7,500,000 in debt to efficiently reorganize under the Bankruptcy Code. The expense and complexity of Chapter 11 has made reorganization unachievable for many small businesses. The SBRA reflects a recognition that reorganization is not a one-size-fits-all approach.

The goal of every bankruptcy case is to confirm a plan of reorganization. A plan is essentially just a new contract that a debtor enters into with its creditors. The Bankruptcy Code, in Congress's judgment, strikes an equitable balance between creditor and debtor interests. It promotes bringing all parties to the negotiating table, and Subchapter V gives debtors the most important tool in bankruptcy—leverage.

The SBRA is nestled within Chapter 11 of the Bankruptcy Code under Subchapter V, but Subchapter V differs from traditional Chapter 11 bankruptcy in a few material ways. First, the absolute priority rule, which prevents equity interests from receiving or retaining any property under a plan of reorganization before unsecured creditors are paid in full, has been eliminated. In other words, if a debtor pays all of its projected disposable income over the life of the plan, the debtor may retain property under the plan. Second, a Subchapter V debtor has the exclusive ability to file a plan, rather than creditors having the ability to file competing plans. Third, a Subchapter V Trustee oversees and facilitates a negotiated, consensual plan of reorganization. A Subchapter V Trustee has a new, unique role in the bankruptcy process, it "transforms the role of the trustee form one of prosecutor to

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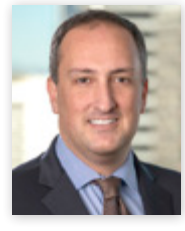
Q&A

LAWYER LIABILITY AND ETHICS

Fani's Fling



Joseph Brophy

The source of the largest gravitational pull known to man is a black hole, where gravity is so strong not even light can escape it. A close second is the gravitational pull that former President Donald Trump exerts on lawyer malfeasance. This indisputable fact is evidenced by the trail of disbarred, censured, sanctioned and even imprisoned lawyers from both sides of the political spectrum that he has left in his wake. When he leaves public life, the market for legal ethics writing will burst like a bubble from lack of content. But not today!

Our story takes us to Fulton County, Georgia, where Mr. Trump, among others, is under indictment by District Attorney Fani Willis for alleged skullduggery arising out of the 2020 presidential election. Ms. Willis appointed a special prosecutor to handle the criminal case. The lucky fellow was a lawyer in private practice named Nathan Wade. Mr. Wade was going through a divorce against a former spouse who is apparently a formidable opponent.

It appears likely that Mr. Wade's ex-wife (or someone on her behalf) made it known to one of the defendants in the Trump case that Mr. Wade and Ms. Willis were engaged in a romantic relationship. Ms. Willis and Mr. Wade told the court in the Trump case that their romantic relationship began in 2022, after Ms. Willis appointed Mr. Wade in November 2021. However, at an evidentiary hearing on February 15, 2024, a witness testified that their romantic relationship began in 2019.

The defendants in the Trump case have moved to disqualify Mr. Wade and Ms. Willis. The factual basis for this request is that Mr. Wade: (1) never tried a felony RICO case, which is what the Trump prosecution involves (2) was paid hundreds of thousands to millions of dollars (different numbers have been thrown around) in legal fees by Fulton County for his work as special prosecutor; (3) submitted multiple bills to Fulton County for 24 billable hours in a day (block billed with no details) and in some cases numbers close to 24 hours; and (4) paid for Ms. Willis to travel with him via plane and cruise ship to the Napa Valley, the Bahamas (twice), Aruba, Belize and Florida. The criminal defendants also charge that Ms. Willis paid Mr. Wade with public funds that were earmarked to clear the backlog of cases left by the Covid pandemic.

The legal grounds for disqualification are: (1) Georgia statutes applicable to public officials that prohibit the appearance of a conflict of interest, and prohibit a public official from receiving directly or indirectly anything of value from anyone having business with the Fulton County; and (2) violations of the Rules of Professional Conduct. Moreover, state regulations require that Ms. Willis and Mr. Wade disclose their relationship, which they failed to do. According to the defense, their failure to disclose the relationship suggests that Ms. Willis and Mr. Wade did not want to be recused from the Trump prosecution because they are motivated to pursue that prosecution for personal, political and financial reasons.

This is more than your garden variety office romance. If the allegations are proven, one could plausibly conclude that Ms. Willis hired an arguably unqualified special pros-

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ecutor because she was in a romantic relationship with him, then benefitted from the public funds paid to that special prosecutor (which the defendants claim are not being used for their intended purpose, i.e. Covid) by having Mr. Wade pay for Ms. Willis's vacations and personal travel. Also indicative of chicanery is the fact that the Fulton County District Attorney is evidently the only client in the continental United States that would pay an attorney for 24 hours of block billing in a single day, instead of having a conniption, refusing to pay the bill, immediately firing that law firm and reporting the offending attorneys to the state bar.

On February 12, 2024, the court held oral argument on a motion to quash subpoenas for Mr. Wade and Ms. Willis to testify at an evidentiary hearing. The court denied the motion, and stated its belief that the facts as alleged may disqualify Ms. Willis and Mr. Wade. At the February 15th evidentiary hearing, Mr. Wade claimed that although the vast majority of the happy couple's travel was paid for on his credit card, Ms. Willis always reimbursed him in cash. The paper trail for these purported cash reimbursements is non-existent.

There is much that could be said about this situation. But alas this is a legal ethics column, not a criminal law, public integrity or gossip column. So what are the ethical issues?

The most obvious issue is that Mr. Wade and Ms. Willis may have violated their duty of candor by claiming their relationship started after she appointed him as special prosecutor. And the cases where lawyers are caught block billing for 24 hours in a single day (there are more than you would think) do not end well for those lawyers. But there are more complicated issues in play.

ER 1.7(a) prohibits a lawyer from representing a client if there is a significant risk that the lawyer's own interests or responsibilities to a third person might affect the representation. Any such potential conflict must be disclosed to the client (Fulton County), which did not happen here. Sexual relations between lawyer (Mr. Wade) and client (arguably Ms. Willis who hired him to work for the county) are a conflict under ER 1.7(a). ER 1.8(j) prohibits sexual relationships between lawyer and client unless the relationship existed when the representation began. Again, if Fulton County and by extension Ms. Willis are viewed as Mr. Wade's clients, then their claim that their relationship began in 2022 is a problem.

ER 1.8(i) prohibits a lawyer from having an interest in the subject matter of litigation (civil lawyers with contingent fee agreements are an exception). The reason for that rule is that if a lawyer has too great of a financial stake in the litigation, her professional judgment might be affected. A prosecutor might, for example, charge a wide-ranging RICO case against many defendants because the more defendants who are charged the larger the financial benefit (i.e., billable hours) there will be to the prosecutor. For that reason, the February 15th evidentiary hearing focused heavily on whether Mr. Wade was funding Ms. Willis's travel (the defense position) or whether Ms. Willis was reimbursing him with cash payments (the prosecution's position).

Prosecutors are not like civil lawyers, advocating for their clients while chasing down mere nickels and dimes. Prosecutors, it is sometimes said, have the responsibility of a minister of justice and not simply that of an advocate. They are required to pursue justice, not convictions.

The issue here is independent professional judgment. While a private attorney must "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf," (ER 1.3, Comment 1), a prosecutor must abandon the prosecution if, in her professional judgment, justice will be promoted by doing so. Unlike with civil lawyers, the prohibition on prosecutors having a financial stake in litigation, including a contingent fee agreement, is absolute. ER 1.5(d)(2). Having a personal, political or financial stake in whether a prosecution should be brought or continue creates the appearance that the prosecutor's professional judgment may reasonably be questioned.

Anyone who gives the issue one second of thought will quickly conclude that we do not want to live in a world where prosecutors have a financial incentive to charge or convict people. The damage to a criminal defendant by this conflict is difficult to remedy because the resulting prejudice is not normally susceptible to proof. As a result, in cases where prosecutors have been disqualified for having a financial interest in the prosecution of the case, courts have held that the criminal defendant does not have to prove actual prejudice to have the prosecutor removed.

The court did not give any signal regarding its position on the ultimate issue of whether the prosecution's ethical issues may justify the dismissal of the charges against Mr. Trump and his co-defendants. One would think that issue could be remedied short of letting a criminal defendant walk. If the defendant were Don Corleone instead of Donald Trump, most people would probably prefer that the current prosecutors simply be replaced.

However, there have been cases where convictions have been reversed and sentencing vacated for this kind of conflict of interest. In those cases, the courts have noted that a criminal defendant does not have to make the Hobson's choice between his right to a speedy trial and his right to an impartial prosecutor. If the prosecution is delayed because the Fulton County DA and special prosecutor are disqualified, it might spell trouble for the government. Stay tuned and keep your popcorn close by. ■

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