(SOLICITED) DRAFT SUBMITTED ON 1/18/24 (revised on 1/27/24) TO (AND ACCEPTED BY) VOLUME 40, *EMORY BANKRUPTCY DEVELOPMENTS JOURNAL*—if you have comments, please email me at nancy.rapoport@unlv.edu

Am I My Colleagues' Keeper When It Comes to Disclosing Connections?[1]

Nancy B. Rapoport[2]

By now, bankruptcy mavens have read the stories: Judge David Jones of the United States Bankruptcy Court for the Southern District of Texas resigned after news emerged about his[3] failure to disclose his relationship with his live-in intimate partner, Elizabeth Freeman. Even before I get started on this article, let's get one thing straight: most of the sources that I'm citing are news stories, not adjudicated facts. Still, I'm going to use many of these stories as a jumping-off point for thinking about who should disclose which types of connections. Even as this article goes to press, the news keeps coming.[4] Before I can address who should have disclosed what and when,[5] let's start with the basics of the story.

I. What we know (or at least what's out there) so far.

The short version is clear: According to numerous news stories, Ms. Freeman was a partner for a time at Jackson Walker, a law firm whose employment and fees were approved in cases over which Judge Jones presided—while Ms. Freeman was living with Judge Jones.[6] Neither Judge Jones, nor Ms. Freeman, nor Jackson Walker, nor any other attorney in any of those cases disclosed the relationship.

Before we go into the details, let's start with one factoid that surprised me: there are more than a few other cases involving undisclosed judge-lawyer affairs. In *Alabama State Bar v. Kaminski,*[7] a judge engaged in an undisclosed eight-month affair (and later married) a lawyer who appeared before him.[8] In *In re Wilfong,*[9] a judge had an undisclosed two-year affair with a lawyer who appeared before

---

[1] © Nancy B. Rapoport 2024. All rights reserved.

[2] I owe thanks to Lila Anderson, Youngwoo Ban, Geoff Berman, J. Scott Bovitz, Walter Effross, Hon. Judith K. Fitzgerald (ret), Charles Gardner Geyh, Randy Gordon, Melissa Jacoby, Lynn M. LoPucki, Adam Levitin, Bruce Markell, Hon. Terrence L. Michael, Denise Neary, Bill Rochelle, Joseph R. Tiano, Jr., Jeff Van Niel, and Clifford J. White III, along with a few friends who felt way more comfortable staying anonymous, given the sensitivities of this issue. For purposes of protecting that anonymity, I'm using "he" or "his" when I refer to the anonymous commenters. I am particularly indebted to my law school colleague, Prof. Youngwoo Ban, for looking into Rule 2014's legislative history. The title of this article harkens back to the Biblical quote regarding Cain, who was queried by God about the location of his brother Abel and responded, "Am I my brother's keeper?" *Genesis 4:1-9*. Cain had killed Abel but was trying to be disingenuous in his wording—never a good idea when dealing with an all-knowing being. It's always bad to cover up a bad act with a lie. And, in case you're wondering, yes, I'm aware of the irony of publishing this piece (at the editors' invitation) in the same journal that gave Judge Jones such a prestigious award not that long ago. *See* David R. Jones, *Acceptance Remarks for the 2023 Distinguished Service Award For Lifetime Achievement, Delivered at the Emory Bankruptcy Developments Journal's Twenty-Third Annual Banquet*, 39 EMORY BANKR. DEVEL. J. 491 (2023) (hereinafter *Acceptance Remarks*). This journal has brave editors.

[3] Judge Jones wasn't the only person who failed to disclose this relationship, as I'll discuss below.

[4] In fact, every time I think I'm ready to turn this draft in so that the editors can take over, something new happens. *Cf. The Godfather, Part III* (Paramount 1990) ("Just when I thought I was out... they pull me back in."), at https://www.imdb.com/title/tt0099674/quotes/?ref_=tt_ql_dyk_3 (last visited Dec. 29, 2023).

[5] I am in the unenviable position of criticizing the Jackson Walker firm, which has lawyers whom I respect deeply, as well as criticizing lawyers at other firms who admitted knowing about the relationship.

[6] *See, e.g.,* n. 48, *infra.*

[7] 367 So. 3d 1047 (Ala. 2021).

[8] *Id.* at 1055. The Supreme Court of Alabama remanded the state bar's suspension on the grounds that the state bar had not sufficiently documented the evidence supporting its findings or the standards that it applied. *Id.* at 1054.

[9] 234 W. Va. 394 (W. Va. 2014).

Electronic copy available at: https://ssrn.com/abstract=4700214

her.[10] In *Matter of Gerard,*[11] a judge had an undisclosed affair with an assistant county attorney who appeared before him.[12] In *People v. Biddle,*[13] the Supreme Court of Colorado suspended a lawyer who, while acting as a magistrate judge, engaged in an undisclosed affair with a deputy district attorney who appeared before him.[14] In *Inquiry Concerning Adams,*[15] the Supreme Court of Florida issued a public reprimand of a judge who had a romantic relationship with an attorney appearing before him. You get the point: the story that I'm about to tell is not a one-off.[16] Although the concept of a judge having an undisclosed romantic relationship with a lawyer who appears before him is rare, it does occur. And that is what happened with Judge Jones and Ms. Freeman.

This whole scandal caught the press's attention when Michael Van Deelen sued Judge Jones, alleging the existence of a relationship between Ms. Freeman and the judge based on a tip from an anonymous informant and also alleging that the orders that Judge Jones had issued in a particular bankruptcy case (*In re* McDermott International[17]) were thus unconstitutional.[18] Mr. Van Deelen

---

[10] The Supreme Court of West Virginia "adopt[ed] the Hearing Board's finding that the judge committed eleven violations of seven Canons. The judge demeaned her office, and significantly impaired public confidence in her personal integrity and in the integrity of her judicial office. As a sanction, we hold that the judge must be censured; suspended until the end of her term in December 2016; and required to pay the costs of investigating and prosecuting these proceedings." *Id.* at 397.

[11] 631 N.W. 2d 271 (Iowa 2001).

[12] As the Court noted,

> In regard to Canon 2(A), Judge Gerard adamantly argues that no one has been able to find any evidence that he acted partially toward the State and, therefore, this mitigates his misconduct. We cannot agree. It is immaterial that the judge's association may not have had a detrimental impact on defendants appearing before him. The key concern of this canon is the appearance of impropriety. In this situation, once the public learned of the judge's relationship with the State's attorney who appeared before him daily, the appearance of bias was very real.

Id. at 278; *see id.* at 280 ("The failure to disclose his relationship with the assistant county attorney or recuse himself where appropriate was not only poor judgment, but suggests to the reasonable onlooker that Judge Gerard's impartiality was affected. Therefore, Canon 3(D)(1)(c) was violated."). The Supreme Court suspended the judge for sixty days. *Id.*

[13] 190 P.3d 461 (Colo. 2007).

[14] In suspending the lawyer, the Court observed that:

> The facts established in the complaint reveal the danger Respondent poses to the public by way of his brazen disregard of his ethical duties both as a lawyer and a public official. By engaging in this conduct, Respondent caused actual injury and serious potential injury to the integrity of the legal profession and our system of justice.

Id. at 465.

[15] 932 So.2d 1025 (Fla. 2006).

[16] For a good discussion of sexual misconduct involving judges, see JAMES J. ALFINI, STEVEN LUBET, JEFFREY SHAMAN, AND CHARLES GARDNER GEYH, JUDICIAL CONDUCT AND ETHICS § 9.04[5], available at https://plus.lexis.com/document?crid=9759bb59-1478-4adc-b824-0f14528eea03&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A55F0-B840-R03M-147D-00000-00&pdsourcegroupingtype=&pdcontentcomponentid=319813&pdmfid=1530671&pdisurlapi=true (last visited Jan. 17, 2024) (footnotes omitted).

[17] Case No. 4:20-bk-30336, United States Bankruptcy Court, Southern District of Texas.

[18] *See* Complaint, Van Deelen v. Jones, Case No. 4:23-cv-03729, United States District Court, Southern District of Texas, Docket No. 1 (Oct. 4, 2023). That complaint has since been sealed by order of the Court. *See id.* at Docket No. 4 (Oct. 23, 2023).

[begin indent]

Deleted: Bankruptcy

Electronic copy available at: https://ssrn.com/abstract=4700214

had previously sued various McDermott employees in state court, but that state court lawsuit was removed to the bankruptcy case as an adversary proceeding.[19] At some time during the pendency of the adversary proceeding, Mr. Van Deelen received the anonymous tip about the romantic relationship between Judge Jones and Ms. Freeman, and he then relied on that tip in his lawsuit against Judge Jones, though Mr. Van Deelen also provided evidence of the live-in relationship in his Appendix A of the Complaint.[20] The Complaint is now under seal,[21] and an amended Complaint was filed on January 11, 2024, adding Ms. Freeman, Jackson Walker, and Kirkland & Ellis as additional defendants.[22] With respect to Kirkland & Ellis, Mr. Van Deelen has alleged, in part, that "Kirkland and Ellis joined Jackson Walker in at least three cases in that period, and while applying as lead counsel, failed to disclose the Jones-Freeman relationship even while identifying Judge Jones in the schedule of bankruptcy judges searched for a potential conflict and listing none."[23]

> In his lawsuit against Jones filed Oct. 4, Michael Van Deelen said he received an anonymous note while involved in an adversary proceeding before Jones in the Chapter 11 bankruptcy of McDermott International, a Houston-based multinational engineering firm.
>
> The letter, delivered to Van Deelen's home, informed him that Jones' live-in girlfriend, Elizabeth Carol Freeman, had been a bankruptcy attorney and partner for the law firm Jackson Walker, Van Deelen says in his lawsuit. Freeman had also clerked for Judge Jones for six years before joining the firm.
>
> The anonymous letter detailed a scheme in which bankruptcy filers would hire Jackson Walker to represent them and get favorable treatment from Jones due to his romantic relationship with Freeman, according to Van Deelen. [end indent]

Cameron Langford, *Houston bankruptcy judge resigns amid ethics investigation,* Courthouse News Service (Oct. 16, 2023), at https://courthousenews.com/houston-bankruptcy-judge-resigns-amid-ethics-investigation/ (last visited Dec. 27, 2023). So far, the anonymous nature of the underlying allegations has worked in Judge Jones's favor.

[19] *See* Notice of Removal, Van Deelen v. Dickson (*In re* McDermott International, Inc.), United States Bankruptcy Court, Southern District of Texas, Docket No. 983 (July 7, 2020); *id.* at Docket No. 983-1.

[20] *See* Complaint, Van Deelen v. Jones, Case No. 4:23-cv-03729, United States District Court, Southern District of Texas, Docket No. 1 at Appendix A (Oct. 4, 2023).

[21] *See* n. 18, *supra.*

[22] Plaintiff's First Amended Complaint, Van Deelen v. Jones, United States District Court, Southern District of Texas, Docket No. 10 (January 11, 2024) (naming Ms. Freeman, Jackson Walker, and Kirkland & Ellis as additional defendants). On December 29, 2023, Judge Jones moved to dismiss the case based on judicial immunity, *See* Defendant's Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(6), Van Deelen v. Jones, United States District Court, Southern District of Texas, Docket No. 9 (December 29, 2023); *see also* nn. 89-91 & 206-207, *infra,* and accompanying text. Mr. Van Deelen filed a reply to the Motion to Dismiss on January 18, 2024. *See* Plaintiff's Response to Judge Jones' Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(6), Van Deelen v. Jones, United States District Court, Southern District of Texas, Docket No. 10 (January 18, 2024), and on January 24, 2024, the District Court issued an Order in light of the additional named defendants that "Defendant Jones shall inform the Court about whether he intends to file a new motion to dismiss or rely on the arguments outlined in his initial motion, in which latter case the Court will evaluate its mootness." *See* Order, Plaintiff's Response to Judge Jones' Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(6), Van Deelen v. Jones, United States District Court, Southern District of Texas, Docket No. 11 at 2 (January 24, 2024).

[23] *Id.* at 21.

Deleted: Distirct

Electronic copy available at: https://ssrn.com/abstract=4700214

Wall Street Journal reporters Alexander Gladstone and Andrew Scurria were among the first to break the story about the Van Deelen lawsuit and its allegations.[24] When the reporters asked Judge Jones for comment, the October 7 article reported:

> [Judge Jones] said he was under no obligation to recuse himself from cases involving Jackson Walker or Freeman's new solo firm, the Law Office of Liz Freeman.
>
> "If for any reason I thought that I should have done something more, I would have done it," the judge said. "I'm certainly not afraid of my relationship, I just simply think I'm entitled to a certain degree of privacy. I and I alone made the call that so long as she never appeared in front of me, that was sufficient."
>
> Jones said that he would have had a recusal obligation for cases involving Freeman's firm only if they had been married and had communal property. Judge Jones owns the home in Houston which

[24] Alexander Gladstone and Andrew Scurria, *Bankruptcy Judge Jones Named in a Lawsuit Over Romantic Relationship With Local Lawyer,* WALL ST. J. (Oct. 7, 2023), at https://www.wsj.com/articles/bankruptcy-judge-jones-named-in-a-lawsuit-over-romantic-relationship-with-local-lawyer-71df2c00 (last visited Dec. 13, 2023) ("Judge David R. Jones, who has overseen some of the nation's largest chapter 11 cases in the U.S. Bankruptcy Court in Houston, told The Wall Street Journal he is in a relationship and has shared a home for years with bankruptcy lawyer Elizabeth Freeman.") The story explained that the relationship came to light because an individual plaintiff involved in the bankruptcy of McDermott International "alleged that Jones and Freeman's romantic relationship amounted to a conflict of interest and tainted [Jones's] rulings in the McDermott case." *Id.* The reporters recounted Judge Jones's perspective:

> The judge confirmed the relationship in an interview with the Journal and said that he and Freeman agreed years ago that she herself would never appear in his courtroom.
>
> Jones said he believes the relationship didn't need to be disclosed because he and Freeman aren't married and there was no economic benefit to him from her legal work.
>
> "I came to the conclusion that I had no duty to disclose," said the judge, who joined the Houston court in 2011. He added that he didn't want to fuel a perception that "if you were going to be appearing, you should go out and hire Jackson Walker."

Id. I'll be writing more about that particular cognitive error in a future article. But the *Wall Street Journal* followed that story with a story about Judge Jones's resignation, and *that* story included this tidbit:

> The bankruptcies that Freeman worked on and that Jones oversaw included some of the largest Chapter 11 cases of recent years, such as retailers JCPenney and Neiman Marcus and oil-and-gas driller Chesapeake Energy. In each of those cases and others, Freeman, then a partner at the Texas law firm Jackson Walker, billed hours along with her colleagues for their work representing the companies in bankruptcy, according to Chapter 11 records[.]
>
> Jones approved more than $1 million in legal fees billed by Freeman over 16 corporate bankruptcy cases from 2018 to 2021 when they shared an address, the Journal found through a review of court records.

Alexander Gladstone, *Houston Bankruptcy Judge Jones Resigns Under Misconduct Investigation,* WALL ST. J. (Oct. 15, 2023) at https://www.wsj.com/articles/houston-bankruptcy-judge-jones-resigns-under-misconduct-investigation-7784fe8c (last visited Dec. 18, 2023).

Electronic copy available at: https://ssrn.com/abstract=4700214

> he and Freeman reside in, and pays utilities and other expenses on the home.[25]

Other stories followed.[26] The stories got the attention of the Fifth Circuit Court of Appeals,[27] which issued a disciplinary complaint that stated, in part:

> Judge Jones is in an intimate relationship with Elizabeth Freeman. It appears that they have cohabited (living in the same house or home) since approximately 2017. Elizabeth Freeman worked in Judge Jones's chambers as a law clerk. Subsequently, she was a partner in the Jackson Walker LLP law firm, it appears from at least 2017 until December 2022. She formed The Law Office of Liz Freeman, from which she has practiced since approximately December 2022.
>
> Members of the Jackson Walker LLP firm have regularly appeared before Judge Jones since 2017. Judge Jones has approved attorneys' fees payable to that firm in which supporting documentation, that [sic] was submitted to Judge Jones and is part of

[25] *Id.; see also* Sara Tapinekis, Pat Holohan, and Ryan Patwell, *Resignation of Texas bankruptcy judge David R Jones raises potential for vacating prior rulings in legacy cases,* DEBTWIRE (Oct. 16, 2023), at https://community.ionanalytics.com/resignation-of-texas-bankruptcy-judge-david-r-jones-raises-potential-for-vacating-prior-rulings-in-legacy-cases#bio-modal-23508 (last visited Jan. 15, 2024) ("Jones admitted to the relationship shortly after the complaint hit, telling the press he did not disclose the connection because he did not want to give the perception that a company filing for bankruptcy in his court 'should go out and hire Jackson Walker.'").

[26] *See, e.g.,* Dietrich Knauth, *Top US bankruptcy judge, under ethics review, steps back from major cases,* REUTERS.COM (Oct. 13, 2023), at https://www.reuters.com/legal/top-us-bankruptcy-judge-steps-back-major-cases-under-ethics-review-2023-10-13/ (last visited Dec. 27, 2023); *see also* Dietrich Knauth & Nate Raymond *Bankruptcy judge's sudden resignation causes 3,500 cases to be reassigned,* REUTERS.COM (Oct. 13, 2023), at https://www.reuters.com/legal/government/bankruptcy-judges-sudden-resignation-causes-3500-cases-be-reassigned-2023-10-19/ (last visited Dec. 27, 2023); Alex Wolf, *Bankruptcy Plan Challenged After Judge Faces Ethics Probe (1),* BLOOMBERG LAW (Oct. 13, 2023), at https://news.bloomberglaw.com/bankruptcy-law/bankruptcy-plan-challenged-amid-ethics-probe-for-houston-judge (last visited Dec. 18, 2023) ("A Chapter 11 settlement plan proposed by Tehum Care Services Inc., a shell company created by Corizon Health Inc. to resolve hundreds of medical malpractice suits in bankruptcy, is facing heightened scrutiny following the revelations, which center around Judge David R. Jones of the US Bankruptcy Court for the Southern District of Texas, one of the premier locations for handling complex Chapter 11 cases."); Dan Roe, *Jackson Walker May Have Violated Ethics Rules by Not Disclosing Partner's Relationship With Judge, Law.com* (Oct. 13, 2023) at https://www.law.com/americanlawyer/2023/10/13/Jackson-walker-may-have-vlolated-ethics-rules-by-not-disclosing-partners-relationship-with-Judgenkw=Jackson%20Walker%20May%20Have%20Violated%20Ethics%20Rules%20by%20Not%20Disclosing%20Partner%27s%20Relationship%20Wrth%20Judge&utm_position=5&utnLsource (last visited Dec. 14, 2023) ("Freeman clerked for Jones for six years before joining Jackson Walker, according to Van Deelen's complaint. After her clerkship, Freeman rose to partner at the firm and helped chart its rise to becoming the go-to local counsel, co-counsel and special counsel to Am Law 100 bankruptcy giants such as Kirkland & Ellis, which sought local expertise and the avoidance of conflicts in the nation's top bankruptcy court for corporate restructuring.").

[27] The Fifth Circuit has a reputation as a conservative-leaning court, *see, e.g.,* Robert Barnes & Ann E. Marimow, *This conservative appeals court's rulings are testing the Supreme Court,* WASH. POST. (Oct. 26, 2023), at https://www.washingtonpost.com/politics/2023/10/26/5th-circuit-supreme-court-reversals-decisions/ (last visited Jan. 2, 2024); Lydia Wheeler & Kimberly Strawbridge Robinson, *Conservative Fifth Circuit Is Stumbling at US Supreme Court,* BLOOMBERG LAW (June 26, 2023), at https://news.bloomberglaw.com/us-law-week/conservative-fifth-circuit-is-stumbling-at-us-supreme-court (last visited Jan. 2, 2024), so when it questions a judge's behavior, that's a big deal.

Electronic copy available at: https://ssrn.com/abstract=4700214

public records, reflects that services by Elizabeth Freeman were performed in connection with a number of cases for which fees were sought and approved, though Elizabeth Freeman was not shown as counsel of record on the face of pleadings. The amounts billed for Elizabeth Freeman's services in those cases were substantial. The fees approved by Judge Jones for Jackson Walker LLP were likewise substantial. Judge Jones approved fees payable to Jackson Walker LLP in other cases in which Elizabeth Freeman does not appear to have provided any legal services or advice. However, at all times when Elizabeth Freeman was a Jackson Walker LLP partner, and regardless of whether she provided services or advice in a case, there is a reasonable probability that Elizabeth Freeman, as a partner in that firm, obtained a financial benefit from, or had a financial interest in, fees approved by Judge Jones. Judge Jones did not recuse in Jackson Walker LLP cases nor did he disclose his relationship with Elizabeth Freeman to the parties or their counsel in which Jackson Walker LLP appeared before him.

A motion to recuse Judge Jones was filed in a case in which Jackson Walker LLP was counsel of record. The basis of the motion was an allegation that Judge Jones was involved in a romantic relationship with Elizabeth Freeman. Judge Jones referred the motion to recuse to another bankruptcy judge but did not disclose to that judge the facts regarding his relationship with Ms. Freeman. On information and belief, the judge who ruled on the motion to recuse was unaware that Judge Jones was romantically involved with Ms. Freeman or that they were cohabiting. The motion to recuse was denied and appealed to a federal district court judge, and on information and belief, Judge Jones did not apprise that district court judge of the relationship with Ms. Freeman, and that judge was also unaware of the facts regarding the relationship. The appeal was denied. There is a reasonable probability that if Judge Jones had disclosed the facts concerning his relationship with Elizabeth Freeman to his fellow bankruptcy judge, to whom the motion to recuse was referred, the motion to recuse would have been granted. Because the motion was denied, and Judge Jones did not voluntarily recuse, Judge Jones presided in the case and approved Jackson Walker LLP's attorneys' fees. Court records appear to reflect that those fees included amounts for services Elizabeth Freeman performed in connection with the case.

It appears that Judge Jones accepted an appointment from another bankruptcy judge to act as mediator in a matter in which Ms. Freeman, as a shareholder or partner in The Law Offices of Liz Freeman, was attorney of record for a party and participated in the mediation; that Judge Jones did not disclose his relationship with Ms. Freeman to the parties, to their counsel or to the bankruptcy judge who appointed Judge Jones. Judge Jones conducted the mediation to a conclusion.

Electronic copy available at: https://ssrn.com/abstract=4700214

> In another matter over which Judge Jones presided, it appears that Judge Jones approved a fee application submitted by The Law Offices of Liz Freeman. It does not appear that any party or any other counsel in that proceeding was apprised of Judge Jones' relationship with Ms. Freeman.
>
> It further appears that Judge Jones recommended to other judges in the Southern District of Texas that Ms. Freeman be appointed to the Lawyer Admissions Committee for the Southern District of Texas Bankruptcy Court. Judge Jones did not disclose his relationship with Ms. Freeman to those considering the appointment.
>
> Judge Jones and Elizabeth Freeman are not married to one another, to the best of my knowledge, and do not hold themselves out as spouses. However, the Commentary to Canon 3C of the Code of Conduct for United State Judges provides "[r]ecusal considerations applicable to a judge's spouse should also be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship."
> ....
>
> Based on the foregoing, there is probable cause to believe that Judge Jones has engaged in misconduct, as that term is defined or described in the code of conduct applicable to federal judges including bankruptcy judges.[28]

[28] Complaint Identified by the Chief Judge of the Fifth Circuit Court of Appeals Against United States Bankruptcy Judge David R. Jones, Southern District of Texas, Under the Judicial Improvements Act of 2002, Complaint Number 05-24-90002, United States Court of Appeals for the Fifth Circuit (October 13, 2023) at 1-4. Judge Jones indicated shortly thereafter that he would resign, effective November 15, 2023. *See, e.g.,* Anna Yukhananov, *Texas Bankruptcy Judge Resigns After His Ethics Questioned,* BLOOMBERG LAW (October 15, 2023) at https://news.bloomberglaw.com/bankruptcy-law/fifth-circuit-issues-ethics-complaint-against-bankruptcy-judge (last visited on Dec. 13, 2023). On November 15, 2023, the Fifth Circuit issued an order closing the investigation for want of jurisdiction:

> On October 16, 2023, Judge Jones submitted his letter of resignation, effective November 15, 2023. He has now resigned his position and is no longer a judicial officer of the United States. He is therefore no longer subject to the disciplinary procedures of 28 U.S.C. § 351 et seq. His resignation is an intervening event that makes further action on the complaint unnecessary, and the complaint against him is therefore CONCLUDED pursuant to 28 U.S.C. § 352(b)(2) and Rule 11(a)(3), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

The fact that Circuit courts are punting on judicial discipline when judges resign is, in my opinion, a national disgrace, but that is an article for another day. I'm not the only person calling for that loophole to close. *See, e.g.,* Michael Traynor, *Some Friendly Suggestions For the Federal Judiciary About Accountability,* 168 U. PA. L. REV. ONLINE 128, 149 (2020) ("Consider whether there is any remedy within the existing system or by possible legislation to address the Kozinski maneuver of resigning and relinquishing office, thereby precluding further judicial inquiry into serious questions of misbehavior.").

Some state Supreme Courts don't have the same qualms about retaining jurisdiction. *See, e.g.,* Petition of W. Stephen Thayer, III, 145 N.H. 177, 181-82 (Aug. 15, 2000) ("[T]he fact that the petitioner's resignation took certain sanctions off the table does not render moot the [New Hampshire Supreme Court Committee on Judicial Conduct] JCC's investigation."); *id.* at 182 ("Even if the JCC had no sanctions available and this matter were technically academic, there can be little doubt that the issues under investigation by the [New Hampshire Supreme Court Committee on Judicial Conduct] qualify as "issue[s] of significant public concern.... Thus, the petitioner's reliance on the mootness doctrine is misplaced.") (citations omitted). For commentary on the decision not to continue to investigate the Complaint, see, e.g., James Nani, *Bankruptcy Judge's Exit Raises Questions About Policing Ethics,* BLOOMBERG LAW (Oct. 19,

Electronic copy available at: https://ssrn.com/abstract=4700214

There are countless other news stories about this debacle, but the Fifth Circuit's version, at least, is an official document written by a court. The United States Trustee has filed numerous motions seeking relief under Federal Rule of Civil Procedure 60(b)(6) from the Jackson Walker fee orders that Judge Jones had signed, and those motions are also superb sources for the history of the cascading failures to disclose[29]—failures by Jackson Walker (its current and former partners, including Ms. Freeman),[30] and failures by Judge Jones himself.

Judge Jones was no ordinary bankruptcy judge. Before he stepped down, he "over[saw] more major Chapter 11 cases than any other U.S. judge."[31] In a chart that *Debtwire* created, out of the bankruptcy judges presiding over all megacases (those with liabilities over $1 billion) filed since January 2020, roughly one-third of those cases went to two judges: Judge Jones (17%) and Judge Marvin Isgur (14%). Judge Christopher Lopez presided over 3% of those cases, and all other bankruptcy judges combined comprised 66% of the pie.[32] That massive caseload didn't accrue by accident: "[Judge Jones's] availability and desire to serve is part of what he hopes makes the U.S. Bankruptcy Court for the Southern District of Texas, where he serves as the chief judge, attractive to businesses that are filing for Chapter 11 protection."[33] As Adam Levitin has explained,

---

2023), at https://news.bloomberglaw.com/bankruptcy-law/bankruptcy-judges-exit-raises-questions-about-policing-ethics (last visited Dec. 18, 2023).

[29] For just one of these motions, see, e.g., United States Trustee's Motion for Relief From Judgment or Order Pursuant to Federal Rule of Civil Procedure 60(b)(6) and Federal Rule of Bankruptcy Procedure 9024 Approving any Jackson Walker Applications for Compensation and Reimbursement of Expenses, *In Re:* Neiman Marcus Group Ltd LLC, Case No. 20-32519, United States Bankruptcy Court, Southern District of Texas, Docket No. 3179 (Nov. 2, 2023); see also *US Trustee Moves to Reverse 'Tainted' Jackson Walker Fees,* LAW360.COM (Nov. 3, 2023) at https://www.law360.com/articles/1740589/us-trustee-moves-to-reverse-tainted-jackson-walker-fees (last visited Dec. 19, 2023); James Nani & Alex Wolf, *Jackson Walker Faces $13 Million Clawback Amid Judge Scandal (2),* BLOOMBERG LAW (Nov. 3, 2023) at https://news.bloomberglaw.com/bankruptcy-law/jackson-walker-faces-13-million-fee-clawback-amid-judge-scandal (last visited Dec. 19, 2023) ("The Justice Department's bankruptcy watchdog is challenging at least $13 million in fees collected by Jackson Walker LLP following revelations that it didn't disclose allegations of a romantic relationship between an attorney and a prominent Houston judge.").

[30] I'll spend a tiny bit of time on the Kirkland & Ellis allegations, *see* nn. 51, 192-197, *infra,* and accompanying text, but those allegations are different in kind from the allegations against Jackson Walker and Ms. Freeman.

[31] Dietrich Knauth, *Top US bankruptcy judge, under ethics review, steps back from major cases,* REUTERS.COM (Oct. 13, 2023), at https://www.reuters.com/legal/top-us-bankruptcy-judge-steps-back-major-cases-under-ethics-review-2023-10-13/ (last visited Dec. 27, 2023); *see also* Dietrich Knauth & Nate Raymond *Bankruptcy judge's sudden resignation causes 3,500 cases to be reassigned,* REUTERS.COM (Oct. 13, 2023), at https://www.reuters.com/legal/government/bankruptcy-judges-sudden-resignation-causes-3500-cases-be-reassigned-2023-10-19/ (last visited Dec. 27, 2023); Sujeet Indap, *The downfall of the judge who dominated bankruptcy in America,* FINANCIAL TIMES (Nov. 21, 2023) at https://www.ft.com/content/574f0940-d82e-4e4a-98bd-271058cce434 (last visited on Dec. 18, 2023) ("...Jones [w]as the ultimate kingmaker in big US bankruptcy cases — so far in 2023, of the 54 large Chapter 11 cases filed, 25 landed in SDTX, where only two judges, including Jones, oversaw large restructurings. This near-majority was more than those total bankruptcy filings in the traditional stalwarts, Delaware and New York, combined."). In other words, with Judge Jones, the risk of "shooting at the king and missing" was huge. *Cf.* n. 175, *infra.*

[32] *See* Sara Tapinekis, Pat Holohan, and Ryan Patwell, *Resignation of Texas bankruptcy judge David R Jones raises potential for vacating prior rulings in legacy cases,* DEBTWIRE (Oct. 16, 2023), at https://community.ionanalytics.com/resignation-of-texas-bankruptcy-judge-david-r-jones-raises-potential-for-vacating-prior-rulings-in-legacy-cases#bio-modal-23508 (last visited Jan. 15, 2024).

[33] *In Texas, bankruptcy judge David Jones is at your service,* 12/11/20 REUTERS LEGAL 19:53:41 (Dec. 11, 2020), at https://today.westlaw.com/Document/I22f002403beb11eba94bbc4acdbe515a/View/FullText.html?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1 (last visisted Jan. 15, 2024).

Deleted: 192188
Deleted: 197193
Deleted: 175171

Electronic copy available at: https://ssrn.com/abstract=4700214

> The complex case system for Bankruptcy Court for Southern District of Texas ("SDTX") has been by far the most successful at attracting business. In 2016, SDTX issued a general order assigning complex chapter 11 cases filed in Houston to a panel of just two judges. Two years later it expanded the system to cover the entire district, channeling all complex cases to two judges—Chief Judge David R. Jones and Judge Marvin Isgur. This was part of a deliberate strategy to attract megacases to Texas, and in case debtors' counsel did not get the signal that Houston was open for business, SDTX even set up a "complex case" advisory committee of bankruptcy attorneys, many of whose members are not even admitted to practice in Texas, but who are important case placers.[34]

Judge Isgur stepped down from the complex case panel in 2023,[35] though of course he's back on that panel now. In short, Judge Jones and Judge Isgur had a lot of power before this scandal broke.

What makes this whole story even worse is that Judge Isgur has been pulled into the morass. This line in the Fifth Circuit Complaint—"[o]n information and belief, the judge who ruled on the motion to recuse was unaware that Judge Jones was romantically involved with Ms. Freeman or that they were cohabiting"—created a firestorm of motions to recuse Judge Isgur based on his longstanding friendship with Judge Jones.[36] Judge Isgur and Judge Jones are, apparently, best

---

[34] Adam J. Levitin, *Judge Shopping in Chapter 11 Bankruptcy,* 2023 U. ILL. L. REV. 351, 372-73 (footnotes omitted). Other districts have come up with other ways to make things easier for megacase filers. *See, e.g.,* General Order 2022-2, United States Bankruptcy Court, Northern District of Texas (June 8, 2022) (enabling megacase filers to see which judge falls next in the rotation for assignment to a megacase). And it's not just bankruptcy cases where judge shopping can happen. *See, e.g.,* Paul R. Gugliuzza & J. Jonas Anderson, *Why Do Judges Compete for (Patent) Cases?,* 65 WM. & MARY L. REV. (forthcoming 2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4331055 (last visited Jan. 26, 2024).

[35] James Nani, *Prominent Texas Bankruptcy Judge to Leave Complex Case Panel,* BLOOMBERG LAW (May2, 2022), at https://news.bloomberglaw.com/bankruptcy-law/prominent-texas-bankruptcy-judge-to-leave-complex-case-panel (liast visited Jan. 15, 2024).

[36] *See, e.g.,* Motion to Recuse, *In re* 4E Brands Northamerica LLC, United States Bankruptcy Court, Southern District of Texas, Case No. 22-50009, Docket No. 511 (Oct. 30, 2023) (citing the standard for recusal set forth in 28 U.S.C. § 455(a)). That Motion alleged, in part, that

> 1. Movants have requested disgorgement of fees based upon the nondisclosure of a relationship between a partner at Jackson Walker LLP and the then sitting bankruptcy judge for the case (Case No. 22-50009).
> 2. This Court was previously presented with allegations concerning the relationship and denied the requested relief.
> 3. In addition, this court has had a personal relationship with the previous judge spanning more than thirty (30) years, providing him his job out of law school, and working with him continuously until taking the bench. This court was one of only two hearing all complex cases in this district, and routinely referred each other mediations and complex settlements, including the prior denied motion to recuse Judge Jones based upon allegations of the same facts.
> 4. Additional, personal facts, together with the above, if known by an objective observer may harbor doubts about the Court's partiality in this matter.

Id. at 2. On December 18, 2023, that motion to recuse was denied. *In re* 4E Brands Northamerica LLC, United States Bankruptcy Court, Southern District of Texas, Case No. 22-50009, Docket No. 573 (Dec. 18, 2023).

[36] *See, e.g.,* Alex Wolf, *Bankruptcy Plan Challenged After Judge Faces Ethics Probe (1),* BLOOMBERG LAW (Oct. 13, 2023), at https://news.bloomberglaw.com/bankruptcy-law/bankruptcy-plan-challenged-amid-ethics-probe-for-houston-judge

Electronic copy available at: https://ssrn.com/abstract=4700214

friends, and typically, best friends know the identities of their friends' long-term romantic partners, causing those in the bankruptcy world to raise an eyebrow or two. But only Judge Isgur knows what he knew or didn't know about the relationship, and even if he did know about the relationship itself, it's possible that he didn't focus on the fact that Ms. Freeman and her firm were appearing in cases before Judge Jones.[37] My head-scratching on that last point comes in part from the facts that (1) Jackson Walker and Kirkland & Ellis were the lawyers who removed the Van Deelen complaint to the *McDermott* bankruptcy case,[38] (2) Mr. Van Deelen made numerous motions to recuse Judge Jones, though apparently the anonymous tip didn't get linked to the motion to recuse until March 2021,[39] (3) Judge Jones asked Judge Isgur to decide which judge should hear the motion to recuse and Judge Isgur decided to hear the motion himself,[40] and (4) Judge Isgur then denied the motion to recuse.[41] Ms. Freeman was still a partner at Jackson Walker during that time.[42] That timeline would normally lead me to conclude that Judge Isgur had sufficient facts to be aware of Judge Jones's need to recuse himself, but the Fifth Circuit intimated that Judge Isgur (though unnamed) was unaware of the relationship.[43] Thus, my analysis of the timeline leaves me puzzled.

That friendship between the two judges runs deep. Judge Isgur has said that he considers Judge Jones his "adopted son," though clearly Judge Isgur was using poetic license when he said that. Here are some excerpts from an introduction that Judge Isgur gave Judge Jones on the occasion of Judge Jones receiving a lifetime achievement award from this very law journal:

> "Three years ago at this ceremony, my friend Jamie Sprayregen was introduced by his father Joel Sprayregen. I have the great honor of following that tradition by introducing my son, David Jones. I am very fortunate to have two very accomplished children. My wonderful daughter Sarah and my stubborn adopted son, David.

....

> "There is no better feeling than when a parent watches his child surpass him in capability and achievement. I am so proud to present

(last visited Dec. 18, 2023) ("A Chapter 11 settlement plan proposed by Tehum Care Services Inc., a shell company created by Corizon Health Inc. to resolve hundreds of medical malpractice suits in bankruptcy, is facing heightened scrutiny following the revelations, which center around Judge David R. Jones of the US Bankruptcy Court, Southern District of Texas, one of the premier locations for handling complex Chapter 11 cases.").

36 *See* Motion to Recuse, *supra* n. 136.

37 The fact that both judges identified each other as best friends, though, might have contributed to a perception that they spent time talking to each other about each other's cases.

38 *See* Notice of Removal, Van Deelen v. Dickson (In re McDermott Int'l, Inc.), United States Bankruptcy Court, Southern District of Texas, Case No. 20-03309 (DRJ) (July 17, 2020), Docket No. 1 at 3-4.

39 *See, e.g., id.* at Docket Nos. 4 (July 20, 2020); 6 (July 27, 2020); 7 (July 27, 2020); 8 (July 27, 2020).

40 *See id.* at Docket No. 40 (Mar. 9, 2021) (focusing on Docket No. 8 as "the" recusal motion and sealing Docket No. 39 – "[t]he document filed at ECF No. 39 is sealed, pending the Court's determination of whether there is credible, admissible evidence in support of the allegations made in ECF No. 39.").

41 *See id.* at Docket No. 42 (Mar. 10, 2021).

42 *See In re:* J.C. Penney Direct Marketing Services, LLC, Case No. 20-20184, United States Bankruptcy Court, Southern District of Texas, Docket No. 1244 (Nov. 13, 2023).

43 Complaint Identified by the Chief Judge of the Fifth Circuit Court of Appeals Against United States Bankruptcy Judge David R. Jones, Southern District of Texas, Under the Judicial Improvements Act of 2002, Complaint Number 05-24-90002, United States Court of Appeals for the Fifth Circuit (October 13, 2023) at 2-3.

Electronic copy available at: https://ssrn.com/abstract=4700214

> your honoree and my friend and son, United States Bankruptcy Judge David Jones."[44]

I know Judge Isgur only a little, but I can imagine the agony he feels as this story continues to develop. His "adopted son," as I'll discuss below, never should have heard any matter in which Ms. Freeman was appearing—or for which Ms. Freeman (or her then-firm, Jackson Walker) was seeking fees. Married or not, Judge Jones should have treated Ms. Freeman as a spouse-equivalent for purposes of disqualification. I'll get to that.[45]

I'm not the only person who thinks that a spouse-equivalent should be treated like a spouse for purposes of applying the disqualification statute. The Fifth Circuit complaint itself disagreed with Judge Jones's view that his unmarried status was dispositive. But after Judge Jones resigned, the Fifth Circuit dropped the Complaint.[46]

> On October 16, 2023, Judge Jones submitted his letter of resignation, effective November 15, 2023. He has now resigned his position and is no longer a judicial officer of the United States. He is therefore no longer subject to the disciplinary procedures of 28 U.S.C. § 351 et seq. His resignation is an intervening event that makes further action on the complaint unnecessary, and the complaint against him is therefore CONCLUDED pursuant to 28 U.S.C. § 352(b)(2) and Rule 11(a)(3), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

---

[44] Marvin Isgur, *Presentation Remarks,* 39 EMORY BANKR. DEVEL. J. 487, 487, 489 (2023). Of course, Judge Isgur didn't really think that Judge Jones was his son, but the words do stress the close relationship between the two people. *See also Acceptance Remarks, supra* n.2, at 492 ("... Judge Isgur started all over again in 2012 when I joined him on the bench. His patience and guidance never wavered. He listened to all of my crazy ideas, he protected me and, like he had done as a lawyer, he taught me how to be a judge. We talk every day, multiple times, whether he wants to or not. I can't imagine him not being right down the hall. Marvin, thank you twice.").

If Judge Isgur did have actual knowledge that Judge Jones and Ms. Freeman were living together and that Judge Jones was not disclosing the relationship to parties, then Judge Isgur would have run smack dab into Canon 3(B)(6): "A judge should take appropriate action upon receipt of reliable information indicating the likelihood that a judge's conduct contravened this Code, that a judicial employee's conduct contravened the Code of Conduct for Judicial Employees, or that a lawyer violated applicable rules of professional conduct." Code of Conduct for United States Judges, Canon 3(B)(6).

Judge Isgur clearly isn't happy about this whole mess. In a story from *Reorg Alert,* Judge Isgur made it clear that "he 'had grave concerns about the due process issues' and that while he didn't know what was required to prevail on due process violations regarding judicial conduct, he wanted to make sure that the matter was given a 'full and fair' hearing. When counsel to the creditors raised the possibility that his clients suffered economic damages from potential ex parte judicial conversations and possible disclosure of case strategy, Judge Isgur assured counsel that he recognized that everything was not 'hunky dory.'" *See Judge Isgur Notes 'Grave Due Process' Concerns Related to Former Judge Jones' Undisclosed Relationship,* REORG ALERT, (Jan. 10, 2024), at [editors, you'll have to write to Reorg Alert at dockets@reorg-research.com to get the cite—sorry].

[45] *See* nn. ___-___, *infra,* and accompanying text.

[46] Order, Complaint Identified by the Chief Judge of the Fifth Circuit Court of Appeals Against United States Bankruptcy Judge David R. Jones, Southern District of Texas, Under the Judicial Improvements Act of 2002, Complaint Number 05-24-90002, Judicial Council for the Fifth Circuit (Nov. 15, 2023) at 1.

Electronic copy available at: https://ssrn.com/abstract=4700214

Judge Jones likely resigned in order to avoid any Fifth Circuit discipline.[47]

The news about Judge Jones spread like wildfire. Even the *Financial Times* (which is published in London) covered the emerging story:

> A top US bankruptcy court judge approved an indirect fee arrangement for his live-in girlfriend that could have paid her $750 per hour in at least two recent high-profile cases, according to publicly filed court documents. Neither disclosed their personal relationship to parties in the cases, despite US bankruptcy code requirements that advisers seeking to be paid by bankruptcy estates disclose connections to other participants in the proceedings.[48]

The *Financial Times,* in a different story, also noted that lawyers outside the Jackson Walker firm were aware of their relationship.[49]

Jackson Walker has vociferously defended itself in the press, as well as in pleadings:

> Jackson Walker conducted its own inquiry and hired outside ethics counsel when it first learned in March 2021 that Freeman was in a potential relationship with Judge Jones, a spokesman said. The law firm instructed Freeman to stop working or billing on any case that had been assigned to Judge Jones, a Jackson Walker spokesman said. Freeman left to start her own law firm in late 2022.

[47] This resign-in-lieu-of-a-bad-finding behavior was also a tactic that former Ninth Circuit Judge Alex Kozinski had used in order to avoid discipline. *See* Matt Zapotosky, *Judiciary closes investigation of sexual misconduct allegations against retired Judge Alex Kozinski,* WASH. POST (Feb. 5, 2018), https://www.washingtonpost.com/world/national-security/judiciary-closes-investigation-of-sexual-misconduct-allegations-against-retired-judge-alex-kozinski/2018/02/05/e3a94bb8-0ac0-11e8-95a5-c396801049ef_story.html (last visited Dec. 13, 2023) ("The judicial council tasked with investigating allegations of sexual misconduct against former appeals court judge Alex Kozinski announced Monday that it was closing its probe because his retirement effectively took away its legal authority to explore the matter."). Other judges have used the same tactic. *See* Russ Buettner & Susanne Craig, *Retiring as a Judge, Trump's Sister Ends Court Inquiry Into Her Role in Tax Dodges,* N.Y. TIMES (Apr. 10, 2019), at https://www.nytimes.com/2019/04/10/us/maryanne-trump-barry-misconduct-inquiry.html (last visited Jan. 17, 2024) (investigation against a Third Circuit judge ended upon the judge's resignation).

There is also the possibility that, should Judge Jones choose to resign his bar membership, he could avoid any potential discipline in that arena as well. *Cf.* Kathryn Rubino, *In the Wake Of Sex Scandal, Judge Resigns Bar Membership,* ABOVE THE LAW (Oct. 19, 2023), at https://abovethelaw.com/2023/10/in-the-wake-of-sex-scandal-judge-resigns-bar-membership/?utm_campaign=Above (last visited Dec. 18, 2023) ("In March of 2021, Oklahoma County District Judge Timothy Henderson resigned from his position. A few days before, he was suspended after three female attorneys complained of sexual misconduct.... [Before the Oklahoma Bar Association concluded its disciplinary proceedings, the judge] resigned his membership.").

[48] Sujeet Indap, *US bankruptcy judge approved potential $750 hourly legal fee for girlfriend,* FINANCIAL TIMES (Oct. 19, 2023) at https://www.ft.com/content/b400e1a8-6f12-46db-acf8-326267379a57 (last visited Dec. 18, 2023). *Id.; see also id.* ("Freeman was a longtime partner at Jackson Walker, a law firm which frequently appeared in Jones's court and whose case billings he often signed off upon. Freeman left Jackson Walker in late 2022 to start her own law firm."). Of course, if Ms. Freeman had left Jackson Walker years earlier, this scandal might never have happened (or it might have been more self-contained).

[49] Sujeet Indap, *The downfall of the judge who dominated bankruptcy in America,* FINANCIAL TIMES (Nov. 21, 2023) at https://www.ft.com/content/574f0940-d82e-4e4a-98bd-271058cce434 (last visited on Dec. 18, 2023).

Deleted: ¶

Electronic copy available at: https://ssrn.com/abstract=4700214

"We are confident that we acted responsibly," the spokesman said.[50]

Kirkland & Ellis, too, has defended itself in the press: "'This lawsuit, filed by a serial litigant, contains a series of baseless and false allegations against Kirkland. Kirkland did not make any misrepresentations to the court, or fail to make any required disclosures, or violate any of our ethical responsibilities,' a Kirkland spokesperson told Law360 in a statement late Friday."[51]

Now that this scandal has emerged, the question of what Bankruptcy Rule 2014 requires in terms of disclosure has become a front-and-center issue.[52] Some firms are even disclosing who's dating whom, in addition to disclosing their connections with judges.[53] Many of us have always disclosed our connections to a court.[54]

Let's recap all of the moving pieces in the news (so far):

- Judge Jones's cases have been reassigned to other bankruptcy judges within the Southern District of Texas;[55]
- All lawsuits against Judge Jones have been transferred to a

[50] Steven Church, Amelia Pollard & Jonathan Randles, *Bankruptcy Judge's Sudden Exit Leaves Big-Money Cases in Limbo,* BLOOMBERG LAW (Oct. 16, 2023) at https://www.bloomberglaw.com/bloomberglawnews/bankruptcy-law/XOSKVNS000000?bna_news_filter=bankruptcy-law#jcite (last visited Dec. 12, 2023). After reading an earlier version of this article, someone who wishes to remain anonymous pointed me to a paragraph in Jackson Walker's engagement letter (Exhibit A to the Employment Application in Sorrento), which said:

> ***CONFLICTS COUNSEL AND SPECIAL COUNSEL***. The Firm from time to time engages outside conflicts counsel to serve as special conflicts counsel "Conflicts Counsel," now and as the need may arise. Due to the number of banking relationships, and utility providers, the need for Conflicts Counsel is imperative, and should be retained concurrently with the Firm. At this time, the Firm strongly recommends the engagement of the Law Office of Liz Freeman as Conflicts Counsel. Ms. Freeman's hourly rate is $750/hour. Ms. Freeman will send a short form of engagement letter by separate cover.

Application to Retain Jackson Walker LLP as Co-Counsel and Conflicts Counsel For the For the [sic] Debtors and Debtors in Possession, *In re* Sorrento Therapeutics, Inc., United States Bankruptcy Court, Southern District of Texas, Case No. 23-90085 (CML), Docket No. 231 (Mar. 15, 2023), at 14. Remember, Jackson Walker has stated that "it first learned in March 2021 that Freeman was in a potential relationship with Judge Jones." *See* n. 50, *supra*; comments from an anonymous source on an earlier draft (Jan. 26, 2024) (on file with author).

[51] Jack Karp, *Jackson Walker, Kirkland Sued Over Ex-Judge's Relationship,* LAW360 (Jan. 12, 2024), at https://www-law360-com.proxy.law.unlv.edu/articles/1785609/jackson-walker-kirkland-sued-over-ex-judge-s-relationship (last visited Jan. 16, 2024).

[52] *See* nn. 101-144, *infra,* and accompanying text.

[53] *See, e.g.,* Supplemental Declaration of Patrick J. Nash Jr. in Support of the Debtors' Application for Entry of an Order Authorizing the Retention and Employment of Kirkland & Ellis LLP and Kirkland & Ellis International LLP as Attorneys for the Debtors and Debtors in Possession Effective as of May 23, 2023, In re: Benefytt Technologies, Inc., Case No. 23-90566 (CML), United States Bankruptcy Court, Southern District of Texas, Docket No. 585, at ¶¶ 14-15.

[54] For the record, my practice is to disclose my connections to a court or court personnel in my own retentions as an expert or as a fee examiner. I believe that disclosing connections to the court or the court's personnel should be considered a best practice, and I also believe that Rule 2014 should be amended to move this type of disclosure from "best practice" to "requirement." *See* text accompanying n. 203, *infra.*

[55] If one includes all of the non-chapter 11 cases over which Judge Jones presided, approximately 3,500 of those cases have now been reassigned. *See* Dietrich Knauth & Nate Raymond, *Bankruptcy judge's sudden resignation causes 3,500 cases to be reassigned,* REUTERS.COM (Oct. 19, 2023), at https://www.reuters.com/legal/government/bankruptcy-judges-sudden-resignation-causes-3500-cases-be-reassigned-2023-10-19/ (last visited Jan. 15, 2024).

Deleted: 144140

Deleted: 203199

Electronic copy available at: https://ssrn.com/abstract=4700214

District Court in the Western District of Texas;[56]

- The United States Trustee is seeking Rule 60(b)(6) reconsideration of over $13 million of Jackson Walker's fees awarded in the implicated cases;[57]
- Other parties in interest are seeking disgorgement of those fees as well;[58]
- Litigants have sought to recuse Judge Isgur on the grounds that Judges Jones and Isgur have been best friends for years (and thus that Judge Isgur's "impartiality might reasonably be questioned" due to that deep friendship);[59]

---

[56] *See* In the Matter of Referral of Lawsuits Against David R. Jones, United States District Court, Southern District of Texas, General Order No. 2023-21 (Oct. 20, 2023) ("All judges in the Southern District of Texas have consented to the referral of all lawsuits against David R. Jones to a judge outside of this District. Chief District Judge Alia Moses of the Western District of Texas has consented to the transfer of all such cases to her. Chief Moses may preside over such cases or assign them to another judge on her Court as she deems appropriate. Any judge from the Western District of Texas may sit by designation in this district or transfer such cases to the Western District of Texas as she or he deems appropriate.").

[57] *See* United States Trustee's Motion for Withdrawal of the Reference and Referral of Motion for Relief Under Rule 60(b)(6) and Related Matters, In re: Neiman Marcus Group LTD LLC, Case No. 20-32519 (MI), Docket No. 3179 (Nov. 2, 2023); *see also* James Nani & Alex Wolf, *Jackson Walker Faces $13 Million Clawback Amid Judge Scandal,* BLOOMBERG LAW (Nov. 3, 2023) at https://news.bloomberglaw.com/bankruptcy-law/jackson-walker-faces-13-million-fee-clawback-amid-judge-scandal (last visited Dec. 20, 2023) ("The US Trustee is now questioning [$13 million of] the firm's fees approved in some of the most prominent Chapter 11 cases that Jones oversaw in recent years, including JC Penney Company Inc., Neiman Marcus Group LTD LLC, and Westmoreland Coal Co.").

[58] *See, e.g.,* Amended Motion to Vacate Employment Order, Final Fee Order, for Disgorgement and Sanctions, In re 4E Brands Northamerica, LLC, Case No. 22-50009, United States Bankruptcy Court, Southern District of Texas, Docket No. 510 (Oct. 27, 2023). Trials for potential clawbacks of Jackson Walker's fees are scheduled to start in August 2024. *See* James Nani, *Jackson Walker Faces August Bankruptcy Fee Clawback Trials (1),* BLOOMBERG LAW (Jan. 16, 2024), at https://news.bloomberglaw.com/business-and-practice/jackson-walker-to-face-bankruptcy-fee-clawback-trials-in-august (last visited Jan. 17, 2024) (("Trials over whether orders should be set aside awarding Jackson Walker about $1.8 million in compensation it collected in three Chapter 11 cases were set at a hearing Tuesday by US Bankruptcy Judge Marvin Isgur of the US Bankruptcy Court for the Southern District of Texas.... The trials are part of the US Trustee's challenges to Jackson Walker's compensation for serving as bankruptcy counsel in the Chapter 11 cases of Neiman Marcus Group LTD LLC, Seadrill Partners LLC, and Strike LLC.").

[59] *See, e.g.,* Reorganized Debtors" Motion for Orders (I) Reopening the Lead Chapter 11 Case; (II) Vacating Certain Orders Approving Jackson Walker Applications for Compensation and Reimbursement of Expenses Pursuant to Federal Rule 60(b); (III) Disgorging Compensation and Expenses Awarded to Jackson Walker Relating Back to July 18, 2018; and (IV)_ Granting Other Appropriate Relief, In re: Exco Resources, Inc., United States Bankruptcy Court, Southern District of Texas, Case No. 18-30155 (MI), Docket No. 2334 (Jan. 12, 2024); *see also* Motion to Recuse, *In re* 4E Brands Northamerica LLC, United States Bankruptcy Court, Southern District of Texas, Case No. 22-50009, Docket No. 511 (Oct. 30, 2023) (citing the standard for recusal set forth in 28 U.S.C. § 455(a)). That Motion alleged, in part, that

> 1. Movants have requested disgorgement of fees based upon the nondisclosure of a relationship between a partner at Jackson Walker LLP and the then sitting bankruptcy judge for the case (Case No. 22-50009).
> 2. This Court was previously presented with allegations concerning the relationship and denied the requested relief.
> 3. In addition, this court has had a personal relationship with the previous judge spanning more than thirty (30) years, providing him his job out of law school, and working with him continuously until taking the bench. This court was one of only two hearing all complex cases in this district, and routinely referred each

Electronic copy available at: https://ssrn.com/abstract=4700214

- Several of Judge Jones's other decisions in specific bankruptcy cases are being reexamined;[60]
- There's a fight about who has standing to raise issues about Jackson Walker's fees, in terms of whether there are indispensable parties out there who are not a part of the United States Trustee's Rule 60(b)(6) motions;[61]
- There's a fight about which court (a bankruptcy court or the district court) should be hearing the United States Trustee's Rule 60(b)(6) motions;[62] and
- Judge Jones is claiming absolute judicial immunity in the Van Deelen lawsuit.[63]

Let's spend a moment talking about who has standing to complain about the failure to disclose the relationship. Jackson Walker is arguing that unsecured creditors in the *4E Brands* case lack standing.[64] My first reaction when I read Jackson Walker's argument was to shake my head and

> other mediations and complex settlements, including the prior denied motion to recuse Judge Jones based upon allegations of the same facts.
> 4. Additional, personal facts, together with the above, if known by an objective observer may harbor doubts about the Court's partiality in this matter.

Id. at 2. On December 18, 2023, that motion to recuse was denied. *In re* 4E Brands Northamerica LLC, United States Bankruptcy Court, Southern District of Texas, Case No. 22-50009, Docket No. 573 (Dec. 18, 2023).

[60] *See* Reorganized Debtors" Motion for Orders (I) Reopening the Lead Chapter 11 Case; (II) Vacating Certain Orders Approving Jackson Walker Applications for Compensation and Reimbursement of Expenses Pursuant to Federal Rule 60(b); (III) Disgorging Compensation and Expenses Awarded to Jackson Walker Relating Back to July 18, 2018; and (IV)_ Granting Other Appropriate Relief, In re: Exco Resources, Inc., United States Bankruptcy Court, Southern District of Texas, Case No. 18-30155 (MI), Docket No. 2334 (Jan. 12, 2024); *see also* Alex Wolf, *Bankruptcy Plan Challenged After Judge Faces Ethics Probe (1),* BLOOMBERG LAW (Oct. 13, 2023), at https://news.bloomberglaw.com/bankruptcy-law/bankruptcy-plan-challenged-amid-ethics-probe-for-houston-judge (last visited Dec. 18, 2023) ("A Chapter 11 settlement plan proposed by Tehum Care Services Inc., a shell company created by Corizon Health Inc. to resolve hundreds of medical malpractice suits in bankruptcy, is facing heightened scrutiny following the revelations, which center around Judge David R. Jones of the US Bankruptcy Court, Southern District of Texas, one of the premier locations for handling complex Chapter 11 cases.").

[61] Order Requiring Any Party-In-Interest Who Asserts Standing or Indispensable Party Status to File a Notice Stating a Basis for Indispensable Party Status or Standing in Connection With Jackson Walker LLP Fee Matters, In re: Neiman Marcus Group Ltd LLC, United States Bankruptcy Court, Southern District of Texas, Case No: 20-32519, Docket No. 3202 (Dec. 20, 2023) ("Any party-in-interest claiming to be an indispensable party pursuant to Fed. R. Bankr. P. 7019 or otherwise claiming to have standing to seek that Jackson Walker LLP return compensation to this bankruptcy estate must file a notice (the "Notice") with the Court asserting the basis for such indispensable party status or standing no later than January 10, 2024, at 5:00 p.m. (prevailing Central Time)."). Both Jackson Walker and the United States Trustee have briefed the issue. *See* Jackson Walker LLP's Brief Regarding Indispensable Parties and Parties With Standing Related to the Jackson Walker Fee Disputes, In re: Neiman Marcus Group LTD LLC, Case No. 20-32519 (MI), Docket No. 3208 (Jan. 10, 2024); United States Trustee's Brief in Response to the Court's Order Seeking Determination on "Indispensable" Parties to the U.S. Trustee's Rule 60(b)(6) Motions, In re: Neiman Marcus Group LTD LLC, Case No. 20-32519 (MI), Docket No. 3209 (Jan. 10, 2024).

[62] Report and Recommendation to the United States District Court that the United States Trustee's Motion to Withdraw the Reference Be Denied, Case No. 23-645, Docket No. 1 (Dec. 22, 2023).

[63] Motion to Dismiss, Van Deelen v. Jones, Case No. 4:23-CV-03729, United States District Court, Southern District of Texas (Dec. 29, 2023).

[64] *See* In re 4E Brands Northamerica, LLC, Case No. 22-50009, United States Bankruptcy Court, Southern District of Texas, Jackson Walker LLP's Emergency Motion to Determine Lack of Standing of Maestas Parties, Docket No. 590 (Dec. 27, 2023); *see id.* at Docket No. 591 (Jackson Walker LLP's Emergency Motion to Continue and/or Reinstate

Electronic copy available at: https://ssrn.com/abstract=4700214

then reread 11 U.S. Code § 1109(b): "A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter."[65] But there's more to standing than section 1109(b); in fact, the statute might be broader than it first appears. As the court explained in *Sindesmos Hellinikes-Kinotitos,*

> In bankruptcy, there is also, however, the question of statutory standing....
>
> A co-debtor, for example, has a statutory right to be heard on a motion for relief from the co-debtor stay, even though such co-debtor is not a party-in-interest under other provisions of the Bankruptcy Code.
> ....
> Here, the Bankruptcy Code is not helpful on who might be heard in the context of a Rule 60 motion, as the section 1109 list of parties in interest who may be heard in chapter 11 matters is nonexhaustive. The statute is therefore neutral on the issue of standing in this matter.[66]

The Fifth Circuit's take on bankruptcy standing uses the "person aggrieved" test, in which the party seeking standing "must show that he is 'directly, adversely, and financially impacted by a bankruptcy order.'"[67]

Jackson Walker's no-standing argument hinges on one sentence in the 4E confirmed plan: "Funds held in the Professional Fee Escrow Account shall not be considered property of the Estate,

---

Abatement Pending Determination of Standing (Dec. 27, 2023).

[65] *See also* In Re: Alpha Natural Resources Inc., 544 B.R. 848, 855 (Bankr. E.D. Va. 2016) ("The Bankruptcy Code sets forth an additional standing requirement to be heard in a Chapter 11 proceeding. Section 1109(b) provides that "[a] party in interest, including the debtor, the trustee, a creditor's committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.").

[66] *In Re:* Sindesmos Hellinikes-Kinotitos of Chicago, 607 B.R. 898, 914-15 (Bankr. N.D. Ill. 2019)(citations omitted); *see also* In re C.P. Hall Co., 750 F.3d 659, 661 (7th Cir. 2014) ("The question we need to answer is whether the Bankruptcy Code, in providing that "a party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case [arising] under" the Code, 11 U.S.C. § 1109(b), confers a right to be heard on a debtor's insurer. The list of "parties in interest" is not exhaustive, but does suggest that such a party is someone who has a legally recognized interest in the debtor's assets, namely the debtor (or the trustee in bankruptcy, if as in this case there is a trustee) and the creditors.") (denying the debtor's excess insurer the right to be heard on an interpretation of a different insurer's policy, because "[i]t is not a creditor of Hall's estate in bankruptcy, is not the debtor, and, unlike the U.S. Trustee, is not a guardian of conduct in bankruptcy proceedings. It is just a firm that may suffer collateral damage from a ruling in a bankruptcy proceeding, in this case the ruling approving the settlement between Hall and Integrity."); *cf id.* at 660 ("[O]ften a probabilistic harm suffices for Article III standing even when the probability that the harm will actually occur is small.") (citations omitted).

[67] *See, e.g.,* Dugaboy Investment Trust v. Highland Capital Management, L.P. (In re Highland Capital Management, L.P.), 2023 WL 4861770 (5th Cir. 2023) ("To determine whether a party has standing to appeal a bankruptcy court order, this court uses the 'person aggrieved' test. This test 'is more exacting than the test for Article III standing.' An appellant must show that he is 'directly, adversely, and financially impacted by a bankruptcy order.'") (citations omitted).

Electronic copy available at: https://ssrn.com/abstract=4700214

the Debtor, the [sic] or the Plan Agent."[68] Jackson Walker contends that, because the creditors wouldn't be entitled to any disgorged fees, they don't have standing to weigh in.[69] That move calls to mind my favorite definition of "chutzpah."[70] The Office of the United States Trustee disagrees with Jackson Walker's stance, including the firm's stance on who might receive the benefit of the disgorged fees:

> If Jackson Walker is required to return funds to the Debtor, there are three possible resolutions for distribution of those funds. First, there could be the proverbial "race to the courthouse" with each creditor seeking to recover any portion of those funds that it can. Second, to the extent that the confirmed plan does not currently authorize the Plan Agent to distribute the money to general unsecured creditors, the Debtor could seek to modify the confirmed Amended Plan to provide for the orderly distribution of the funds. Last, the Court could convert the case to chapter 7, which would allow a chapter 7 trustee to administer the funds in accordance with the Bankruptcy Code. In each of those three scenarios, creditors in this case like the Maestas Parties have a cognizable interest in any funds that Jackson Walker may be required to return to the Debtor.[71]

Of course, it's not unheard-of for a court to order a professional to disgorge fees even in cases in which a plan has already been confirmed.[72] The fight about standing continues.

[68] Order Confirming Plan, In re 4E Brands Northamerica, LLC, Case No. 22-50009, United States Bankruptcy Court, Southern District of Texas, Docket No. 228 at 24 (August 15, 2022); *see also* Jackson Walker LLP's Emergency Motion to Determine Lack of Standing of Maestas Parties, In re 4E Brands Northamerica, LLC, Case No. 22-50009, United States Bankruptcy Court, Southern District of Texas, Docket No. 353 at 57 (Oct. 27, 2022); *see also* Amended Motion to Vacate Employment Order, Final Fee Order, for Disgorgement and Sanctions, In re 4E Brands Northamerica, LLC, Case No. 22-50009, United States Bankruptcy Court, Southern District of Texas, Docket No. 510 (Oct. 27, 2023).

[69] That plan was filed years after the date that Jackson Walker admitted that it was aware of at least the past relationship between Judge Jones and Ms. Freeman. *Cf. In re:* J.C. Penney Direct Marketing Services, LLC, Case No. 20-20184, United States Bankruptcy Court, Southern District of Texas, Docket No. 1244 (Nov. 13, 2023).

[70] See *Chutzpah,* OXFORD REFERENCE, at https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095612185#:~:text=The%20classical%20definition%20of%20chutzpah,Subjects%3A%20Religion (last visited Dec. 29, 2023) ("The classical definition of chutzpah is given in the story of the boy who killed his parents and then threw himself on the mercy of the court on the grounds that he was an orphan.").

[71] In re 4E Brands Northamerica, LLC, Case No. 22-50009, United States Bankruptcy Court, Southern District of Texas, Docket No. 600 at 4-5 (Jan. 9, 2024) (footnote omitted). *See* Evan Ochsner, *Bankruptcy Judge Mulls Calls to Disgorge Jackson Walker Fees,* BLOOMBERG LAW (Dec. 12, 2023) ("Isgur wondered during a hearing Tuesday how the funds would be distributed under numerous restructuring plans that have been approved by the US Bankruptcy Court, Southern District of Texas for those cases.... 'Any relief that would be awarded' would be 'distributed in accordance with the plan' Jones approved in the Neiman Marcus bankruptcy, Nan Eitel, of the US Trustee's office, said. The US Trustee hasn't analyzed how the money would be distributed in all of the cases it has asked for disgorgement, she said."), at https://www.bloomberglaw.com/bloomberglawnews/bankruptcy-law/XCOBEEV8000000?bna_news_filter=bankruptcy-law#jcite (last visited Dec. 25. 2023).

[72] See, e.g., Office of Public Affairs, Department of Justice, U.S. Trustee Program Reaches $15 million Settlement with McKinsey & Company to Remedy Inadequate Disclosures in Bankruptcy Cases (Feb. 19, 2019) ("The Department of Justice's U.S. Trustee Program (USTP) has entered into a multi-district settlement agreement with global consulting firm McKinsey & Company, Inc. (McKinsey), resolving disputes over the adequacy of McKinsey's disclosures of connections in Chapter 11 bankruptcy cases.... Under the terms of the settlement, McKinsey agrees to pay $15 million in three bankruptcy cases to remedy inadequate disclosures of connections and to make additional disclosures. The payment will

Electronic copy available at: https://ssrn.com/abstract=4700214

There's also a fight about discovery. I've been following discovery requests like the one in *Sorrento Therapeutics:*

> The Equity Committee sought this information [about whether Ms. Freeman was involved in a case in which she was not employed] in discovery from the Debtors and Ms. Freeman, but has been rebuffed. Although the Equity Committee believed that this information was relevant to Plan discovery – because the Plan seeks broad releases for the Debtors' professionals, the context of the requests is largely irrelevant. Instead of expeditiously assisting the Court, the Equity Committee, and the public in learning the true extent and nature of Ms. Freeman's involvement in these Chapter 11 Cases, the Debtors and Ms. Freeman have chosen obfuscation over transparency. That is precisely the wrong lesson to draw from the unfortunate events that have recently transpired in this Court. Lawyers have ethical obligations to protect courts from "fraudulent conduct that undermines the integrity of the judicial process" and to "take remedial measures including disclosure, if necessary, whenever the lawyer knows that a person . . . intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding." Rule 3.3 of the Model Rules of Professional Conduct. The mere possibility that the Debtors' professionals may have known about the judicial misconduct leading to Judge Jones's resignation—yet potentially exploited rather than disclosing it—requires immediate and complete disclosure to ensure the integrity of these proceedings.[73]

On December 18, 2023, the bankruptcy court denied the Equity Committee's motion for a Rule 2004 examination.[74] Maybe the United States Trustee will have better luck with discovery.[75]

---

be distributed to the creditors and other parties in accordance with the reorganization plans approved by the courts or other applicable law."), at https://www.justice.gov/opa/pr/us-trustee-program-reaches-15-million-settlement-mckinsey-company-remedy-inadequate (last visited Dec. 26, 2023).

[73] *In re* Sorrento Therapeutics, Inc., United States Bankruptcy Court, Southern District of Texas, Case No. 23-90085 (CML), Docket No. 1594 (Nov. 27, 2023), at 3.

[74] *In re* Sorrento Therapeutics, Inc., United States Bankruptcy Court, Southern District of Texas, Case No. 23-90085 (CML), Docket No. 1688 (Dec. 18, 2023) ("For the reasons stated on the record at the hearing held on December 18, 2023, the Equity Committee's motion for a Rule 2004 examination is denied."). That ruling is being appealed. *See id.* at Docket No. 1721 (Jan. 2, 2024).

[75] If the courts are not going to allow discovery on this issue, the goal of transparency will just be a distant memory. Let the public relations nightmare begin. Or, as Charles Geyh has noted in suggesting that it's time to reform the system of judicial ethics:

> Retool *Iqbal* and *Twombly*. Enabling judges to dismiss actions that their unguided "common sense" tells them are implausible invites public suspicion that plausibility is all in the eye of the beholder. If the federal courts are disinclined to reconsider the plausibility standard itself, add guidance to assist district judges in structuring plausibility determinations. When a plaintiff's claim lacks plausibility because details critical to the claim are in the defendant's control, consider experimenting with

Electronic copy available at: https://ssrn.com/abstract=4700214

Then there's the question of whether the consolidated Rule 60(b)(6) motions filed by the United States Trustee should be heard by a district court, not a bankruptcy court, via withdrawal of the reference.[76] The multiple-case Rule 60(b)(6) motions had simultaneously requested withdrawal of the reference,[77] but the Chief Judge of the United States Bankruptcy Court for the Southern District of Texas would prefer to keep the issue of Jackson Walker's fees in-house, rather than having a District Court rule on them.[78] In *Professional Fee Matters Concerning the Jackson Walker Law Firm,* the court recommended that the Southern District of Texas *not* withdraw the reference.[79] The court also recommended that these cases should not be moved to the Western District of Texas.[80]

Even if the District Court decides not to withdraw the reference, I think that the real question is not "*can* the bankruptcy courts in the Southern District of Texas hear these cases?" but "*should* the bankruptcy courts in the Southern District of Texas hear these cases?" To be clear, I believe that the judges hearing these cases can do so fairly and impartially—whether or not those judges sit in the Southern District of Texas or in the Southern District of Texas's bankruptcy courts. Nonetheless, I'm convinced that there is a public interest in having a court that is farther removed from the players hear these arguments.[81] When there is a scandal affecting multiple cases, and when

---

> sharply truncated discovery for the limited purpose of affording plaintiff an opportunity to flesh out his claims.

Charles Gardner Geyh, *Judicial Ethics: A New Paradigm For a New Era,* 9 ST. MARY'S J. LEGAL MAL. & ETHICS 238, 256 (2019).

[76] *See In re* Professional Fee Matters Concerning the Jackson Walker Law Firm, United States Bankruptcy Court, Southern District of Texas, Case No. 23-645, Docket No. 44 at 13 (Dec. 21, 2023) ("In sum, the balance of *Holland* factors as articulated by the Fifth Circuit, along with the UST's failure to clearly articulate what matters it seeks to withdraw, strongly weigh against permissive withdrawal of the reference.").

[77] *See, e.g.,* United States Trustee's Motion for Relief From Judgment or Order Pursuant to Federal Rule of Civil Procedure 60(b)(6) and Federal Rule of Bankruptcy Procedure 9024 Approving any Jackson Walker Applications for Compensation and Reimbursement of Expenses, *In Re:* Neiman Marcus Group Ltd LLC, Case No. 20-32519, United States Bankruptcy Court, Southern District of Texas, Docket No. 3179 (Nov. 2, 2023).

[78] *See* Report and Recommendation to the United States District Court That the United States Trustee's Motion to Withdraw the Reference Be Denied, *In re* Professional Fee Matters Concerning the Jackson Walker Law Firm, Case No. 23-645 (Dec. 21, 2023), Docket No. 44 at 15-16 ("[T]his Court recommends that the reference remain with this Court to continue presiding over the instant miscellaneous proceeding created for the purpose of consolidating certain pre-trial matters with respect to the Motions for Relief from Final Judgment (defined below), and with all other matters remaining with each of the presiding bankruptcy judges. This miscellaneous proceeding, in large part, alleviates any concerns that the United States Trustee and Jackson Walker, LLP have raised concerning judicial efficiency."). Both Clifford J. White (the former Director of the United States Trustee Program) and I believe that a district court, and not a bankruptcy court, should hear any matter relating to Jackson Walker's (and Ms. Freeman's) fees. *See* email from Clifford J. White III to author (Dec. 26, 2023) (on file with author) ("[Having the relevant bankruptcy courts [r]ecusing themselves or asking the district court to hear these cases would not be an admission of bias or an admission of having had knowledge of their former colleague's misconduct. Instead, the court would be taking a step to restore the credibility that Judge Jones took away from it.").

Deleted: *In Re:*

[79] *See In re* Professional Fee Matters Concerning the Jackson Walker Law Firm, United States Bankruptcy Court, Southern District of Texas, Case No. 23-645, Docket No. 44 at 13 (Dec. 21, 2023) ("In sum, the balance of *Holland* factors as articulated by the Fifth Circuit, along with the UST's failure to clearly articulate what matters it seeks to withdraw, strongly weigh against permissive withdrawal of the reference.").

Deleted: ,

[80] *See id.* at 15 ("This Court declines to opine as to the internal reasoning behind General Order 2023-21, but notes that the UST does not even attempt to articulate why it would be in the interests of justice for the Motions for Relief from Final Judgments to be heard out of this district. The Southern District of Texas Bankruptcy Courts are more than capable of disposing of these matters in an orderly, timely, and impartial manner.") (footnote omitted).

[81] *See* Akiko Matsuda & Alexander Gladstone, *Bankruptcy Court Seeks Control of Review of Fees OK'd by Judge Who Resigned Amid Ethics Probe,* WALL ST. J. (Dec. 22, 2023), at https://www.wsj.com/articles/bankruptcy-court-seeks-control-of-review-of-fees-okd-by-judge-who-resigned-amid-ethics-probe-84745849 (last visited on Dec. 23, 2023) ("Nancy Rapoport, a law professor at the William S. Boyd School of Law at the University of Nevada[,] Las Vegas, said the

Electronic copy available at: https://ssrn.com/abstract=4700214

that scandal has already made international news,[82] the better part of valor (at least from a public relations standpoint) is to adjudicate the aftermath of that scandal in another jurisdiction.[83]

The United States Trustee agrees with me in its objection to the Chief Judge's Report and Recommendation.[84] That objection argued that there are good reasons for permissive withdrawal—most important of those the restoration of a sense of transparency and fairness to the proceedings: "Although the U.S. Trustee has not alleged bias or impropriety by the remaining bankruptcy judges within the district, withdrawal of the reference is necessary to restore the public's confidence by avoiding the appearance of bias that otherwise will unnecessarily distract from the merits of the Rule 60(b)(6) Motions if they are heard by this district's sitting bankruptcy judges."[85] Why? "[J]udges who have shared a courthouse, a clerk's office, and a bench should not sit in judgment about the legality of one another's conduct, even if they believe they could do so fairly and impartially."[86]

Jackson Walker's response, of course, disagreed with the United States Trustee's perspective and observed that the United States Trustee's own argument "cites to and relies upon largely unsubstantiated media reports, none of which were admitted into evidence for the truth of the matters asserted in the original hearing held before Chief Judge Rodriguez on December 5, 2023, and many of which are simply incomplete and/or incorrect as the U.S. Trustee now knows and knew prior to the filing of its R&R Objection."[87] The United States Trustee's reply added a twist: that Jackson Walker had agreed to produce certain documents but had not produced them yet.[88] We'll see what happens in terms of the withdrawal of the reference.

In the laundry list of "news events still developing," there's one more important thread—Judge Jones's insistence that Mr. Van Deelen can't sue him for violating his constitutional rights. As Judge Jones wrote in his *pro se* motion to dismiss the Van Deelen complaint,

> 10. ... It is well established that judges enjoy absolute judicial immunity from lawsuits related to acts taken in their capacity as

---

matter should be handled outside of the Houston bankruptcy court, from where Jones's ethical issue originated. ... 'This situation calls for fresh eyes on all of the factors,' she told The Wall Street Journal. 'The cascading failures of transparency in these cases cast a pall, not just over this court, but over all bankruptcy courts.'"). Bill Rochelle also notes an important point: "With regard to the appearance of impropriety, it's not just the possibility that bankruptcy judges in Houston might go easy on those who violated their ethical obligations. Rather, observers also might wonder whether Houston judges would mete out undeservedly harsh punishment on those who brought the court's integrity into question." Bill Rochelle, *Reference Withdrawal on Houston Ethics Probe Pits UST Against Bankruptcy Judge,* AMERICAN BANKRUPTCY INSTITUTE/ROCHELLE'S DAILY WIRE (Jan. 17, 2024) at https://www.abi.org/newsroom/daily-wire/reference-withdrawal-on-houston-ethics-probe-pits-ust-against-bankruptcy-judge (last visited Jan. 17, 2024).

[82] *See* n. 48, *supra.*

[83] *Cf.* United States Trustee's Objection to the Bankruptcy Court's Report and Recommendation That His Motions to Withdraw The Reference Be Denied, *In Re* Professional Fee Matters Concerning the Jackson Walker Law Firm, United States District Court, Southern District of Texas, Case No. 4:23-cv-04787, Docket No. 5 (Jan. 4, 2024).

[84] *See* United States Trustee's Objection to the Bankruptcy Court's Report and Recommendation That His Motions to Withdraw The Reference Be Denied, *In Re* Professional Fee Matters Concerning the Jackson Walker Law Firm, United States District Court, Southern District of Texas, Case No. 4:23-cv-04787, Docket No. 5 (Jan. 4, 2024).

[85] *Id.* at 3.

[86] *Id.* at 4.

[87] Jackson Walker LLP's Limited Response to the United States Trustee's Objection to the Bankruptcy Court's Report and Recommendation, *In Re* Professional Fee Matters Concerning the Jackson Walker Law Firm, United States District Court, Southern District of Texas, Case No. 4:23-cv-04787, Docket No. 6 (Jan. 17, 2024) (footnotes omitted).

[88] *See* United States Trustee's Reply to Jackson Walker LLP's Limited Response to the United States Trustee's Objection to the Bankruptcy Court's Report and Recommendation That This Court Deny the United States Trustee's Motions to Withdraw the Reference, *In Re* Professional Fee Matters Concerning the Jackson Walker Law Firm*In Re* Professional Fee Matters Concerning the Jackson Walker Law Firm, United States District Court, Southern District of Texas, Case No. 4:23-cv-04787, Docket No. 7 at 10-11 (Jan. 25, 2024)

Formatted: Font: Italic

Electronic copy available at: https://ssrn.com/abstract=4700214

> judges that are not undertaken in "clear absence of all jurisdiction." "Judicial immunity is immunity from suit, not just from ultimate assessment of damages."
>
> 11. The Fifth Circuit has adopted a functional approach in determining whether a judge is entitled to absolute immunity. Under the functional approach, a court will determine whether the activities of the party seeking immunity are "intimately associated with the judicial process." The primary factor considered in determining whether a judge's act is "judicial" is whether the act complained of is one normally performed by a judge in her official capacity. This determination should be broadly construed in favor of immunity.[89]

Judge Jones may well be right, though I personally like the theory that, because Judge Jones should never have heard certain cases, he shouldn't have immunity for issuing orders in those cases.[90] We'll get to that when I discuss disqualification below.[91]

One issue that hasn't been fleshed out enough is whether any of the firms that hired Jackson Walker as local counsel knew about the relationship and didn't ask Jackson Walker to disclose.[92] Mr. Van Deelen has amended his complaint to include Kirkland & Ellis as a defendant,[93] and in *Sorrento Therapeutics,* one party in interest has moved to compel discovery from Latham & Watkins as well as from Jackson Walker,[94] though the Sorrento court denied that motion without prejudice on the grounds that "[t]here is not currently enough substance to [the party in interest]'s claims that Latham knew of the relationship before Jones came clean publicly, Judge Lopez determined, though he left free to bring his motion again with new evidence."[95] The inquiries about who else knew about the Jones-Freeman relationship brings

Deleted: .96

[89] Defendant's Motion to Dismiss Under Fed. R. Civ. P. 12(b)(6), Van Deelen v. Jones, United States District Court, Southern District of Texas, Case No. 4:23-CV-03729, Docket No. 9 (Dec. 29, 2023) (citations omitted).

[90] In his recently filed Plaintiff's Response to Defendant David R. Jones' Motion to Dismiss Under Fed. R. Civ. P. 12(b)(6), Van Deelen v. Jones, United States District Court, Southern District of Texas, Case No. 4:23-CV-03729, Docket No. 11 (Jan. 18, 2024), Mr. Van Deelen argued in part that Judge Jones's failure to disclose the relationship and failure to recuse meant that judicial immunity was not available to him. *Id.* at 8-13.

[91] *See* nn. 101-144, *infra,* and accompanying text.

Deleted: 10197

Deleted: 144140

[92] *See, e.g.,* Complaint, *In re* 4E Brands Northamerica LLC, United States Bankruptcy Court, Southern District of Texas, Case No. 22-50009, Docket No. 593 (Dec. 28, 2023) (alleging that Jackson Walker deliberately gamed the case-filing system in order to draw Judge Jones); Plaintiff's First Amended Complaint, Van Deelen v. Jones, United States District Court, Southern District of Texas, Case No. 4:23-cv-3729, Docket No. 10 (Jan. 11, 2024) (adding Kirkland & Ellis to the named defendants); Timothy Culberson's, Alternative Motion to Compel Discovery From Debtors and Their Counsel, In re: Sorrento Therapeutics Inc., United States Bankruptcy Court, Southern District of Texas, Case No. 23-90085 (DRJ), Docket No. 1700 (Dec. 21, 2023); Debtors' (I) Objection to Party in Interest, Timothy Culberson's, Alternative Motion to Compel Discovery From Debtors and Their Counsel, and (II) Cross-Motion for Protective Order Regarding First Request for the Production of Documents From Party in Interest, Timothy L. Culberson, Esq[.] to Debtors and Their Counsel, In re: Sorrento Therapeutics Inc., United States Bankruptcy Court, Southern District of Texas, Case No. 23-90085 (DRJ), Docket No. 1749 (Jan. 11, 2024); Party in Interest, Timothy Culberson's, Reply and Supplemental Brief Regarding the FRCP 60(b)(6) and Federal Rule of Bankruptcy Procedure 9024 Motion for Relief From All Orders Approving All Applications for All Professional Fees and Reimbursement [of] Expenses as to Jackson Walker, LLP, Latham & Watkins, LLP, and M3 Partners and Motion to Disgourge [sic] Said Fees/Expenses and to Remove Professionals From This Matter, In re: Sorrento Therapeutics Inc., United States Bankruptcy Court, Southern District of Texas, Case No. 23-90085 (DRJ), Docket No. 1751 (Jan. 12, 2024).

[93] *See* n. 22, *supra.*

[94] *See* Timothy Culberson's, [sic]Alternative Motion to Compel Discovery From Debtors and Their Counsel, In re: Sorrento Therapeutics Inc., United States Bankruptcy Court, Southern District of Texas, Case No. 23-90085 (DRJ), Docket No. 1700 (Dec. 21, 2023).

[95] *See* Emily Lever, *Latham Ducks Sanctions in Sorrento Chapter 11,* LAW360 (Jan. 24, 2024), at https://www-law360-

Electronic copy available at: https://ssrn.com/abstract=4700214

to mind the old Watergate question that can be asked of each of the parties involved: "What did [the person] know, and when did [he or she] know it?"[97]

This whole story is still going strong. In a future article,[98] I plan to write about why Judge Jones might have rationalized his decision not to disclose the relationship. But this article concerns the issue of who should disclose a material connection between a judge and a lawyer appearing before that judge—and when. By my count, there are three separate disclosure issues so far, with more coming.[99] We need to examine what Judge Jones should have disclosed, what Jackson Walker should have disclosed, and what Ms. Freeman should have disclosed.[100] Let's start with what Judge Jones himself should have disclosed and what he should have done beyond merely disclosing his relationship with Ms. Freeman.

- What do 28 U.S.C. § 455 and the Code of Conduct for United States Judges say about disclosure and recusal?

Judge Jones and Ms. Freeman had what I'll call "an intimate-enough" relationship to trigger disclosure and recusal. To put the issue in perspective, according to news stories,

> Judge Jones and Freeman have been living in the same house since roughly 2017, according to a Fifth Circuit complaint. Despite that fact, Judge Jones approved "substantial" fees for Jackson Walker and

com.proxy.law.unlv.edu/articles/1789749/latham-ducks-sanctions-in-sorrento-ch-11 (last visited Jan. 24, 2024).

97 *See, e.g.,* Victoria Bassetti, *The Curious History of 'What Did the President Know, and When Did He Know It?',* Brennan Center for Justice (Mar. 12, 2018), at https://www.brennancenter.org/our-work/analysis-opinion/curious-history-what-did-president-know-and-when-did-he-know-it (last visited Dec. 18, 2023) (discussing the history of Howard Baker's famous question during Watergate: "What did the President know, and when did he know it?"); *see also* n. 49, *supra; cf.* Alexander Gladstone & Akiko Matsuda, *Texas Law Firm Didn't Disclose Possible Conflict Involving Bankruptcy Judge,* WALL ST. J. (Oct. 27, 2023) at https://www.wsj.com/articles/texas-law-firm-didnt-disclose-possible-conflict-involving-bankruptcy-judge-3761ffe0 (last visited Dec. 20, 2023) (" 'The goal behind disclosing connections is the transparency of the system,' said Nancy Rapoport, a law professor at the William S. Boyd School of Law at the University of Nevada Las Vegas who specializes in bankruptcy ethics. 'People want to know what advantages people might have,' Rapoport said. 'A failure to disclose causes the maelstrom we're experiencing now, because it leads to other questions. Who else knew, and when did those persons know it?'").

98 Nancy B. Rapoport, *Failing to See What's in Front of Our Eyes: The Effect of Cognitive Errors on Corporate Scandals,* __ WM. & MARY BUS. L. REV. ___ (forthcoming 2024).

99 *See* n. 92, *supra.*

Deleted: 9290

See, e.g., Victoria Bassetti, *The Curious History of 'What Did the President Know, and When Did He Know It?',* Brennan Center for Justice (Mar. 12, 2018), at https://www.brennancenter.org/our-work/analysis-opinion/curious-history-what-did-president-know-and-when-did-he-know-it (last visited Dec. 18, 2023) (discussing the history of Howard Baker's famous question during Watergate: "What did the President know, and when did he know it?"). *See also* n. 49, *supra; cf.* Alexander Gladstone & Akiko Matsuda, *Texas Law Firm Didn't Disclose Possible Conflict Involving Bankruptcy Judge,* WALL ST. J. (Oct. 27, 2023) at https://www.wsj.com/articles/texas-law-firm-didnt-disclose-possible-conflict-involving-bankruptcy-judge-3761ffe0 (last visited Dec. 20, 2023) (" 'The goal behind disclosing connections is the transparency of the system,' said Nancy Rapoport, a law professor at the William S. Boyd School of Law at the University of Nevada Las Vegas who specializes in bankruptcy ethics. 'People want to know what advantages people might have,' Rapoport said. 'A failure to disclose causes the maelstrom we're experiencing now, because it leads to other questions. Who else knew, and when did those persons know it?'"). I expect more discovery requests along the lines of "what did they know, and when."

100 I'm not addressing, in this article, what knowledge other firms hiring Jackson Walker may have had about the Jones-Freeman relationship, in large part because the facts surrounding any such knowledge haven't been developed yet.

Electronic copy available at: https://ssrn.com/abstract=4700214

> for Freeman's work on cases that the firm had before the court, according to the complaint.
>
> His decision not to recuse himself in those cases violated a duty Judge Jones had to avoid making any decision that could "substantially" affect Freeman's financial interests, said Stephen Gillers, a professor emeritus at New York University School of Law. A separate rule also applies requiring recusal "if the judge's 'impartiality might reasonably be questioned,'" Gillers said.[101]

---

[101] Alex Wittenberg, *Judge Jones' Abrupt Exit Puts Major Ch. 11 Cases In Question,* LAW360.COM (Oct. 17, 2023), at https://www.law360.com/articles/1733415/judge-jones-abrupt-exit-puts-major-ch-11-cases-in-question (last visited Dec. 18, 2023). As Ted Gavin predicted in that article, "'Because there was an undisclosed relationship, we have to revisit every decision he ever made involving that firm,' said restructuring expert Ted Gavin of Gavin Solmonese LLC. 'This was just such an unforced error.'"

"Unforced error," indeed. For example, in *Westmoreland Coal,* the United States Trustee argued that

> 2. The bankruptcy system was significantly compromised in this and other bankruptcy cases by an undisclosed intimate relationship between Judge David R. Jones and Elizabeth Freeman ("Judge Jones" and "Ms. Freeman," respectively)—a partner (now former) at Jackson Walker. Judge Jones's secret relationship with Ms. Freeman created an unlevel "playing field" for every party in interest in every case Jackson Walker had before Judge Jones, including this one, and in Jackson Walker cases mediated by Judge Jones. In this case, Jackson Walker was employed as debtors' counsel with court approval and later awarded compensation and expenses for the services rendered that Judge Jones approved.
>
> ....
>
> 5. Because of Judge Jones's failure to recuse himself from presiding over cases where Jackson Walker was counsel for the debtors-in-possession while Ms. Freeman was both living with him and a partner at Jackson Walker, all orders awarding fees and expenses are tainted and should be set aside under Rule 60(b)(6) because this new information revealing a compromised process is a "reason that justifies relief." Vacating all orders granting fees and expenses in this case would allow parties in interest, including the United States Trustee, to object to, and to seek the return of, fees and expenses awarded to Jackson Walker under that tainted process. Judge Jones presided over at least 26 cases, and perhaps more, where he awarded Jackson Walker approximately $13 million in compensation and expenses while Ms. Freeman was both a Jackson Walker partner and living with him in an intimate relationship. This includes approximately $1 million in fees billed by Ms. Freeman herself in 17 of those cases....
>
> ....
>
> 13. Ms. Freeman is a former law clerk to Judge Jones and was a partner at Jackson Walker "from at least 2017 until December 2022." Jackson Walker has regularly appeared in cases before Judge Jones since Ms. Freeman joined the firm sometime in 2017 or 2018, including cases on which Ms. Freeman worked and billed fees.
>
> 14. Ms. Freeman left Jackson Walker in December 2022 and opened her own practice, The Law Office of Liz Freeman, PLLC.
>
> 15. While Ms. Freeman was a partner at Jackson Walker, the firm also represented parties in cases mediated by Judge Jones, and Ms. Freeman worked and billed on many of those cases, as well.
>
> 16. Jackson Walker has also retained and billed for Ms. Freeman as a contract attorney since she resigned from Jackson Walker. In GWG [GWG Holdings, Inc., No. 22-90032], Jackson Walker moved to have Judge Jones appointed as mediator the month before Ms. Freeman resigned Jackson Walker,

Electronic copy available at: https://ssrn.com/abstract=4700214

Professor Gillers is, of course, correct that Judge Jones violated a clear duty. Here's why: 28 U.S.C. § 455(a) provides that "[a]ny justice, judge, or magistrate judge of the United States *shall* disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[102] That section dovetails with Canon 3 of the Code of Conduct of United States Judges, which provides, in part:

> The duties of judicial office take precedence over all other activities. The judge should perform those duties with respect for others, and should not engage in behavior that is harassing, abusive, prejudiced, or biased. The judge should adhere to the following standards:
> ....
> (C) *Disqualification*.
> (1) A judge *shall* disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:

> and Ms. Freeman appeared at the mediation. As a result of the mediation, Ms. Freeman was appointed as the trustee for the post-confirmation Wind Down Trust.
> ....
> 39. Judge Jones presided over at least 26 cases, and perhaps more, where he awarded Jackson Walker approximately $13 million in compensation and expenses under 11 U.S.C. § 330 and § 331 while Ms. Freeman was both a Jackson Walker partner and living with him in an intimate relationship. This includes approximately $1 million in fees billed by Ms. Freeman herself in 17 of those cases.
> 40. Judge Jones also presided over three additional cases filed in 2017—which may be affected cases depending on the date Ms. Freeman joined the Jackson Walker partnership— potentially implicating an additional $850,000 in fees and expenses awarded to Jackson Walker. One case closed on September 29, 2017, with a Jackson Walker fee award on August 22, 2017. The other two had final fee awards for Jackson Walker in 2018, with final decrees closing one case on August 2, 2018, and another on March 31, 2021....
> 41. In addition to the Jackson Walker cases over which Judge Jones presided, he mediated six cases where Jackson Walker was debtor's counsel while Ms. Freeman was either a Jackson Walker partner or contract attorney (as of 2023). The impact on those cases remains under review.

United States Trustee's Motion for Relief from Judgment or Order Pursuant to Federal Rule of Civil Procedure 60(B)(6) and Federal Rule of Bankruptcy Procedure 9024 Approving Any Jackson Walker Applications for Compensation and Reimbursement of Expenses, *In re* Westmoreland Coal Co., Case No. 18-35672, United States Bankruptcy Court, Southern District of Texas, Docket No. 3360 (Nov. 2, 2023) (citations omitted).

[102] 11 U.S.C. § 455(a) (emphasis added), at https://www.law.cornell.edu/uscode/text/28/455 (last visited Dec. 21, 2023). The rest of Section 455 mirrors Canon 3 of the Code of Conduct of United States Judges quite well. *Compare id. with* Code of Conduct of U.S. Judges, https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#:~:text=Canon%203%20requires%20disqualification%20of,of%20the%20judge's%20judicial%20duties (last visited Dec. 21, 2023); *see also* Melissa B. Jacoby, *Other Judges' Cases,* 78 N.Y.U. ANN. SURV. AM. L. 39, 85 (2022) ("... 28 U.S.C. § 455, a more catch-all statutory provision, first calls for disqualification when "impartiality might reasonably be questioned." Due to the difficulty of proving actual bias and the importance of perception to the legitimacy of the judiciary, an *appearance* of partiality is sufficient. The standard is the perspective of a disinterested observer, an objectively reasonable layperson, knowing all relevant circumstances.") (footnotes omitted) (emphasis in original). Any study of judicial disqualification should start with CHARLES GARDNER GEYH, JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW (2d ed. 2010). It's a wonderful compendium of everything one would want to know about disqualification.

Electronic copy available at: https://ssrn.com/abstract=4700214

> (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> ...
> (c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, *has a financial interest*[103] in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding;
> (d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person is:
>> (i) a party to the proceeding, or an officer, director, or trustee of a party;
>> (ii) acting as a lawyer in the proceeding;
>> (iii) known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or
>> (iv) to the judge's knowledge likely to be a material witness in the proceeding....[104]

As the Fifth Circuit observed in its complaint against Judge Jones, the Commentary to Canon 3(C) clearly states that "[r]ecusal considerations applicable to a judge's spouse should also be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship."[105] Although the Canons are hortatory,[106] Section 455(a) is

---

[103] Emphasis added. Canon 3 defines (c) "financial interest" [as] ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party [with a few exclusions] ...." Canon 3(C)(3)(c), Code of Conduct of U.S. Judges, https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#:~:text=Canon%203%20requires%20disqualification%20of,of%20the%20judge's%20judicial%20duties (last visited Dec. 21, 2023).

[104] Code of Conduct for United States Judges, Canon 3, https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#:~:text=Recusal%20considerations%20applicable%20to%20a,3C(1)(c) (last visited Dec. 18, 2023).

[105] Code of Conduct for United States Judges, Canon 3, https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#:~:text=Recusal%20considerations%20applicable%20to%20a,3C(1)(c) (last visited Dec. 18, 2023).

[106] For a nice description of the enforceability of the Canons, see, e.g., Melissa B. Jacoby, *Other Judges' Cases,* 78 N.Y.U. ANN. SURV. AM. L. 39, 77 (2022) ("Departures from the Code of Conduct are not actionable, strictly speaking. It might be cited in connection with other accountability measures, but the grounds for any resulting legal or equitable remedy come from a source other than the Code.") (footnotes omitted). And Charles Geyh has this explanation:

> Disqualification has ethical and procedural dimensions. The ethical dimension is governed by Canon 3C of the Code of Conduct for United States Judges, as construed by the Codes of Conduct Committee of the Judicial Conference of the United States....
>
> The procedural dimension [of disqualification] is governed by four sections in Title 28 of the United States Code: §§ 47, 144, 455, and 2106. While the text of Canon 3C on disqualification is substantially similar to 28 U.S.C. § 455, and both seek to promote public confidence in the judiciary, the focus of the two is different: Whereas the goal of the Code of Conduct, including Canon 3C, is to inform federal judges of their ethical obligations to the end of advising them on

Electronic copy available at: https://ssrn.com/abstract=4700214

statutory, and Judge Jones thus should have recused himself from any cases in which Ms. Freeman appeared. He knew he lived with her. She knew it, too. And at some point, her former firm knew it.[107]

But Canon 3 isn't the only applicable Canon here. Canon 2 provides in part:

> (A) *Respect for Law*. A judge should respect and comply with the law and *should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.*
> (B) *Outside Influence. A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment.* A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge....[108]

And the Commentary to Canon 2A provides:

> An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges, including harassment and other inappropriate workplace behavior. A judge must avoid all impropriety and appearance of impropriety. This prohibition applies to both professional and personal conduct. A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen. *Because it is not practicable to list all prohibited acts, the prohibition is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code.*[109]

> how judges should conduct themselves, § 455 is a procedural statute aimed at articulating disqualification standards to the end of preserving the rights of litigants to impartial justice.

CHARLES GARDNER GEYH, JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 2 (2d ed. 2010) (footnotes omitted).

[107] *See* nn. 153-156, *infra,* and accompanying text.

[108] Canon 2, Code of Conduct of U.S. Judges, https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#c (last visited Jan. 3, 2024) (emphasis added). For a good article about Canon 2 and the appearance of impropriety standard, see Cynthia Gray, *Avoiding the Appearance of Impropriety: With Great Power Comes Great Responsibility,* 28 U. ARK. LITTLE ROCK L. REV. 63 (2005).

[109] Commentary, Canon 2, Canon 2, Code of Conduct of U.S. Judges, https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#c (last visited Jan. 3, 2024) (emphasis added).

Deleted: 153149

Deleted: 156152

Electronic copy available at: https://ssrn.com/abstract=4700214

That catch-all in the Commentary is important. I did my own informal poll of a few laypeople,[110] describing the news articles and asking them what they thought. Those reasonable minds were shocked by the idea that a judge would hear any case in which his live-in romantic partner was involved. A more scientific poll reached the same conclusion.[111] Taken together, these statutes and Canons required Judge Jones to recuse himself.

Let's go through these standards step by step.

28 U.S.C. § 455(a)	"Any justice, judge, or magistrate judge of the United States *shall* disqualify himself in any proceeding in which his impartiality might reasonably be questioned."	If Judge Jones were legally married to Ms. Freeman, and Judge Jones were tasked with approving her employment and her fees, reasonable people would likely question his impartiality.[112] I hazard a guess that the same would be true if those reasonable people had been asked about a live-in romantic relationship.
Canon 3(C)(1)(a) of the	(1) A judge *shall* disqualify himself or herself in a proceeding in which the	One could also hazard a guess that Judge Jones had a personal

[110] In other words, I asked my hairstylist and some of her friends. *Cf.* n. 161, *infra* (where I discuss asking ChatGPT about whether Rule 2014 requires disclosure of connections to judges).

Deleted: 161157

[111] Akiko Matsuda, *Creditors Cite Poll to Question Judge's Impartiality in Fee Dispute,* WALL ST. J. (Dec. 15, 2023), at https://www.wsj.com/articles/creditors-cite-poll-to-question-judges-impartiality-in-fee-dispute-e480fa7c (referring to the 4E recusal motion) (last visited Dec. 22, 2023).

[112] In one survey unrelated to the direct question of whether Judge Jones's failure to disclose created an appearance of impropriety, reasonable people *did* question whether the judge hearing many of these post-Jones matters could do so impartially:

[start indent] Mark P. Jones, a public opinion survey analyst at Rice University, testified he provided 150 adults randomly selected across the Southern District of Texas with basic facts about the circumstances of the fee dispute without naming its parties, and then asked if a judge in the situation could be impartial.

Roughly 80% of respondents said it was unlikely a judge could be impartial in the fee matter, said Jones, who isn't related to the former judge. "They don't know [Judge Isgur] as a person. Just looking at the objective facts in the case, these objective observers say this appears to be a case where Judge Isgur would not be able to be impartial," said Jones. [end indent]

Akiko Matsuda, *Creditors Cite Poll to Question Judge's Impartiality in Fee Dispute,* WALL ST. J. (Dec. 15, 2023), at https://www.wsj.com/articles/creditors-cite-poll-to-question-judges-impartiality-in-fee-dispute-e480fa7c (referring to the 4E recusal motion) (last visited Dec. 22, 2023). The judge hearing that recusal motion did not find the survey to be persuasive. *See In re* 4E Brands Northamerica LLC, United States Bankruptcy Court, Southern District of Texas, Case No. 22-50009, Docket No. 573 (Dec. 18, 2023) ("Mr. Jones provided testimony concerning a survey he conducted (Exhibit 21[,] which was not offered or admitted into evidence) in which respondents were presented with a very abbreviated version of the facts of this case and asked if they believed Judge Isgur should be recused. This survey was, similar to Green's testimony, not evidence of anything. This Court is both the finder of fact and decider of law in this case, and the opinions of individuals in an anonymous survey who do not know all of the facts of this case or the legal standards to be applied in this proceeding does nothing to move this Court.") (footnote omitted). That survey was performed as part of a motion to recuse Judge Isgur based on his longstanding and close friendship with Judge Jones. The survey did not ask people to opine on whether the live-in relationship between Judge Jones and Ms. Freeman would cause Judge Jones's impartiality reasonably to be questioned.

Electronic copy available at: https://ssrn.com/abstract=4700214

Code of Conduct for United States Judges	judge's impartiality might reasonably be questioned, including but not limited to instances in which: (a) the judge has a personal bias or prejudice concerning a party ….	bias in favor of Ms. Freeman. Even if he didn't, it certainly appears that some other people believed that he had that personal bias.
Canon 3(C)(1)(c) of the Code of Conduct for United States Judges	(1) A judge *shall* disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which: (c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse[113] or minor child residing in the judge's household, has a financial interest[114] in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding….	And one could hazard a guess that live-in romantic partners, even those with entirely separate bank accounts, surely gain some financial benefit when one of them approves the employment or fees of the other one.[115]
Canon 3(C)(1)(d) of the Code of Conduct for United States Judges	(1) A judge *shall* disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which: (d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person is: … (ii) acting as a lawyer in the proceeding….	Ms. Freeman and her now-former law firm appeared in several of Judge Jones's cases, and she billed time on many of these cases, even if she didn't make any personal appearances to argue an issue pending before the court.[116]

[113] *See* n. 105, *supra* (live-in romantic partners are equivalent to spouses in terms of applying the Code of Conduct).

[114] Emphasis added; *see* n. 103, *supra* (discussing the definition of "financial interest" in Canon 3).

[115] Especially if the two share an undivided interest in residential real property with any material value.

[116]

> Freeman billed more than $1 million in bankruptcy cases over which Jones presided while she worked at Texas firm Jackson Walker, the Journal found through a review of court records. She left Jackson Walker in December 2022 to start her own law firm, the Law Office of Liz Freeman. With her own law firm, Freeman has won assignments to do bankruptcy work on behalf of clients in a number of chapter 11 cases, including cases involving Alex Jones's media platform Infowars and prison healthcare provider YesCare.
>
> On Thursday, government lawyers from the Justice Department U.S. Trustee's office filed legal motions in at least three bankruptcy cases that Jones oversaw seeking to vacate his orders approving fees to Jackson Walker, stating that "all orders awarding fees and expenses are tainted."

Alexander Gladstone, *Trustee Assignment Went to Bankruptcy Lawyer Who Lived With Mediating Judge,* WALL ST. J. (Nov. 3, 2023) at https://www.wsj.com/articles/trustee-assignment-went-to-bankruptcy-lawyer-who-lived-with-mediating-judge-f495b362 (last visited Dec. 26, 2023).

Deleted: 105101

Deleted: 10399

Electronic copy available at: https://ssrn.com/abstract=4700214

Canon 2(A) of the Code of Conduct for United States Judges	A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.	The failure to disclose the relationship, let alone the failure to recuse on the grounds of the relationship, has created a national scandal that does the exact opposite of promoting public confidence in the integrity and the impartiality of Judge Jones, at least.
Canon 2(B) of the Code of Conduct for United States Judges	Outside Influence. *A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment.* A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge....	Even a live-in roommate who was not romantically involved with a judge would have trigged the "financial" part of Canon 2(B), if that roommate was paying some of the household expenses; surely a romantic partner would trigger this same Canon.
Commentary to Canon 2(A)	An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's	As a friend once said to me, "my judge friends don't even let me buy them coffee, so how is this relationship not a triggering event?"[117]

[117] Most judges take pains to behave well. One of the characteristics of judges that I've noticed is that they have a drive to "get things right." As one judge explained to me, judges have numerous ethics resources at their disposal, including "baby judges" school and a colleague designated to provide ethics advice. They can, and do, use those resources, which is why this particular judge who spoke to me was so dismayed by the scandal. That judge actually said: "This all makes me so sad, disappointed, shocked, angered, dismayed, and, again, sad. You may quote that if you want, anonymously. Many of my judge friends feel the same way — you may say that as well." Email from anonymous judge to author (Jan. 5, 2024) (on file with author).

Judges are also aware that their behavior will be scrutinized. And this quote, passed along to me by a friend, captures *why* judges (like any other public figures) should be so cautious about their reputations:

> I mentioned a club in London at the Boar's Head in East-cheap, the very tavern where Falstaff and his joyous companions met;' and the members of it all assume Shakespeare's characters. One is Falstaff, another Prince Henry, another Bardolph, and so on. Mr. Johnson said, "Don't be of it. Now that you have a name, you must be careful to avoid many things not bad in themselves, but which will lessen your character. This," said he, "every man who has a name must observe. A man who is not publicly known may live in London as he pleases without any notice being taken of him. But it is wonderful how a person of any consequence is watched. There was a Member of Parliament who wanted to prepare himself to speak on a question that was to come on in the House, and he and I were to talk it over together. He did not wish it should be known that he talked with me; so he would not let me come to his house, but came to me. Some time after he made his speech in the House, Mrs. Cholmondeley, a very airy lady, told me, 'Well, you could make nothing of him,' — naming the gentleman, which was a proof that he was watched. I had once some business to do for Government," and I went to Lord North's. It was dark before I went. Yet a few days after, I was told, 'Well, you have been with Lord North.' That the door of the Prime Minister should be watched is

Electronic copy available at: https://ssrn.com/abstract=4700214

	honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired.... A judge must avoid all impropriety and appearance of impropriety. This prohibition applies to both professional and personal conduct.... Because it is not practicable to list all prohibited acts, the prohibition is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code....	

Was there any sort of "out" for Judge Jones? Could he have disclosed his relationship with Ms. Freeman and provided the parties with the opportunity to object his continuing to preside over these cases, notwithstanding that relationship? No. Canon 3(D) provides:

> (D) *Remittal of disqualification.* Instead of withdrawing from the proceeding, a judge disqualified by Canon 3(C)(1) may, *except in the circumstances specifically set out in subsections (a) through (e),* disclose on the record the basis of disqualification. The judge may participate in the proceeding if, after that disclosure, the parties and their lawyers have an opportunity to confer outside the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate. The agreement should be incorporated in the record of the proceeding.[118]

The Jones-Freeman situation required Jones's disqualification under Canon 3(C)(1)(a), Canon 3(C)(1)(c), and Canon 3(C)(1)(d).[119] So remittal (disclosure plus consent) was not an option. The comment to Canon 3(C) clearly indicates that a person with whom the judge maintains both a household and an intimate relationship is considered to be a spouse. Common sense says so, too. Judge Jones should have removed himself from all cases in which Ms. Freeman had any involvement.

- Are there any Bankruptcy Rules that shed light on whether Judge Jones should have recused himself?

> not so wonderful; but that a Member of Parliament should be watched, or my door should be watched, is wonderful."

JAMES BOSWELL, THE JOURNAL OF A TOUR TO THE HEBRIDES WITH SAMUEL JOHNSON (1785), LL.D., at https://archive.org/stream/in.ernet.dli.2015.179653/2015.179653.Journal-Of-A-Tour-To-The-Hebrides_djvu.txt (last visited Jan. 5, 2024) (footnotes omitted).

118 Code of Conduct for United States Judges, Canon 3, https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#:~:text=Recusal%20considerations%20applicable%20to%20a,3C(1)(c) (last visited Dec. 18, 2023) (emphasis added).

119 Of course, there's no real remedy if a judge violates these Canons, unless a court incorporates the Canons into its analysis. *See, e.g.,* Melissa B. Jacoby, *Other Judges' Cases, supra* n. 106, at 77.

Deleted: 106102

Electronic copy available at: https://ssrn.com/abstract=4700214

In addition to 28 U.S.C. § 455, there are two Bankruptcy Rules that matter here as well. Bankruptcy Rule 5004 provides:

> (a) DISQUALIFICATION OF JUDGE. A bankruptcy judge shall be governed by 28 U.S.C. §455, and disqualified from presiding over the proceeding or contested matter in which the disqualifying circumstances arises or, if appropriate, shall be disqualified from presiding over the case.
> (b) DISQUALIFICATION OF JUDGE FROM ALLOWING COMPENSATION. A bankruptcy judge shall be disqualified from allowing compensation to a person who is a relative of the bankruptcy judge or with whom the judge is so connected as to render it improper for the judge to authorize such compensation.[120]

In other words, there's no escaping 28 U.S.C. § 455 in bankruptcy cases. Bankruptcy Rule 5004 partners up nicely with Bankruptcy Rule 5002, which also implicates connections with the court.[121]

Rule 5002(a) says, in part, that "[t]he employment of an individual as an attorney, accountant, appraiser, auctioneer, or other professional person pursuant to §§ 327, 1103, or 1114 shall not be approved by the court if the individual is a relative of the bankruptcy judge approving the employment."[122] Technically,[123] a "live-in" co-home-owner isn't a relative, though there's still that Commentary to Canon 3C of the Code of Conduct for United State Judges that says that

---

120 Fed. R. Bankr. P. 5004 (footnote omitted).

121 My friend Walter Effross suggests another, more self-protective reason for disclosing connections in general, and a judge-lawyer romantic relationship in particular: keeping a covert relationship covert increases the risk that someone "in the know" could extort the person trying to keep the relationship secret. *See* Walter Effross, comments on an earlier draft (on file with author). Walter also pointed out that other statutes and model codes are even broader in terms of determining "relatedness" than is the Code of Conduct for United States Judges. As he explained to me, Section 8.60 of the Model Business Corporation Act includes, in its definition of "[r]elated person" "(iii) a natural person living in the same home as the individual." Model Business Corporation Act § 8.60 (updated through April 28, 2023), at https://www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/mbca-202304.pdf (last visited Dec. 28, 2023). He's right that this definition is both "overbroad (because they could be, say, just sharing rent) and underinclusive (since plenty of serious romantic partners don't (yet) live together))." *See* Walter Effross, comments on an earlier draft (on file with author). My point is that living together romantically is a serious step in a relationship and should trigger disclosure.

122 Fed. R. Bankr. P. 5002.

123 "Technically" is the ultimate weasel-word. As Colin Marks and I have said,

> [S]ome clients (and some lawyers) couldn't even locate the line between right and wrong with a map and a divining rod. For this last group (those who couldn't find the line if it were directly in front of them and labeled "LINE IS HERE"), we propose a bright-line test for legal advice: if the advice uses the word "technically" in order to be accurate, then that advice is far too close to the line for comfort. So, for example, if an opinion letter suggests that a transaction will comply with the relevant regulations only if the words are read out of context and counter to the purpose of the regulations, that opinion letter likely will have some variant of the word "technically" in it, and it is too close to the line.

Colin Marks & Nancy B. Rapoport, *Corporate Ethical Responsibility and the Lawyer's Role in a Contemporary Democracy,* 77 FORDHAM L. REV. 1269, 1290-91 (2009) (footnote omitted). That point about "technically" works equally well in the context of a judge who is living with someone but decides not to disclose that relationship because "technically" the judge isn't married to the romantic partner.

Electronic copy available at: https://ssrn.com/abstract=4700214

marriage wasn't technically necessary to trigger the issue.[124] And Rule 5002(b) is clear about the standard that prevents a judge from approving an employment application of someone closely connected with that judge:

> JUDICIAL DETERMINATION THAT APPROVAL OF APPOINTMENT OR EMPLOYMENT IS IMPROPER. A bankruptcy judge may not approve the appointment of a person as a trustee or examiner pursuant to §1104 of the Code or approve the employment of a person as an attorney, accountant, appraiser, auctioneer, or other professional person pursuant to §§327, 1103, or 1114 of the Code *if that person is or has been so connected with such judge or the United States trustee as to render the appointment or employment improper.*[125]

Moreover, the Notes of the Advisory Committee on Rules (1985 Amendment) mention the need for disclosure *to* the judge about connections that the court should consider before approving the appointment of a professional. Those Notes provide in part:

> The policy underlying subdivision (b) is essentially the same as the policy embodied in the Code of Judicial Conduct. Canon 2 of the Code of Judicial Conduct instructs a judge to avoid impropriety and the appearance of impropriety, and Canon 3(b)(4) provides that the judge "should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism." *Subdivision (b) alerts the potential appointee or employee and party seeking approval of employment to consider the possible relevance or impact of subdivision (b) and indicates to them that appropriate disclosure must be made to the bankruptcy court before accepting appointment or employment*. The information required may be made a part of the application for approval of employment. See Rule 2014(a).[126]

I'll go ahead and say it: a romantic partner living with a judge[127] is exactly the kind of connection that should prevent that judge from approving the romantic partner's employment, awarding fees, or otherwise benefitting that romantic partner's livelihood.[128] Would any reasonable person believe that intimate partners are not "connected"?

---

[124] *See* n. 28, *supra,* at 4.

[125] Fed. R. Bankr. P. 5002 (emphasis added).

[126] Fed. R. Bankr. P. 5002 (Notes of Advisory Committee) at https://www.law.cornell.edu/rules/frbp/rule_5002 (last visited Dec. 29, 2023) (emphasis added).

[127] And apparently they were living together for quite a while. *See, e.g.,* Alexander Gladstone, *Houston Bankruptcy Judge Jones Resigns Under Misconduct Investigation,* WALL ST. J. (Oct. 15, 2023) at https://www.wsj.com/articles/houston-bankruptcy-judge-jones-resigns-under-misconduct-investigation-7784fe8c (last visited Dec. 13, 2023) ("Property records reviewed by the Journal show that the couple began living at the same address in the Houston area in 2017. A survivorship agreement attached to the deed of the house lists both Jones and Freeman as owners and states that the two own the property jointly. Jones previously declined to comment to the Journal on the fees billed by Freeman that he approved and the property records for his house.").

[128] The connection with Judge Jones appears to have helped Ms. Freeman's career. *Cf.* Dan Roe, *Jackson Walker May Have Violated Ethics Rules by Not Disclosing Partner's Relationship With Judge, Law.com* (Oct. 13, 2023) at https://www.law.com/americanlawyer/2023/10/13/Jackson-walker-may-have-vlolated-ethics-rules-by-not-disclosing-

Electronic copy available at: https://ssrn.com/abstract=4700214

After all, a judge's extremely close friends may also be close enough as to trigger recusal. I'm not talking about "go out to brunch occasionally" friends, or "let's sit together at this Bar dinner" friends. I'm talking about friends who are so close to each other that they create semi-familial relationships. For example, in a judicial advisory opinion, the Committee on Codes of Conduct explained,

> A godfather is not a "relative" within the meaning of Canon 3C(1)(d) and is not otherwise covered by any of the enumerated circumstances requiring recusal. Recusal may nonetheless be required if the circumstances are such that the judge's impartiality could reasonably be questioned. No such question would be raised if the relationship were simply one of historical significance, the godfather being merely within the wide circle of the judge's friends, and the obligation having been perfunctorily assumed. *By contrast, if the godfather is a close friend whose relationship is like that of a close relative, then the judge's impartiality might reasonably be questioned.* Ultimately, the question is one that only the judge may answer.[129]

If a godfather relationship can sometimes trigger recusal, what about a long-term romantic relationship? A long-term romantic relationship, whether sanctioned by marriage or not, is, after all, exactly the kind of connection that—in the world of legal (not judicial) ethics—creates a conflict of interest for a lawyer whose love interest appears as opposing counsel. ABA Formal Op. 494 explicitly states "[l]awyers who cohabit in an intimate relationship should be treated similarly to married couples for conflicts purposes."[130] If lawyers can have a Model Rule[131] 1.7 conflict because of a live-in relationship, then surely a long-term romantic judge-lawyer relationship should be treated with the same kind of heightened scrutiny. Judge Jones's comments to the *Wall Street Journal* focused on the fact that he was not "technically" married to his romantic partner.[132] That bespeaks a cognitive error large enough to have rocked the entire Southern District of Texas, if not the entire federal judiciary.[133]

---

partners-relationship-with-Judgenkw=Jackson%20Walker%20May%20Have%20Violated%20Ethics%20Rules%20by%20Not%20Disclosing%20Partner%27s%20Relationship%20Wrth%20Judge&utm_position=5&utnLsource (last visited Dec. 14, 2023) ("Freeman clerked for Jones for six years before joining Jackson Walker, according to Van Deelen's complaint. After her clerkship, Freeman rose to partner at the firm and helped chart its rise to becoming the go-to local counsel, co-counsel and special counsel to Am Law 100 bankruptcy giants such as Kirkland & Ellis, which sought local expertise and the avoidance of conflicts in the nation's top bankruptcy court for corporate restructuring."). But even if Judge Jones and Liz Freeman had completely separate bank accounts, and even if Judge Jones paid for 100% of the couple's expenses, they shared a homestead exemption on their home. Their finances weren't entirely separate. Even if they were mere business partners sharing an investment in a home, rather than romantic partners, that connection is significant.

129 Committee on Codes of Conduct Advisory Opinion No. 11: Disqualification Where Long-Time Friend or Friend's Law Firm Is Counsel, Guide to Judiciary Policy, Ch. 2: Published Advisory Opinions (June 2009) (emphasis added).

130 ABA Formal Op. 494 at 5 (July 29, 2020).

131 Actually, a lawyer would never have a "Model Rule violation." A lawyer could violate his or her state ethics rules that might be modeled after the Model Rules of Professional Conduct.

132 *See* n. 24, *supra.*

133 *See* n. 98, *supra.*

Deleted: 9894

Electronic copy available at: https://ssrn.com/abstract=4700214

Where should we draw the line for recusal when it comes to romance? For the non-marital relationships that aren't part of a documented (i.e., filed somewhere) domestic partnership, there will always be a classic line-drawing problem, if we allow any fuzziness in the standard. A flat rule that says "judges and lawyers with cases in the judge's court shouldn't date—ever" is the easiest rule to enforce.[134] As a leading treatise has explained,

> Of particular concern is the dilemma introduced when a judge has a social relationship with a party or witness in a proceeding. On one hand, a judge should not be discouraged from having social or other extrajudicial relationships; in fact, they can enhance a judge's effectiveness. Moreover, in smaller communities, judges cannot avoid being familiar with a substantial percentage of the lawyers and the parties who appear before them; to require that those judges disqualify themselves from every case in which an acquaintance appears in their court would impose an unreasonable burden on the justice systems of those communities.
>
> On the other hand, the obvious problem of the appearance of bias and favoritism exists when a friend or associate appears before the judge; these social relationships should not diminish the dignity of the judiciary or interfere with judicial responsibilities. Although the mere opportunity for exposure to extrajudicial influence via relationships does not require recusal, a judge, or his or her relatives, should not accept gifts or favors from individuals who are likely to appear in the judge's court as a party.[135]

Where the rubber hits the road is the difference between purely social and in-public relationships and more private intimate ones. The ABA has stated that, when it interpreted Rule 2.11 of the Model Code of Judicial Conduct (which is different from the Code of Conduct for United States Judges), that "[a] judge must disqualify himself or herself when the judge has a romantic relationship with a lawyer or party in the proceeding, or desires or is pursuing such a relationship."[136] After all, there is an inherent power imbalance between a judge and a lawyer appearing in her court. Lunches and publicly held bar events aren't a problem, but the fuzziness (and thus the risk) increases as soon as a social relationship between a judge and a lawyer appearing before her slips away from the public eye.

Even in a lawyer-lawyer relationship, the line-drawing gets tricky.[137] A single date wouldn't be enough to create such a relationship. Nor would two dates. Nor would three dates, necessarily,

[134] *Cf.* n. 209, *infra.*

[135] JAMES J. ALFINI, STEVEN LUBET, JEFFREY SHAMAN, AND CHARLES GARDNER GEYH, JUDICIAL CONDUCT AND ETHICS § 4.07, available at https://plus.lexis.com/api/permalink/9adef50c-b992-4ea8-b0d8-4c91753cac00/?context=1530671 (last visited Jan. 17, 2024) (footnotes omitted).

[136] ABA Formal Op. 488 (Judges' Social or Close Personal Relationships with Lawyers or Parties as Grounds for Disqualification or Disclosure) (Sept. 5, 2019) at 6.

[137] *See* ABA Formal Op. 494 (Conflicts Arising Out of a Lawyer's Personal Relationship with Opposing Counsel) (July 29, 2020) at 7 ("Close friendships with opposing counsel should be disclosed to each affected client and, when circumstances require as described further below, their informed consent obtained."); *id.* ("If there is a significant risk

Deleted: 209205

Electronic copy available at: https://ssrn.com/abstract=4700214

even with the classic "three date" rule lurking in the background.[138] We don't need to know about one-night stands or mild flirtations. But I do think that there's something to be said for a "toothbrush rule": if a person is romantically involved enough to leave a toothbrush at the romantic partner's dwelling, it's probably time for both parties to disclose the relationship. And that toothbrush rule is just for lawyer/lawyer relationships, not for judge/lawyer relationships.

What of a judge's colleagues who know about the romantic relationship? Canon 3(D) provides that "[a] judge should take appropriate action upon receipt of reliable information indicating the likelihood that a judge's conduct contravened this Code...." If a colleague judge actually knew about the relationship and about Judge Jones's failure to recuse, that colleague judge would have contravened this Canon.[139] To be clear, I have no idea if any of the other judges had actual knowledge of the relationship. It's possible that Judge Jones kept this information from his best friend. Inklings and spidey-senses aren't the same as knowing. Only discovery could tell us more, though large swaths of discovery attempts have been blocked.[140]

If you're keeping score, then so far, the answers about disclosure are (1) 28 U.S.C. § 455(a) mandated recusal; (2) Rule 5002 should have kept Judge Jones from approving Ms. Freeman's employment because Ms. Freeman *"is or has been so connected with such judge or the United States trustee as to render the appointment or employment improper,"*[141] (3) Rule 5004(a) would have disqualified Judge Jones, and (4) Rule 5004(b) would have prevented Judge Jones from approving Ms. Freeman's fees.[142] As to Jackson Walker's fees more generally, I'll discuss those when I discuss Texas's ethics rules.[143]

Section 455, Canons 2 and 3, Rule 5002, and Rule 5004 might not have prevented Judge Jones from providing other benefits to Ms. Freeman, such as signing the order that appointed her to

Deleted: appointing

---

that the representation of one or more clients will be materially limited by a lawyer's relationships, the lawyers must disclose the relationship to each affected client and obtain that client's informed consent, confirmed in writing, assuming the lawyers reasonably believe they will be able to provide competent and diligent representation to each affected client."); id. at 5 ("Lawyers who cohabit in an intimate relationship should be treated similarly to married couples for conflicts purposes. The same is true for couples who are engaged to be married or in exclusive intimate relationships. These lawyers must disclose the relationship to their respective clients and ordinarily may not represent the clients in the matter, unless each client gives informed consent confirmed in writing, assuming the lawyers reasonably believe that they will be able to provide competent and diligent representation to each client") (footnote omitted).

[138] *Cf.* Kelsey Borresen, *The Truth About the 'Three-Date' Rule,* HUFFINGTON POST (Nov. 22, 2022) at https://www.huffpost.com/entry/three-date-rule-when-sex-dating_l_637d0fdbe4b0e771d9591657 (last visited Dec. 20, 2023).

[139] But I doubt that the relationship was an open secret across a large swath of judges. As Charles Geyh has explained, "[i]t is probably safe to assume that judges desire the respect of their colleagues to an extent no less than anyone else." Charles Gardner Geyh, *Informal Methods of Judicial Discipline,* 142 U. PA. L. REV. 243, 304 (1993). Had other judges known, I would have expected them to exert peer pressure on Judge Jones to disclose. *Cf. id.* at 304.

[140] *See, e.g.,* nn. 57 & 99, *supra.* My frustration with how the rulings on discovery are going is that it is starting to feel that every road to learning more has procedural roadblocks. A friend suggested a particularly apt quote to me: "'There's an old maxim in the Anglican church. You can get away with unorthodox behaviour. Or you can get away with unorthodox doctrine. But you can't get away with both of them at the same time.'" C.P. SNOW, CORRIDORS OF POWER [Editors: still trying to find the page number—sorry] (1964). This whole narrowing down of discovery options strikes me as getting away with both at the same time, though I know that the non-Jones judges who are hearing these motions are trying to do their level best.

Deleted: 9995

[141] Fed. R. Bankr. P. 5002(b).

[142] Fed. R. Bankr. P. 5004 (footnote omitted).

[143] *See* nn. 167-171, *infra*, and accompanying text.

Deleted: 167163

Deleted: 171167

Electronic copy available at: https://ssrn.com/abstract=4700214

serve on the Southern District of Texas's Complex Case Committee,[144] but they would have prevented the scandal of Judge Jones lining the pockets of his inamorata. We have those statutes and rules for good reasons. We must prevent a judge from directly benefitting his romantic partner in order to maintain public trust in the integrity of the judicial system. So Judge Jones made a massive mistake by not disclosing his relationship with Ms. Freeman and removing himself from temptation. But are Jackson Walker and Ms. Freeman entirely off the hook?

- What do the Bankruptcy Code and Rules say about a professional's connections and disclosure of those connections to the court?

Let's start with the rules for those seeking employment as estate-paid professionals. In order for a bankruptcy court to approve an application for employment under 11 U.S.C. § 327(a), the applicant must demonstrate that he, she, or it (in the case of a firm) does "not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title."[145] Tied to that requirement is the requirement that the applicant must file a disclosure pursuant to Bankruptcy Rule 2014. Rule 2014(a) says, in part, that:

> The application [for employment under § 327, § 1103, or § 1114 of the Code] shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, *to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest,*[146] *their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.* The application shall be accompanied by a verified statement of the person to be employed setting forth 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.[147]

144 Liz Freeman was appointed to the Complex Case Committee "to (i) review and recommend changes to the Procedures for Complex Cases; and (ii) provide feedback to the Court on the operation of the Complex Case docket." Matter of Complex Case Administration, GENERAL ORDER 2021-6 (July 1, 2021) at 2. Judge Jones appointed her to that committee.

145 11 U.S.C. § 327(a). Pursuant to 11 U.S.C. § 1103(a), an official committee "may select and authorize the employment by such committee of one or more attorneys, accountants, or other agents, to represent or perform services for such committee." Section 1103(b) provides that "[a]n attorney or accountant employed to represent a committee appointed under section 1102 of this title may not, while employed by such committee, represent any other entity having an adverse interest in connection with the case. Representation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an adverse interest."

146 Life would be so much easier if one could interpret "party in interest" to include court personnel. But it doesn't. Even 11 U.S.C. § 1109(b), which states that "[a] party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter," focuses on who "may appear and be heard." Judges are on the other side of that podium.

147 Fed. R. Bankr. P. 2014 (emphasis added).

Electronic copy available at: https://ssrn.com/abstract=4700214

"All connections" is a broad term, and I won't rehash the caselaw here.[148] Rule 2014 also subsumes a continuing duty to update connections as they come to light.[149] But look at what's missing from Rule 2014: an explicit requirement to disclose any connections with the judge or other court personnel. Though Rule 2014 does not explicitly require such disclosure, many professionals do disclose such connections in their employment applications as a "best practice,"[150] in order to assist the court in meeting its own disqualification obligations and to inform the other parties in case they want to decide whether to raise that issue.[151] Disclosure about connections to the judge or other court personnel is important to ensure that the appointment of a professional to a case and the approval of any fees awarded to that professional satisfies the Bankruptcy Code and Rules. As I've discussed above, the 1985 Advisory Committee Notes to Rule 5002 at least suggest that disclosures about connections to judges could be in the penumbra of Rule 2014.[152]

That fuzziness about whether Rule 2014 required disclosure of connections to the judge is part of what made Jackson Walker's recent "preliminary response" to the United States Trustee's actions so intriguing. In several cases, including *In re:* J.C. Penney Direct Marketing Services, LLC,[153] the firm stated, in part:

> ... Jackson Walker's management first learned in March of 2021 that a *pro se* litigant had *alleged* a romantic relationship between Ms. Freeman and Judge Jones. The Firm immediately asked Ms. Freeman to confirm or deny the allegation. She denied the charge of a current romantic relationship but admitted to a past relationship which had ended. Nevertheless, the Firm retained and consulted with a prominent ethics expert regarding the matter and set up certain safeguards regarding Ms. Freeman's future involvement in Judge Jones' cases. As part of the ethics expert's review, the Firm's General Counsel prepared a statement of relevant facts and presented a draft

[148] For an overview of the caselaw, see, e.g., James L. Buchwalter, Construction and Application of Requirement of Federal Rules of Bankruptcy Procedure, Rule 2014, That Professional Disclose "All Connections" with Debtor and Other Parties in Interest, 11 A.L.R. Fed. 3d Art. 2 (originally published in 2016); *see also* William L. Norton III, 172:14 *Disclosure is mandatory*, NORTON BANKR. L. & PRACTICE 3d (Oct. 2023 update).

[149] *See generally § 16:87. Ongoing nature of duty to disclose,* 2A BANKR. SERVICE L. ED. § 16:87; *§ 52:260. Ongoing duty to disclose*, 6 BANKR. SERVICE L. ED. § 52:260 (October 2023 update).

[150] *See, e.g.,* Tom Hals, *Law firm tied to bankruptcy judge resignation did not make conflict disclosures -data analysis,* REUTERS (Oct. 30, 2023) at https://www.reuters.com/legal/law-firm-tied-bankruptcy-judge-resignation-did-not-make-conflict-disclosures-2023-10-30/ (last visited Dec. 19, 2023) ("Law firms and other professionals employed by debtors are required under a bankruptcy rule to publicly list potential connections so that judges and other parties in the bankruptcy can assess if there might conflicts of interest. The rule does not mention judges specifically; it refers to debtors, creditors and 'parties in interest.' But disclosing connections to judges appears to be a standard practice. In the court filings Reuters reviewed, the larger national law firms that worked for the debtor alongside Jackson Walker always indicated that they had searched for connections to the judges on the bankruptcy court.").

[151] *But see* n. 175, *infra* (it's dangerous to shoot at the king and miss).

[152] *See* n. 126, *supra.*

[153] *In re:* J.C. Penney Direct Marketing Services, LLC, Case No. 20-20184, United States Bankruptcy Court, Southern District of Texas, Docket No. 1244 (Nov. 13, 2023). Scott Bovitz believes that the fee applications would be better addressed (for a second time) by a different judge under Federal Rule of Civil Procedure 60(b), though with the likely result that creditors would see very little benefit if the fees are returned to the estate. *See* notes by J. Scott Bovitz on an earlier draft of this article (on file with author).

Deleted: 175171

Deleted: 126122

Electronic copy available at: https://ssrn.com/abstract=4700214

> to Ms. Freeman who, after reviewing it, stated in writing that she had no issues with its accuracy. The factual summary that was confirmed by Ms. Freeman stated, among other things as described below, that there was no ongoing intimate relationship with Judge Jones. As a result, Jackson Walker did not know of any ongoing intimate relationship between Ms. Freeman and Judge Jones until 2022 when it learned, quite by accident, that Ms. Freeman's denial was possibly false or at least no longer true. When confronted again she initially denied the relationship but later on admitted to a current romantic relationship. Jackson Walker then commenced discussions with Ms. Freeman and her counsel that ultimately resulted in her separation from the Firm.[154]

The pleading went on to attach a letter that the law firm's general counsel drafted to send to its outside ethics counsel[155] to request legal advice.[156] I haven't yet seen the ethics counsel's response to Jackson Walker's letter, but I'd be interested in any analysis of Jackson Walker's duty to disclose the allegedly newly discovered connections.

Let's break down my reaction to Jackson Walker's filing:

JACKSON WALKER'S FILING	MY REACTION
... Jackson Walker's management first learned in March of 2021 that a *pro se* litigant had *alleged* a romantic relationship between Ms. Freeman and Judge Jones. The Firm immediately asked Ms. Freeman to confirm or deny the allegation. She denied the charge of a current romantic relationship but admitted to a past relationship which had ended.	*If* Bankruptcy Rule 2014 had required the disclosure of connections with the court, *then* at the point of an admission of a past relationship, both the firm and Ms. Freeman would have had a duty to update the prior Rule 2014 disclosures, because Rule 2014's duty to disclose connections is a continuing duty.[157]
Nevertheless, the Firm retained and consulted with a prominent ethics expert regarding the matter and set up certain safeguards regarding Ms. Freeman's future involvement in Judge Jones' cases. As part of the ethics expert's review, the Firm's General Counsel prepared a statement of relevant facts and presented a draft to Ms.	Did the ethics expert know enough bankruptcy law to account for the continuing duty to disclose and to parse the issues concerning the missing language of Bankruptcy Rule 2014,

[154] *Id.* at 1-2 (emphasis in original).
[155] Thus waiving privilege, at least for the letter itself and presumably for the outside ethics counsel's response to the letter.
[156] *In re:* J.C. Penney Direct Marketing Services, LLC, Case No. 20-20184, United States Bankruptcy Court, Southern District of Texas, Docket No. 1244-1 (Nov. 13, 2023).
[157] The 1985 Advisory Committee Notes at least hint at such a reading of Rule 2014. *See* n. 126, *supra,* and accompanying text.

Deleted: 126122

Electronic copy available at: https://ssrn.com/abstract=4700214

Freeman who, after reviewing it, stated in writing that she had no issues with its accuracy.	especially taken in conjunction with Texas Disciplinary Rules of Professional Conduct 3.03 and 8.04?[158] And why didn't either Jackson Walker or the ethics expert make more of the fact that Judge Jones and Ms. Freeman jointly owned a home?
The factual summary that was confirmed by Ms. Freeman stated, among other things as described below, that there was no ongoing intimate relationship with Judge Jones. As a result, Jackson Walker did not know of any ongoing intimate relationship between Ms. Freeman and Judge Jones until 2022 when it learned, quite by accident, that Ms. Freeman's denial was possibly false or at least no longer true.[159]	No matter what the firm did or didn't know before 2022, the firm admitted knowledge as of 2022 and thus, *if* Rule 2014 had "connections to the court" as part of its laundry list of connections, the firm would have had a continuing duty to disclose the relationship at the time it "learned, quite by accident" about it; moreover, there are also two Texas ethics rules (3.03 and 8.04) to consider.

[158] I'll be discussing those two rules later in this article.

[159] Keep in mind that this entire pleading is effectively throwing Ms. Freeman under the bus. (And at least one of my friends would describe the pleading not just as throwing her under the bus but also backing the bus up and then running her over again. But that friend won't let me attribute this much-better phrasing to him.) *Cf.* Alexander Gladstone & Akiko Matsuda, *Texas Law Firm Sys Former Partner Lied About Relationship With Judge,* WSJ.COM (Nov. 13, 2023) at https://www.wsj.com/articles/texas-law-firm-says-former-partner-lied-about-relationship-with-judge-9a62a69f (last visited on Dec. 20, 2023) ("'They're throwing her under the bus,' said Nancy Rapoport, a law professor at the William S. Boyd School of Law at the University of Nevada, Las Vegas, who specializes in bankruptcy ethics, adding she thinks Jackson Walker still has more questions to answer. 'Didn't they know from any independent means that she might be lying?'"). My friend Scott Bovitz disagrees, asking instead, "What is a large law firm to do? Hire a private investigator? Put trackers on attorney vehicles? Prohibit flirtation?" *See* comments by J. Scott Bovitz on an earlier draft (on file with author). Law firm aren't required, of course, to monitor the dating lives of their employees, but they should investigate if and when a potential significant ethics issue bubbles up. *See* ABA MODEL RULE OF PRO. CONDUCT R. 5.1 (governing the managerial and supervisory responsibility of lawyers toward other lawyers in their firm), at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_1_responsibilities_of_a_partner_or_supervisory_lawyer/ (last visited Dec. 26, 2023); *id.* at R. 5.3 (governing the managerial and supervisory responsibility of lawyers toward non-lawyers in their firm), at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_3_responsibilities_regarding_nonlawyer_assistant/ (last visited Dec. 26, 2023). And if dating inside one's own organization is often a bad idea (though the rules against it are honored in the breach more than they are, well, honored), *cf.* Walter Effross, *Directors Dating Directors: Don't. (Ten Reasons),* GOVERNANCE DRAFTING BLOG (Apr. 13, 2021), at https://governancedrafting.com/directors-dating-directors-dont-ten-reasons/ (last visited Dec. 27, 2023), a romantic relationship with a massive power imbalance—one in which one of the parties gets to decide the employment (and award the fees) of the other—is a supremely bad idea. For thoughts on where to draw the line between casual flirting and a significant long-term relationship, *see* text accompanying n. 138, *supra.*

Deleted: 138134

Electronic copy available at: https://ssrn.com/abstract=4700214

When confronted again she initially denied the relationship but later on admitted to a current romantic relationship.	Just as the phrase "now we're just haggling about the price"[160] goes, now we're just haggling about the timing.
Jackson Walker then commenced discussions with Ms. Freeman and her counsel that ultimately resulted in her separation from the Firm.	Even after the separation from the firm, both Ms. Freeman and Jackson Walker still may have had duties to disclose the connection for any "live" cases, based on the state ethics rules that I'll discuss below.

Let's assume, for the sake of argument, that Bankruptcy Rule 2014 can't be interpreted to require the disclosure of connections to judges.[161] There are still state ethics rules, such as rules relating to candor to the tribunal[162] and to dishonest conduct,[163] that might apply in this situation. And that's where I think Jackson Walker and Ms. Freeman tripped up.

- The lawyers and the ethics rules.

Attorneys who practice in the Southern District of Texas "are required to act as mature and responsible professionals, and the minimum standard of practice shall be the Texas Disciplinary

---

[160] For a discussion of the origins of this phrase, see, e.g., *Now We're Just Haggling Over the Price,* QUOTE INVESTIGATOR (Mar. 7, 2012) at https://quoteinvestigator.com/2012/03/07/haggling/ (last visited Dec. 20, 2023).

[161] Just for fun, I asked ChatGPT4 whether Rule 2014 required the disclosure of connections to judges. Here is the response:

> Bankruptcy Rule 2014 generally pertains to the employment of attorneys, accountants, appraisers, auctioneers, and other professional persons in bankruptcy cases. This rule mandates that a professional seeking approval for employment in a bankruptcy case must provide a statement of their 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.
>
> The main focus of Rule 2014 is to ensure transparency regarding any potential conflicts of interest that may arise due to the professional's relationships with parties involved in the bankruptcy case. While the rule specifically requires disclosure of connections with the parties mentioned, it does not explicitly mention a requirement for disclosure of connections to the judge presiding over the case.
>
> However, in practice, any significant connection to the judge or any appearance of a conflict of interest should also be disclosed, as this is consistent with the broader ethical obligations and principles of transparency and fairness in the judicial process. This kind of disclosure helps to maintain the integrity of the bankruptcy proceedings and ensures that all parties are treated fairly and impartially.

ChatGPT4, Dec. 23, 2023 (on file with author). I eventually came to the same conclusion, but it took me more than two seconds to do so.

[162] *See* nn. 173-180, *infra,* and accompanying text.

[163] *See* n. 181, *infra,* and accompanying text. And if Texas-admitted lawyers knew and didn't report the relationship, Rule 8.03 might have come into play. *See* n. 195, *infra,* and accompanying text.

Deleted: 173169

Deleted: 180176

Deleted: 181177

Deleted: 195191

Electronic copy available at: https://ssrn.com/abstract=4700214

Rules of Professional Conduct (TDRPC)."[164] Ms. Freeman (a Texas-admitted lawyer)[165] and many of the Jackson Walker lawyers in the firm's Bankruptcy, Restructuring & Recovery practice area[166] are bound by these rules. There are four such rules for us to examine in light of the Jones/Freeman/Jackson Walker story,[167] and the first rule involves whether or not Ms. Freeman's relationship with Judge Jones should be imputed to the entire firm, or whether the firm could have screened off Ms. Freeman from any of Judge Jones's cases, thus enabling itself legitimately to serve as an estate-paid professional in Judge Jones's cases. Short answer? Under the Texas ethics rules, even personal interest conflicts are imputed to the entire firm.[168]

---

164 *See* Notice of Proposed Amendments to Local Rules of Procedure, Appendix A: Rules of Discipline, United States District Court, Southern District of Texas 1A (Nov. 1, 2006), at https://www.txs.uscourts.gov/sites/txs/files/attydiscipline.pdf (last visited Dec. 21, 2023), as amended in 2023 https://www.txs.uscourts.gov/sites/txs/files/Rules_of_Discipline_REDLINE_FINAL.pdf. [Note to editors: I'll need your help with this citation—there's a variety of versions out there. Thanks!] That Appendix says, in part, that:
[indent quote] Rule 1. Standards of Conduct.
A. Lawyers who practice before this court are required to act as mature and responsible professionals, and the minimum standard of practice shall be the Texas Disciplinary Rules of Professional Conduct.
B. Violation of the Texas Disciplinary Rules of Professional Conduct shall be grounds for disciplinary action, but the court is not limited by that code. [end indent quote]
Id.

165 *See* https://www.texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&template=/Customsource/MemberDirectory/MemberDirectoryDetail.cfm&ContactID=200314 (last visited Dec. 21, 2023). So, of course, is Judge Jones. *See* https://www.texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&template=/Customsource/MemberDirectory/MemberDirectoryDetail.cfm&ContactID=150096 (last visited Dec. 21, 2023). Not only is Ms. Freeman a member of the Texas Bar, but she's a board-certified member of the Texas Bar. See https://www.tbls.org/profile/24009222 (last visited Dec. 26, 2023). She could lose that privilege, depending on any State Bar discipline that may come out of this scandal.

166 https://www.jw.com/practice-areas/restructuring-reorganization-bankruptcy-litigation/ (last visited Dec. 21, 2023).

167 Again, I'm leaving for another time and place an exploration of who else outside this circle—Judge Jones, Ms. Freeman, and Jackson Walker—knew about the relationship.

168

> Although there is significant merit to the ABA's approach regarding imputation of "personal interest" conflicts, no such exception exists under the Texas Disciplinary Rules of Professional Conduct. Rule 1.06(f) provides:
>
> > "If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct."
>
> Rule 1.06(f) requires imputation of personal interest conflicts under Rule 1.06(b)(2). Consequently, if a lawyer would be prohibited from undertaking representation on a matter because the representation "reasonably appears to be or become adversely limited" by the lawyer's relationship with the lawyer's spouse, no other lawyer in the firm may undertake the representation without obtaining the client's informed consent under Rule 1.06(c). The Committee appreciates that the firm-wide imputation of spousal conflicts may in some cases lead to harsh results but those results are dictated by the current provisions of Rule 1.06(f).

Opinion No. 666, The Professional Ethics Committee of the State Bar of Texas (Dec. 2016).

Had Judge Jones and Ms. Freeman disclosed their live-in status openly before the scandal hit, *cf.* n. 127, *supra,* or had they chosen to get married, it's entirely possible that Judge Jones could still be on the bench, albeit without the ability to hear cases in which Ms. Freeman (or Jackson Walker, when Ms. Freeman was still at that firm) was appearing. He could still be hearing cases—including mega-cases. But what he could not be doing—and what he never should have been doing—is hearing those mega-cases involving his inamorata. *See* nn. 122-118, *supra,* and accompanying text.

Deleted: Error! Bookmark not defined.

Deleted: 122118

Deleted: 118114

Electronic copy available at: https://ssrn.com/abstract=4700214

When I started thinking about imputation in the Jones/Jackson Walker/Freeman context, my first instinct was to look at Texas's version of Model Rule 1.10, because I'm used to thinking about imputation in terms of Model Rule 1.10. Model Rule 1.10 provides:

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 [the rules involving concurrent conflicts of interest or conflicts between a current client's interests and a former client's interests], unless
>
> (1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm….[169]

In other words, if a lawyer has a conflict that is personal to her, that conflict doesn't necessarily taint the entire firm *if* that personal conflict won't cause the other lawyers in the firm to pull their punches. But the standard concept of personal-interest non-imputation, as described in Model Rule 1.10, goes nowhere in Texas. As Opinion No. 666 of the Professional Ethics Committee of the State Bar of Texas explained:

> Although there is significant merit to the ABA's approach regarding imputation of "personal interest" conflicts, no such exception exists under the Texas Disciplinary Rules of Professional Conduct. Rule 1.06(f) provides:
>
> "If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct."
>
> Rule 1.06(f) requires imputation of personal interest conflicts under Rule 1.06(b)(2). Consequently, if a lawyer would be prohibited from undertaking representation on a matter because the representation "reasonably appears to be or become adversely limited" by the lawyer's relationship with the lawyer's spouse, no other lawyer in the firm may undertake the representation without obtaining the client's informed consent under Rule 1.06(c). The Committee appreciates that the firm-wide imputation of spousal conflicts may in some cases lead to harsh results but those results are dictated by the current provisions of Rule 1.06(f).[170]

---

[169] MODEL R. PRO. CONDUCT 1.10, at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_10_imputation_of_conflicts_of_interest_general_rule/ (last visited Dec. 25, 2023).

[170] *See* Opinion No. 666, The Professional Ethics Committee of the State Bar of Texas (Dec. 2016) ("A Rule 1.06(b)(2) conflict of interest will usually exist when both spouses are personally involved in representing opposing parties in the same matter, or when either spouse, for whatever reason, has a material personal interest in the outcome of the matter."); *see also id.* ("If, under the circumstances, it reasonably appears that the lawyer's representation will not be

Electronic copy available at: https://ssrn.com/abstract=4700214

Rule 1.06(f) is conclusive. Judge Jones approved Ms. Freeman's fees (and Jackson Walker's fees).[171] Even if imputation wouldn't have infected the entire firm, the firm would have had to screen off Ms. Freeman.[172] But these cases were all filed in Texas, and Texas takes imputation to a

adversely limited by the lawyer's interests arising from the marital relationship, the lawyer is free to undertake or continue with the representation. Even in that event, it may be wise (although not required) for the lawyer to disclose the spousal relationship to the client, notwithstanding the absence of a conflict of interest."). And yes, both Scott Bovitz and I have marveled over the fact that this opinion is numbered "666." *See* comments by J. Scott Bovitz on an earlier draft (on file with author).

In addition to TDRPC Rule 1.06(f), TDRPC Rule 1.06(b) provides, in part, that:

> (b) ... except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:
>
> …
>
> (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

Look at the "adversely ... limited by the lawyer's own interests" part of Rule 1.06(b). Here's the problem with focusing on subsection (b): appearing in front of one's romantic partner might well *advance* "the lawyer's or law firm's own interests [in helping the firm's client win]," rather than limit the effectiveness of the representation. In other words, if my spouse were a judge and I were appearing before him, I might be getting the benefit of the doubt in my arguments on behalf of my client. After all, "happy wife, happy life"—a phrase with which many spouses have intimate familiarity, including mine.

171

> Members of the Jackson Walker LLP firm have regularly appeared before Judge Jones since 2017. Judge Jones has approved attorneys' fees payable to that firm in which supporting documentation, that [sic] was submitted to Judge Jones and is part of public records, reflects that services by Elizabeth Freeman were performed in connection with a number of cases for which fees were sought and approved, though Elizabeth Freeman was not shown as counsel of record on the face of pleadings. The amounts billed for Elizabeth Freeman's services in those cases were substantial. The fees approved by Judge Jones for Jackson Walker LLP were likewise substantial. Judge Jones approved fees payable to Jackson Walker LLP in other cases in which Elizabeth Freeman does not appear to have provided any legal services or advice. However, at all times when Elizabeth Freeman was a Jackson Walker LLP partner, and regardless of whether she provided services or advice in a case, there is a reasonable probability that Elizabeth Freeman, as a partner in that firm, obtained a financial benefit from, or had a financial interest in, fees approved by Judge Jones. Judge Jones did not recuse in Jackson Walker LLP cases nor did he disclose his relationship with Elizabeth Freeman to the parties or their counsel in which Jackson Walker LLP appeared before him.

Complaint Identified by the Chief Judge of the Fifth Circuit Court of Appeals Against United States Bankruptcy Judge David R. Jones, Southern District of Texas, Under the Judicial Improvements Act of 2002, Complaint Number 05-24-90002, United States Court of Appeals for the Fifth Circuit (October 13, 2023) at 2.

172 Normally, screened-off lawyers do not get apportioned any of the fees for the cases for which they're screened off. Model Rule 1.10(a)(2) permits screening, but only if

> (2) the prohibition is based upon Rule 1.9(a) or (b) and *arises out of the disqualified lawyer's association with a prior firm, and*
>
> *(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;*
>
> (ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a

Electronic copy available at: https://ssrn.com/abstract=4700214

whole new level. Thus, as long as Ms. Freeman was working at Jackson Walker, the firm should not have been appearing before Judge Jones.

How would parties in interest have known to object to Jackson Walker's employment on the grounds of imputation (or later, when Ms. Freeman went solo, to her own employment)? Because lawyers are supposed to be candid (forthcoming) and honest. Let's start with candor to the tribunal. TDRPC Rule 3.03 states:

> (a) A lawyer shall not knowingly:
> (1) make a false statement of material fact or law to a tribunal;
> (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;
> (3) in an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision;
> (4) fail to disclose to the tribunal 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
> (5) offer or use evidence that the lawyer knows to be false.
> (b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.
> (c) The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible.[173]

Comment 2 to that rule explains that, although an advocate "is usually not required to have personal knowledge of matters asserted therein, ... an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or a representation of fact in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a

---

> description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and
> (iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

MODEL R. PRO. CONDUCT 1.10 (emphasis added). None of the italicized portions of this Rule fit the Jones/Freeman/Jackson Walker situation, and even if they did, Texas hasn't adopted that Rule.

[173] Texas Disciplinary Rule of Professional Conduct 3.03, at https://www.texasbar.com/AM/Template.cfm?Section=Home&ContentID=27271&Template=/CM/ContentDisplay.cfm (last visited Dec. 21, 2023). *Cf.* ABA MODEL R. PRO. CONDUCT 3.3, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_3_candor_toward_the_tribunal/ (last visited Dec. 21, 2023).

Electronic copy available at: https://ssrn.com/abstract=4700214

reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation."[174]

The interaction between Bankruptcy Rule 2014, which does not explicitly require disclosure of connections to courts, and TDRPC Rule 3.03, which provides that "(a) [a] lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; [or] (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act ....," is tricky. Is the failure to disclose a connection not explicitly required by Bankruptcy Rule 2014 still a TDRPC Rule 3.03 violation, on the grounds that other parties in those cases—those who had no knowledge of the relationship between Judge Jones and Ms. Freeman—would have wanted to know that information? Did Judge Jones have to disclose his relationship to Ms. Freeman in order to avoid assisting a fraudulent act? Maybe. If Jackson Walker and Ms. Freeman had disclosed the relationship on the record, maybe nothing would have changed—not because parties would be copacetic with the Jones-Freeman relationship, but because asking for recusal comes with its own risks.[175] As Charles Geyh has so aptly explained, lawyers face considerable risk when complaining about a judge's behavior.[176] Lawyers who suspect but don't know for sure about a lawyer-judge romantic relationship might recall the fate of Colette Bohatch, who fought with her own law firm about an ethics issue and lost.[177]

But maybe one of the other parties in interest in the case would have asked Judge Jones for recusal much earlier in each case's denouement.[178] Maybe Judge Jones would have refused to recuse,

---

[174] Id.

[175] There are variations of this basic concept—"when you come for the king, you'd best not miss"—attributed variously to Ralph Waldo Emerson or the show *The Wire*. *See, e.g.,* https://www.reddit.com/r/shakespeare/comments/a5xkk9/i_cant_find_the_origin_of_this_quote_if_you_come/?rdt=48424 (last visited Dec. 25, 2023) [sorry, editors, but I can't source this quote—I'd love it if you could please help me out here]; *cf.* NICCOLO MACHIAVELLI, THE PRINCE ("If an injury has to be done to a man it should be so severe that his vengeance need not be feared.") at https://www.goodreads.com/author/quotes/16201.Niccol_Machiavelli (last visited Dec. 26, 2023). My point is that a judge who started his own disqualification analysis with "we weren't technically married," *see* nn. 24-25, *supra,* and accompanying text, wouldn't be sanguine about lawyers pointing out to him that his analysis was wrong.

[176] Charles Gardner Geyh, *Informal Methods of Judicial Discipline,* 142 U. PA. L. REV. 243, 258 (1993) ("As one chief judge said in an interview with Barr and Willging: 'Lawyers are reluctant to file complaints and will do it only in a serious case.' Echoed another judge, 'It's very difficult for a practicing lawyer to file a complaint, they're in constant practice before the judge. Yet, those are the complaints that tend to require some action or caution on my part.") (footnotes omitted).

[177] *See* Bohatch v. Butler & Binion, 977 S.W.2d 543 (Tex. 1998) (lawyer who thought that her firm was overbilling a client got deeply crosswise with her firm's leadership, leading to her removal as a partner). Ratting out colleagues (or superiors) isn't risk-free.

[178] That idea that the parties deserved to know about the connection at the time that Judge Jones drew a case reminds me of this quote from *The Wedding Singer* (New Line Cinema 1998):

> Robbie: [*Linda shows up for the first time after failing to marry him*] You're late.
> Linda: [*sighs*] I'm sorry... I just couldn't do it.
> Robbie: Well, if you need more time, I guess I could wait.
> Linda: No... I don't need more time, Robbie. I don't ever want to marry you.
> Robbie: [*takes a deep breath, sighs*] Gee, you know that information... really would've been more useful to me *yesterday.*

https://www.imdb.com/title/tt0120888/quotes/?ref_=tt_ql_dyk_3 (last visited Dec. 21, 2023). After all, if the parties had known, they could have raised the recusal issue much earlier. Even Jackson Walker could have prophylactically dealt with the recusal and, for safety's sake, asked that Judge Jones step aside:

> [W]e believe that when a party has timely moved for the recusal of a district judge, that party has standing to challenge the judge's refusal to recuse even if the alleged bias would be in the moving party's favor. Such a party might legitimately be concerned that the judge will "bend over backwards" to avoid any appearance of partiality, thereby inadvertently favoring the opposing party. The possibility of this compensatory bias by an interested judge is sufficiently immediate to constitute the "personal injury" necessary to confer standing under Article III.

Electronic copy available at: https://ssrn.com/abstract=4700214

on the same grounds ("we're not technically married") that he explained to the *Wall Street Journal*.[179] But I think it's a safe bet that the other parties in interest would have found that live-in relationship to be *material*.

If the general rule in bankruptcy is "disclose, disclose, disclose," and it is, then I can make the argument that others who were not aware of that relationship would have preferred to have known of its existence so that they themselves could have raised the possibility of recusal.[180] Requiring "candor *to* the tribunal" is not the same as requiring "candor *from* the tribunal," and we should have had candor going in both directions.

What of the law firms that used Jackson Walker as co-counsel in cases before Judge Jones? Here's where it will be important to find out more in discovery. Certainly Jackson Walker and Ms. Freeman should have made their disclosures to the court. Ms. Freeman, at the very least, might have implicated TDRPC Rule 8.04. TDRPC 8.04(a) provides, in part, that

> A lawyer shall not:
> (1) violate these rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not the violation occurred in the course of a client-lawyer relationship;
> …
> (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or]
> (4) engage in conduct constituting obstruction of justice;... or
> (12) violate any other laws of this state relating to the professional conduct of lawyers and to the practice of law.[181]

Pashaian v. Eccelston Properties, Ltd., 88 F.3d 77, 83 (2d Cir. 1996) (cited in CHARLES GARDNER GEYH, JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 16 (2d ed. 2010)).

[179] A judge who started his own disqualification analysis with "we weren't technically married," *see* nn. 24-25, *supra,* and accompanying text, wouldn't be sanguine about lawyers pointing out to him that his disqualification analysis was wrong.

[180] Remember, the Fifth Circuit pointed out:

> On information and belief, the judge who ruled on the motion to recuse was unaware that Judge Jones was romantically involved with Ms. Freeman or that they were cohabiting. The motion to recuse was denied and appealed to a federal district court judge, and on information and belief, Judge Jones did not apprise that district court judge of the relationship with Ms. Freeman, and that judge was also unaware of the facts regarding the relationship. The appeal was denied. There is a reasonable probability that if Judge Jones had disclosed the facts concerning his relationship with Elizabeth Freeman to his fellow bankruptcy judge, to whom the motion to recuse was referred, the motion to recuse would have been granted.

Complaint Identified by the Chief Judge of the Fifth Circuit Court of Appeals Against United States Bankruptcy Judge David R. Jones, Southern District of Texas, Under the Judicial Improvements Act of 2002, Complaint Number 05-24-90002, United States Court of Appeals for the Fifth Circuit (October 13, 2023) at 2-3.

[181] Texas Disciplinary Rule of Professional Conduct 8.04, https://www.texasbar.com/AM/Template.cfm?Section=News_and_Publications_Home&ContentID=27271&Template=/CM/ContentDisplay.cfm (last visited Dec. 21, 2023). *Cf.* ABA MODEL R. PRO. CONDUCT 8.4, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/ (last visited Dec. 21, 2023).

Electronic copy available at: https://ssrn.com/abstract=4700214

I'm willing to bet that deciding not to disclose this particular judge-lawyer live-in relationship constitutes "deceit or misrepresentation." So at the time that Jackson Walker knew (not suspected, but knew) about the relationship, then—Rule 2014's language notwithstanding—it should have found a way to disclose that information. Of course, maybe it did. Maybe it filed a disclosure under seal. Filing the disclosure under seal, though, would have created a closed loop that disclosed to the judge who already knew about the relationship that there was a relationship. Once again, we'd be back to the concept of "technically"[182] here—and that damnable word is what brought us the whole scandal in the first place.

Should the law firms that partnered with Jackson Walker have insisted to the firm that it disclose the relationship more broadly? I found it interesting that even firms with local Houston offices hired Jackson Walker for bankruptcy cases filed in that city, and not only as "conflicts counsel."[183] In *Belk,* for example, Jackson Walker's portion of the responsibilities as "co-counsel and conflicts counsel" was

> To primarily provide the following services for its engagement in these chapter 11 cases as local and
> conflicts counsel to the Reorganized Debtors:
>
> - provide legal advice and services regarding local rules, practices, and procedures, including Fifth Circuit law;
> - provide certain services in connection with administration of the chapter 11 cases, including, without limitation, preparing agendas, hearing notices, witness and exhibit lists, and hearing binders of documents and pleadings; review and comment on proposed drafts of pleadings to be filed with the Court;
> - at the request of the Reorganized Debtors, appear in Court and at any meeting with the United States Trustee, and any meeting of creditors at any given time on behalf of the Reorganized Debtors as their local and conflicts bankruptcy co-counsel;
> - perform all other services assigned by the Reorganized Debtors to the Firm as local and conflicts bankruptcy co-counsel; and provide legal advice and services on any matter on which K&E may have a conflict or as needed based on specialization.[184]

[182] *See* n. 123, *supra.*

[183] *See, e.g.,* Application of Reorganized Debtors to Retain Jackson Walker LLP as Co-Counsel and Conflicts Counsel, In re: Belk, Inc., United States Bankruptcy Court, Southern District of Texas, Case No. 21-30630, Docket No. 154 at 3 (Mar. 8, 2021) ("The Reorganized Debtors have determined that the retention of co-counsel and conflicts counsel is necessary to the successful administration of these chapter 11 cases, and that the Firm's [Jackson Walker] employment would be in the best interest of the estates. The Firm's complex chapter 11 experience, as well as its extensive practice before this Court, and knowledge of the Local Rules and practices, make it substantively and geographically ideal to efficiently serve the needs of the Reorganized Debtors.").

[184] *Id.* at 4. For an interesting take on *Belk* itself and its implications, see Lynn M. LoPucki, *Chapter 11's Descent into Lawlessness,* 96 AM. BANKR. L.J. 247 (2022); *see also* Robert K. Rasmussen & Roye Zur, *The Beauty of* Belk, 97 AM. BANKR. L.J. 438 (2023).

Deleted: 123119

Electronic copy available at: https://ssrn.com/abstract=4700214

Having conflicts counsel is important.[185] But Kirkland's Houston office has, at least as of 2024, thirty-four lawyers in the restructuring group,[186] and given the high caliber of its work, it had the staffing to handle the same "local" work as Jackson Walker. One difference lies in the hourly rates: Kirkland's proposed hourly rates in its *Belk* application ranged from

Billing Category	U.S. Range
Partners	$1,080-$1,895
Of Counsel	$625-$1,845
Associates	$625-$1,195
Paraprofessionals	$255-$475[187]

Jackson Walker's hourly rates were lower: "Matthew D. Cavenaugh's hourly rate is $825. The rates of other restructuring attorneys in the Firm range from $445.00 to $935.00 an hour, and the paraprofessional rates range from $185.00 to $195.00 per hour."[188] I searched the *Belk* docket, though, and found no objections to either firm's employment—not by creditors, and not by the United States Trustee.[189] The same rate differential appeared in *Sorrento Therapeutics,* but with Latham & Watkins and Jackson Walker,[190] and no one objected to the co-counsel relationship there, either.[191]

[185] I've written on conflicts in bankruptcy myself. See, e.g., Nancy B. Rapoport, Seeing the Forest and The Trees: The Proper Role of the Bankruptcy Attorney, 70 IND. L.J. 783 (1995); Nancy B. Rapoport, Turning and Turning in the Widening Gyre: The Problem of Potential Conflicts of Interest in Bankruptcy, 26 CONN. L. REV. 913 (1994),

[186] *See* https://www.kirkland.com/lawyers?practice=85268642-addb-45ee-8e92-ab9608393a9e&office=2ef6b233-eaab-45eb-b2a8-7115bbe6a5f4&page=1 (last visited Jan. 18, 2024).

[187] Application of Reorganized Debtors for Entry of An Order Authorizing the Retention of Kirkland & Ellis LLP and Kirkland & Ellis International LLP as Attorneys for the Reorganized Debtors as of February 23, 2021, In re: Belk, Inc., United States Bankruptcy Court, Southern District of Texas, Case No. 21-30630, Docket No. 154 at 7 (Mar. 8, 2021).

[188] Application of Reorganized Debtors to Retain Jackson Walker LLP as Co-Counsel and Conflicts Counsel, In re: Belk, Inc., United States Bankruptcy Court, Southern District of Texas, Case No. 21-30630, Docket No. 154 at 7 (Mar. 8, 2021)

[189] *See* https://cases.ra.kroll.com/belk/Home-DocketInfo?DocAttribute=6670&DocAttrName=COURTDOCKET(BELK%2CINC.)_Q&MenuID=16746&AttributeName=Belk%2C%20Inc.%20(21-30630) (last visited Jan. 18, 2024).

[190] *Sorrento Therapeutics* is another case in which a firm (Latham & Watkins) applied to be counsel, *see* Debtors' Aplication for Entry of an Order Authorizing the Employment and Retention of Latham & Watkins LLP as Bankruptcy Co-Counsel, *In re* Sorrento Therapeutics, Inc., United States Bankruptcy Court, Southern District of Texas, Case No. 23-90085 (CML), Docket No. 226 (Mar. 14, 2023); Application to Retain Jackson Walker LLP as Co-Counsel and Conflicts Consel For the For the [sic] Debtors and Debtors-in-Possession, *In re* Sorrento Therapeutics, Inc., United States Bankruptcy Court, Southern District of Texas, Case No. 23-90085 (CML), Docket No. 231 (Mar. 15, 2023).

In its application, Latham listed its hourly rates as:

Billing Category	Range
Partners	$1,360 to $2,230
Counsel	$1,300 to $1,690
Associates	$705 to $1,400
Professional Staff	$210 to $1,050
Paralegals	$300 to $660.

Docket No. 224 at 5. Jackson Walker listed its rates as:

Billing Category	Range
Partners	$750 to $1,045
Associates	$475 to $750
Paraprofessionals	$230 to $250

Docket No. 231 at 5.

[191] *See* https://cases.stretto.com/Sorrento/court-docket/ (last visited Jan. 18, 2024).

Electronic copy available at: https://ssrn.com/abstract=4700214

The lack of objections to having two firms with Houston offices act as co-counsel, rather than having one firm act as counsel and one firm as conflicts counsel, can mean many things. It can mean that creditors and the United States Trustee found nothing wrong with the relationship; it can mean that no one was paying particular attention, because having multiple firms represent the debtor in a megacase isn't unusual; or it could mean something more. There's no way to tell without discovery.

Latham & Watkins has denied that it knew about the relationship before the relationship became public: "As the Debtors have explained on multiple occasions in filings and in court hearings attended by Mr. Culberson, Latham and M3 did not know about the relationship between Ms. Freeman and Judge Jones until it was announced publicly...."[192] But according to an interview in the *Financial Times,*[193] "Jackson Walker said it had informed Kirkland about its 2021 inquiry into Freeman's relationship with Jones. Multiple Kirkland partners told the FT that they were long aware of the romantic relationship between the pair, though did not know how advanced it was. The Kirkland lawyers assumed the pair had received clearance from a superior court or decided that it was not Kirkland's place to intervene in Jackson's retention applications."

The facts haven't been adjudicated, but let's assume that Latham & Watkins was a "no" and that Kirkland & Ellis was a "yes." Is a connection to a law firm with a connection a "connection" under Bankruptcy Rule 2014, such that a failure of Law Firm A to disclose Law Firm B's connections is itself a violation? Rule 2014 asks for "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."[194] But again, those connections that Law Firm B might have had to disclose don't include connections to the court, thanks to Rule 2014's wording. Still, if Law Firm A knew that Law Firm B was keeping silent about the relationship (and all we have right now is a newspaper article), then might TDRPC Rule 8.03 have come into play? That rule provides:

> (a) Except as permitted in paragraphs (c) or (d), a lawyer having knowledge that another lawyer has committed a violation of applicable 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 disciplinary authority.
> (b) Except as permitted in paragraphs (c) or (d), a lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge[']s fitness for office shall inform the appropriate authority.[195]

---

[192] Debtors' (I) Objection To Party in Interest, Timothy Culberson's, Alternative Motion to Compel Discovery From Debtors and Their Counsel, and (II) Cross Motion For Protective Order Regarding First Request For the Production pf Documents From Party in Interest, Timothy L. Culberson, Esq[.] to Debtors and Their Counsel, *In re* Sorrento Therapeutics, Inc., United States Bankruptcy Court, Southern District of Texas, Case No. 23-90085 (CML), Docket No. 1700 at 3 (Jan. 11, 2024).
[193] Sujeet Indap, *The downfall of the judge who dominated bankruptcy in America,* FINANCIAL TIMES (Nov. 21, 2023) at https://www.ft.com/content/574f0940-d82e-4e4a-98bd-271058cce434 (last visited on Jan. 17, 2024).
[194] Fed. R. Bankr. Pro. 2014(a) (emphasis added).
[195] Texas Disciplinary Rule of Professional Conduct 8.03,

Electronic copy available at: https://ssrn.com/abstract=4700214

TDRPC Rule 8.03(a) applies to any lawyers appearing in these cases who knew[196] that Ms. Freeman was living with Judge Jones and that that relationship was being concealed to give Jackson Walker an advantage. Rule 8.03(b) applies to lawyers who knew that Judge Jones should have disqualified himself because of this concealed relationship. If indeed some Texas lawyers knew, then they should have told someone—the state bar, someone else in the judiciary—someone with the power to act. But we don't know if these lawyers knew that the relationship was being *concealed*.[197] Only discovery will tell us that. And it's easy for me to say that someone should have spoken up.[198] I'm not the one who would be making a career-limiting move[199] by speaking up. Still, taken together, these Texas ethics rules at least advance the notion that hiding the relationship from other parties in interest falls significantly short of proper behavior.

---

https://www.texasbar.com/AM/Template.cfm?Section=News_and_Publications_Home&ContentID=27271&Template=/CM/ContentDisplay.cfm (last visited Dec. 26, 2023). *Cf.* ABA MODEL R. PRO. CONDUCT 8.3, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_3_reporting_professional_misconduct/ (last visited Dec. 25, 2023).

In the sense of making sure that everyone plays by the same rules, Rule 8.03 (and, for that matter, Model Rule 8.3) is trying to "protect the field," in the same way that the golf rules protect the field:

> ... [T]he R&A and USGA offer players the following guidance and explanation of best practice:
> - In stroke play, the competition involves all players and, because each player in the competition cannot be present to protect his or her own interests, protecting the field is an important responsibility that all players in the competition share.
> - Therefore, in stroke play, if there is a reasonable possibility that a player's ball close to the hole could help another player who is about to play from off the green, both players should ensure that the player whose ball is close to the hole marks and lifts that ball before the other player plays.
> - If all players follow this best practice, it ensures the protection of the interests of everyone in the competition.

United States Golf Association, Clarifications of the 2019 Rules of Golf (updated July 4, 2022), Rule 15.3 (Added 1/2020), at https://www.usga.org/content/dam/usga/pdf/2022/rules/Clarifications%20of%20the%202019%20Rules%20of%20Golf%20-%20April%202022.pdf (last visited Dec. 26, 2023); see also Missywilliamspgapro, *Rules & Protecting the field,* Williams Golf Academy (Mar. 15, 2015) ("**What should you do if someone isn't following the rules of golf??** ... PROTECT THE FIELD!! It isn't easy to call an obvious rules infraction, BUT it is your duty!! ... If you see someone breaking the rules (either knowing or unknowing) it is your duty to protect the field and call them on it.") (emphasis in original) at https://williamsgolfacademy.wordpress.com/2015/03/03/rules-protecting-the-field/ (last visited Dec. 26, 2023). Scott Bovitz suggests that the only other cure for cheating of this magnitude is to engage in "rough justice" by "kick[ing] the other player's ball into the rough when she isn't looking." *See* comments by J. Scott Bovitz on an earlier draft (on file with author).

[196] Under the Texas Rules of Disciplinary Procedure, " '[k]nowingly,' '[k]nown," or '[k]nows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Tex. R. Disc. Pro. Terminology at 9, available at https://www.texasbar.com/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=27271 (last visited Jan. 17, 2024).

[197] *See* n. 193, *supra,* and accompanying text.

[198] *Cf. The American President* (Universal Pictures 1995) ("President Andrew Shepherd: [*after playing pool*] Is the view pretty good from the cheap seats, A.J.?"), at https://www.imdb.com/title/tt0112346/quotes/?ref_=ttco_ql_dyk_3 (last visited Jan. 17, 2024).

[199] See n. 175, supra.

Deleted: 193189

Deleted: 175171

Electronic copy available at: https://ssrn.com/abstract=4700214

- Conclusion

What we have here is a scandal of epic proportions,[200] all brought about by failures to disclose. Judge Jones absolutely should have recused himself from cases involving Ms. Freeman. Ms. Freeman should have disclosed the relationship, and she shouldn't have appeared in cases assigned to her romantic partner. Jackson Walker should have disclosed the relationship once it became aware of it, and the firm itself should have stayed away from appearing in Judge Jones's court.[201] It's hard to avoid the conclusion that the lawyers who should have disclosed chose not to do so at least in part because of the financial benefits of being employed in those cases.[202]

How do we move forward from this mess? Three clear "fixes" come to mind. First, Rule 2014 should be amended to include the disclosure of any connections to a court and the court's personnel.[203] Second, Circuit Courts should stop punting on judicial discipline on the grounds of "lack of jurisdiction" when a judge resigns in the wake of a scandal.[204] Although it's true that the ultimate punishment of kicking a misbehaving judge off the court is off the table if the judge has already resigned, there are other reasons to retain jurisdiction: to create a factual record for referral to that judge's state bar (if the judge still has an active bar membership), to issue a public reprimand, or simply to put down stakes about misbehavior that is beyond the pale. Both of these fixes—revising Rule 2014 and retaining disciplinary jurisdiction—are low-hanging fruit.[205]

---

[200] Or, as one of my anonymous friends has noted, "a cluster is not just a type of candy." Thanks to an email from Charles Geyh, I now know that Judge Jones isn't the only judge—and not even the only Texas judge—to fall from grace because of an intimate relationship. *See* email from Charles Geyh to author (Dec. 31, 2023) (on file with author); Public Reprimand and Order of Additional Education, Hon. Samuel Berry, State Commission on Judicial Conduct, CJC No. 17-1480 (Feb. 21, 2018), at https://www.scjc.texas.gov/media/46664/sberry17-1480pubrepoaesigned.pdf (last visited Dec. 31, 2023) (judge who was in an undisclosed romantic relationship with a prosecutor appearing before him received a public reprimand and two hours of instruction with a mentor). My home state of Texas apparently has a different view of inappropriate sexual relationships than does the rest of the country. *Compare* TDRPC 1.08 (no prohibition against sex with clients) with MODEL R. PRO. CONDUCT 1.8(j) (("A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced."); *see also* CPR Policy Implementation Committee, American Bar Association, *Variations of the ABA Model Rules of Professional Conduct, Rule 1.8: Conflict of Interest: Current Clients: Specific Rules* (as of Dec. 2023), at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-1-8.pdf (last visited Dec. 31, 2023).

[201] Other non-Jackson Walker Texas lawyers who knew about the relationship should have disclosed it. *See* n. 195, *supra.* Under the ethics rules, "knowing" means "actual knowledge." Texas Disc. R. of Pro. Conduct Terminology ("'Knowingly,' 'Known,' or 'Knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."), at https://www.texasbar.com/AM/Template.cfm?Section=Home&ContentID=27271&Template=/CM/ContentDisplay.cfm (last visited on Dec. 26, 2023). I'm not suggesting that any lawyers should have been disclosing mere rumors about the Jones-Freeman live-in relationship, but I *am* suggesting that any Texas lawyers who had actual knowledge, *cf,* n. 49, *supra,* should have stepped forward, at least to insist to Jackson Walker that *it* should disclose the relationship (or to insist that Ms. Freeman should). I keep waiting to see if discovery will reveal information tending to indicate that some people knew, such as RSVPs to holiday parties (either holiday parties at the firm or at the courthouse) or dinners at Judge Jones and Ms. Freeman's home.

Deleted: 195191

[202] *See* n. 99, *supra.*

Deleted: 9995

[203] In the interim, creating local rules requiring such disclosures could be an easy fix.

[204] *See* n. 46, *supra.*

[205] Congress could also clarify that, for purposes of 11 U.S.C. § 101(14)(C), the "for any other reason" at the end of that clause ("does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.") includes connections to the presiding court.

Electronic copy available at: https://ssrn.com/abstract=4700214

The third "fix" is more complicated. There are valid rules for judicial immunity, and I don't believe that judges should be exposed to unmeritorious lawsuits. Judge Jones's application of this valid general principle,[206] though, bothers me. He's absolutely right about the broad scope of judicial immunity, as far as the case law goes. But where the law stops short is in considering whether a judge who should never have heard a case in the first place—who should have recused himself—is entitled to judicial immunity for actions taken in that case. I think that the answer should be no, but my friends who are better educated than I am on the law of judicial immunity disagree with me. If they're right about the law, and I'll bet that they are, then that law should change. Or, perhaps, instead of watering down the concept of judicial immunity, perhaps we should focus more on the right to seek appeal from a denial of a motion to recuse on the grounds that the denial would be a final order?[207] That way, there are fresh eyes on the issue of whether recusal is appropriate. On the other hand, those fresh eyes have got to be really, really fresh, or we'd likely find ourselves in the same position this scandal created.

But we need not stop there. Let's throw into the mix the issue of the composition of a national complex case panel. *See* Rachel Erlich Albanese, *One Code, One Court, Special Issue: Venue Reform in the Spotlight,* CREDITOR RIGHTS COALITION, at https://mailchi.mp/creditorcoalition/i0jxve6xnm-9181632 (last visited Dec. 25, 2023) ("[W]hat if there were a national complex case panel? … Judges could apply or be nominated by their respective circuits to sit on the national panel. While the number would be determined by the US GAO, the judges who were selected for the panel could divide their duties between their home jurisdictions and their complex case assignments."); *see id.* ("Each such case would be randomly assigned to a judge from the national complex case panel. Geography is no longer a factor. Flying to Houston for an in-person hearing is no different than flying to St. Louis, for example, and zoom hearings remain popular…. In essence, one Bankruptcy Code governs all fifty states; one panel of experienced and sophisticated judges to apply that statute to complex cases across the country would work equally well."). Concentrating the power to hear complex cases in a few judges is risky, and having only some jurisdictions with complex case panels is riskier still. There is a temptation to want to attract the most interesting cases to a particular jurisdiction (they're more interesting than the standard case), and that temptation can lead to other temptations. *Cf.* Sydney E. Ahlstrom, *Lord Acton's Famous Remark,* N.Y. Times (Mar. 13, 1974) (discussing Lord Acton's famous quote, "Power tends to corrupt and absolute power corrupts absolutely."), at https://www.nytimes.com/1974/03/13/archives/lord-actons-famous-remark.html (last visited Dec. 25, 2023). Possibly venue reform, or at least a national complex case panel of judges, could fix some of these issues. *See, e.g.,* Creditor Rights Coalition, *Special Issue: Venue Reform in the Spotlight,* CREDITOR RIGHTS COALITION, at https://mailchi.mp/creditorcoalition/i0jxve6xnm-9181632 (last visited Dec. 25, 2023). Full disclosure: I'm a signatory to a November 1, 2023, letter sent to Chief Judge Eduardo V. Rodriguez, United States Bankruptcy Court, Southern District of Texas, suggesting a slightly less drastic reform ("We write you to respectfully request that you abolish the current system of assigning complex chapter 11 cases to two judges pursuant to General Order 2018-1 and, instead, adopt a system of random assignment among all bankruptcy court judges.") (letter on file with author); *see also* Bob Lawless, *Let's End Bankruptcy Judge Shopping,* CREDIT SLIPS (Nov. 2, 2023), at https://www.creditslips.org/creditslips/2023/11/lets-end-bankruptcy-judge-shopping.html (last visited Dec. 25, 2023).

[206] *See* n. 89, *supra.*

[207] Suggestion from Judith Fitzgerald to author as part of comments on an earlier draft (Jan. 17, 2024) (on file with author).

Deleted: 8988

Electronic copy available at: https://ssrn.com/abstract=4700214

Ultimately, our system of justice relies on transparency, and the rules that reinforce transparency include the rules on disclosure and on disqualification.[208] Those rules matter. Formalities matter.[209] But those rules only work if the people to whom they apply actually comply with them. When they don't, more scandals like this one[210] will surely follow.[211]

---

[208] And on judges and lawyers abiding by their oaths. *See* 28 U.S. Code § 453 ("Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: 'I, ___ ___, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ___ under the Constitution and laws of the United States. So help me God.'"); *see, e.g.,* Texas Attorney's Oath ("I, [insert name] do solemnly swear that I will support the Constitutions of the United States, and of this state; that I will honestly demean myself in the practice of law; that I will discharge my duties to my clients to the best of my ability; and that I will conduct myself with integrity and civility in dealing and communicating with the court and all parties. So help me God."), at https://www.txcourts.gov/media/1436354/oath.pdf (last visited Jan. 2, 2024).

[209] One of my friends who asked to remain anonymous gave me this wonderful analogy from the series *Lenny, The American Pope (The Young Pope)* (HBO 2017). In Season 1, Episode 1, he explains why too-friendly relationships are so risky:

> Lenny Belardo: Friendly relationships are dangerous. They lend themselves to ambiguities, misunderstandings, and conflicts, and they always end badly. Formal relationships, on the other hand, are as clear as spring water. Their rules are carved in stone. There's no risk of being misunderstood and they last forever.

Lenny, The American Pope (The Young Pope) (HBO 2017), IMDB.COM https://www.imdb.com/title/tt4897554/quotes/?ref_=tt_ql_dyk_3 (Jan. 15, 2017) (last visited Jan. 3, 2024).

[210] And the ones like the ones in nn. 7-15, *supra,* and accompanying text.

[211] In my mind, the United States Trustee has put it best: "[I]t simply cannot be that a Judge, his intimate partner, and her law firm can engage in a pattern of unethical and illegal conduct and the firm retains its ill-gotten gains because the debtors were pleased with the results achieved by the corruption...." United States Trustee's Objection to the Bankruptcy Court's Report and Recommendation That His Motions to Withdraw The Reference Be Denied, *In Re* Professional Fee Matters Concerning the Jackson Walker Law Firm, United States District Court, Southern District of Texas, Case No. 4:23-cv-04787, Docket No. 5 at 13 n. 12 (Jan. 4, 2024).

Electronic copy available at: https://ssrn.com/abstract=4700214