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“Listserv Lawyering”: Definition and Exploration of Its Utility in Representation of Consumer Debtors in Bankruptcy and in Law Practice Generally

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ARTICLE

Josiah M. Daniel, III

“Listserv Lawyering”: Definition and Exploration of Its Utility in Representation of Consumer Debtors in Bankruptcy and in Law Practice Generally*

Abstract. The author examines the communications and activities of bankruptcy lawyers participating in the listserv of the Bankruptcy Law Section of the State Bar of Texas and finds that those activities constitute a previously unrecognized form of “lawyering,” which he has defined as the work of lawyers in and through the legal system to accomplish the objectives of their clients. Review of specific postings about legal issues and practical problems by Texas bankruptcy lawyers, whose practices are primarily on behalf of individual debtors in cases under Chapters 7 and 13 of the Bankruptcy Code, and observations about the voluntary, collaborative, and uncompensated nature of those activities collectively undergird four main insights that, in turn, inform the author’s formulation of a specific definition of such activities, which he denominates “*listserv lawyering*.” Even though legal listservs have generally declined in popularity since their heyday in the 1990s, the author recommends other bar groups take notice of the successful Texas Bankruptcy Listserv and reconsider listservs as a means of maintaining competence in the service of clients, fostering a stronger sense of community among lawyers, and heightening practitioners’ professionalism—not only in bankruptcy practice but in all substantive areas of legal services.

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I. INTRODUCTION TO “LAWYERING”

In my 2009 article, “A Proposed Definition of the Term ‘Lawyering,’” I posited:

“Lawyering” is the work of a specially skilled, knowledgeable, or experienced person who, serving by mutual agreement as another person’s agent, invokes and manipulates, or advises about, the dispute-resolving or transaction-effectuating processes of the legal system for the purpose of solving a problem or causing a desired change in, or preserving, the status quo for his or her principal.¹

Back then, “[e]veryone seem[ed] to know what [“lawyering”] mean[t], but finding a published—and meaningful—definition of the word [was] exasperating.”² I charted the meteoric rise in the usage of the term *lawyering* over the course of the second half of the 20th century in the background section.³ Observing that lawyering must remain within the boundaries of legal ethics,⁴ I noted a variety of collocations of *lawyering* as then reflected in the literature, such as “transnational lawyering,” “cause lawyering,” “political lawyering,” “community lawyering,” “collaborative lawyering,” and “preventative lawyering.”⁵ I have continued to use the concept of lawyering as a prism for analyzing attorneys’ work for clients in bankruptcy matters,⁶ as well as for understanding legal history through the lens of

1. Compare Josiah M. Daniel, III, *A Proposed Definition of the Term “Lawyering,”* 101 LAW LIBR. J. 207, 215 (2009) [hereinafter Daniel, *Proposed Definition*] (emphasis in original), with *Lawyering*, BLACK’S LAW DICTIONARY (11th ed. 2019) (evidencing Black’s Law Dictionary adopted a definition substantially similar to mine, with the one difference being that Black’s contemplates the person performing “lawyering” must be a licensed attorney, while I do not).

2. Daniel, *Proposed Definition*, *supra* note 1, at 207.

3. *Id.* at 207.

4. *Id.* at 215–16.

5. *Id.* at 217.

6. See Josiah M. Daniel, III, *Rx for Ailing Rural Public Hospitals: Chapter 9 Bankruptcy and Pro Bono Lawyering*, 18 HOUS. J. HEALTH L. & POL’Y 205, 210–12 (2018) [hereinafter Daniel, *Ch. 9 & Pro Bono Lawyering*] (discussing the successful reorganization of a rural hospital under Ch. 9 of the Bankruptcy Code); see also Josiah M. Daniel, III, *Lawyering on Behalf of the Non-Debtor Party in Anticipation, and During the Course, of an Executory Contract Counterparty’s Chapter 11 Bankruptcy Case*, 14 HOUS. BUS. & TAX L.J. 230, 233–37 (2014) (presenting “the general rules of executory contracts” and “issues faced by the non-debtor”); Josiah M. Daniel, III, *Landlord Rejection-Damage Claims Lawyering Using Graphic and Mathematical Expressions*, 31 AM. BANKR. INST. J. 26, 77 (Dec. 2012/Jan. 2013) (emphasis omitted) (exploring four methods “for lawyering the client’s desired claim amount in the allowance process”).

“historical lawyering.”⁷

Now, my own bankruptcy lawyering days are over, but I try nonetheless to keep up with developments in bankruptcy law and practice. One way I do this is by reading the postings on one of the social media networks or channels maintained by the State Bar of Texas (SBOT or the “Bar”), originally called “Texas Bar Connect”⁸—specifically in its “Community”⁹ of members in the organization’s Bankruptcy Law Section, of which I am a part. It occurred to me that what is happening on that platform is not a bare exchange of e-mailed messages among its participating lawyers but a new and unique type of *lawyering*. It is *new* because such activities could not have existed prior to the advent of the “listserv” and other forms of social media that exist on and through the Internet. It is *unique* because the Texas bankruptcy group’s communications and activities—that I am here recognizing as a specialized type of *lawyering*—do not and could not happen or exist outside this or a similar electronic medium.

A listserv is simply a computer-enabled list of persons who send and receive messages by mass e-mails to and from all participants.¹⁰ Law-focused listservs emerged as an early form of social media that lawyers found useful during the Internet Revolution¹¹—a result of the advent of widely available personal computers and networks that provided e-mail capabilities¹²—but the use of listservs has declined significantly over the more recent past.¹³ A listserv enables forming groups to conduct discussion, such as among professionals. Listservs for lawyers are fairly

7. See Josiah M. Daniel, III, LBJ v. Coke Stevenson: *Lawyering for Control of the Disputed Texas Democratic Party Senatorial Primary Election of 1948*, 31 REV. LITIG. 1, 5 (2012) (proposing the study of “historical lawyering”—“[t]he lawyering of a dispute or transaction in an earlier time”).

8. TEX. BAR CONNECT, <https://connect.texasbar.com/home> [<https://perma.cc/86FQ-YX7K>]. Due to the social media network’s move to another online platform, URLs for the Texas Bar Connect website no longer function, and the majority were unfortunately not saved via an archival tool. Therefore, the defunct URLs have been omitted from the pertinent footnotes due to their obsolescence and for the sake of brevity. Specific webpages are on file with the author.

9. *Welcome to the Community*, TEX. BAR CONNECT (on file with author).

10. See *infra* note 19 and accompanying text.

11. Cf. Barry M. Leiner et al., *Brief History of the Internet*, 39 COMPUT. COMM’N REV. 22, 22 (Oct. 2009), https://www.internetsociety.org/wp-content/uploads/2017/09/ISOC-History-of-the-Internet_1997.pdf [<https://perma.cc/L7PL-PKH3>] (“The Internet is at once a world-wide broadcasting capability, a mechanism for information dissemination, and a medium for collaboration and interaction between individuals and their computers . . .”).

12. See *id.* at 24 (“[E-]mail took off as the largest network application for over a decade. This was a harbinger of the kind of activity we see on the World Wide Web today, namely, the enormous growth of all kinds of ‘people-to-people’ traffic.”).

13. See discussion *infra* notes 25–28 and accompanying text.

straightforward and never really captured the sustained scrutiny of academic scholars; most references to them in legal literature appear in state and local bar journals, and the relevant law review articles I cite are now relatively ancient by Internet standards. Mainly, this Article is grounded upon my own analysis of the activities of the listserv of which I am a member and occasional participant—one of the few legal listservs surviving and, indeed, thriving today—the listserv for bankruptcy lawyers that is enabled and maintained by the SBOT as part of its overall worldly electronic presence.¹⁴

Proceeding in five more sections, this Article examines, in some detail, the SBOT listserv that inspires the definition proposed in this Article. Next, I review similar listservs of the American Bar Association (ABA) and other state and private bar organizations. Then, I posit a definition of “*listserv lawyering*.” Legal ethics always matter, so next I apply relevant ethical rules to my concept of *listserv lawyering*. Finally, I explore the future of *listserv lawyering*, both for bankruptcy lawyers and for practitioners of other substantive law specialties worldwide.

II. THE TEXAS BAR CONNECT LISTSERV AND ITS COMMUNITY OF BANKRUPTCY LAWYERS

A. *A Short History of the State Bar of Texas's Bankruptcy Listserv*

The communications and interactions of bankruptcy lawyers on which I focus are the result of the institution of a listserv with several additional features under the aegis of Texas Bar Connect, which the SBOT established in the past half-dozen years.¹⁵ The Bar offered this platform to all of its “communities” of specialized, substantive law-practice groups,¹⁶ but, so far, the only community that took substantial advantage of this opportunity to launch and utilize a listserv was the Bankruptcy Law Section of the SBOT.¹⁷ This listserv (the “SBOT Bankruptcy Listserv”) commenced on June 11,

14. See TEX. BAR CONNECT, *supra* note 8 (providing and maintaining the listserv for Texas lawyers engaged in the practice of bankruptcy); see also BANKR. L. SECTION: STATE BAR TEX., <https://statebaroftexasbankruptcy.com/page-18057> [<https://perma.cc/LUU7-MJTS>] (providing the Texas Bar Connect Listserv on a list of resources).

15. TEX. BAR CONNECT, *supra* note 8.

16. See *Welcome to the Community*, *supra* note 9 (exhibiting a list of upcoming events pertaining to various areas of the law).

17. See *id.* (evidencing most of the activity on Texas Bar Connect was conducted by the Bankruptcy Law Section).

2014, when Bankruptcy Judge Richard Schmidt, as then-Chair of that Section, posted the first message.¹⁸

For an appreciation of the SBOT Bankruptcy Listserv, it is necessary to bear in mind the distinctions among the various forms of social media that all originated in the 1990s and remain germane to this topic in 2020:

- Blog: “a website that contains online personal reflections, comments, and often hyperlinks, videos, and photographs provided by the writer”;
- Chat room: “a real-time online interactive discussion group”;
- Listserv: “software for managing e-mail transmissions to and from a list of subscribers”;
- Thread (in this context): “a series of electronic messages (as on a message board or social media website) following a single topic or in response to a single message.”¹⁹

While occasional references to the SBOT Bankruptcy Section’s e-mail-based discussion function call it a blog, and some of the colloquies on and through it occur quite rapidly as if in a chat room, it is a listserv because it is a system for e-mail communications among a group of members.²⁰ One commentator has limned the difference this way: “Blogs are accessible on the web while listservs are open only to their members. Thus, anyone may

18. *Welcome to Our New Private Online Community Texas Bar Connect*, TEX. BAR CONNECT: BANKR. SECTION (June 11, 2014, 1:17 PM) (on file with author) (emphasis added) (providing a quote from Judge Schmidt regarding the predecessor listserv: “For years, our section listserv has allowed our members to network and educate each other about important legal questions and trends [but] the software . . . is very old [so] we have been asked to participate in the beta test of much more user-friendly software . . .”).

19. *Blog*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/blog> [<http://perma.cc/5XEF-264Q>]; *Chat Room*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/chat%20room> [<https://perma.cc/2K5T-RBCZ>]; *Listserv*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/LISTSERV> [<https://perma.cc/PJS8-59ZE>]; *Thread*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/thread> [<https://perma.cc/G498-QT7L>]; see also Martin Whittaker, *Ethical Considerations Related to Blogs, Chat Rooms, and Listservs*, 21 PRO. LAW. 3, 3 (2012) (citing earlier definitions of the terms by the same dictionary); DAN STRUTZEL, VOCABULARY POWER FOR BUSINESS: THE 500 WORDS YOU NEED TO TRANSFORM YOUR CAREER AND YOUR LIFE, *listserv*, n.p. (2018) (e-book) (defining listserv as “[a]n automatic emailing list server that sends messages to all individuals on a specific list”).

20. See TEX. BAR CONNECT, *supra* note 8 (providing the SBOT Bankruptcy Section’s listserv); see also *supra* note 19 and accompanying text (defining blog, chat room, and listserv).

discover a blog, while one has to become aware of a listserv and actively join.”²¹

A listserv “is the ultimate in online information, delivered to your virtual mailbox. Postings to a list are sent just like e-mail, except they go to every subscriber to the mail list instead of just one recipient, all of whom are put right in the middle of the ongoing discussion.”²² A message from any member of the listserv generates an e-mail to every other member—a member can opt for either real-time delivery or a periodic digest of messages.²³ Almost every message posted on the SBOT Bankruptcy Listserv has generated multiple responses, producing a conversation, which constitutes a “thread.”²⁴

By the late 1990s,²⁵ a “raft of substantive law e-mail lists” was “ever-proliferating.”²⁶ Today, however, at the beginning of the third decade of the 21st century, the number of law-related listservs has sharply declined. *Electronic Mailing Lists* was a very lengthy list of legal listservs maintained by the Library of the University of Chicago during the 1990s that is no longer updated, as the vast majority of those listservs no longer exist²⁷; and none of the five state bar-sponsored listservs identified in a law review article published in 2009 survives today.²⁸

Listsers have positive attributes of simplicity, easy availability, and low cost, but they also exhibit negative characteristics, such as encouraging “lazy

21. Benjamin G. Davis & Keefe Snyder, *Online Influence Space(s) and Digital Influence Waves: In Honor of Charly*, 25 OHIO ST. J. ON DISP. RESOL. 201, 232 (2010).

22. Ross L. Kodner, *The Internet is Not Just the Web: Legal Technology Listservs Visited*, 23 LAW PRAC. MGMT. 44, 45 (1997).

23. *Id.*

24. See generally Mark S. Scarberry, *The Gateway Thread—AALS Contracts Listserv*, 16 TOURO L. REV. 1147 (2000) (providing what must be the apotheosis of a legal-listserv thread, a discussion regarding contract law that was so brilliant that it was simply copied and pasted, exactly in its listserv format, into a published law review article).

25. Leslie C. Levin, *Lawyers in Cyberspace: The Impact of Legal Listservs on the Professional Development and Ethical Decisionmaking of Lawyers*, 37 ARIZ. ST. L.J. 589, 589 (2005) (“In recent years, computer technology has greatly facilitated education and advice-seeking among lawyers in all practice areas. Listservs have become a common way for lawyers with similar interests to communicate and obtain answers to their questions. Legal listservs have proliferated since the early 1990’s and have become a very important source of information for lawyers.”).

26. Kodner, *supra* note 22, at 44–45.

27. See *Electronic Mailing Lists*, UNIV. CHI. LIBR., <https://www2.lib.uchicago.edu/~llou/lawlists.txt> [<https://perma.cc/QU9X-P528>] (providing a list of legal listservs).

28. See Caroline D. Buddensick, *Risks Inherent in Online Peer Advice: Ethical Issues Posed by Requesting or Providing Advice via Professional Electronic Mailing Lists*, 22 GEO. J. LEGAL ETHICS 715, 717 n.10 (2009) (providing names of five listservs limited to members of the respective state bar).

research,” overly broad focus, and the nuisance of potentially massive numbers of listserv e-mails clogging a lawyer’s inbox.²⁹ Newer forms of social media, such as blogs,³⁰ LinkedIn,³¹ and Twitter,³² probably better meet the desires of those lawyers today who wish to market themselves to other attorneys and to potential clients through thought leadership and client development.³³ What a successful legal listserv has to offer is immediacy, relevance, and knowledgeable voices in threads on specific issues and problems encountered in the actual practice of law, usually laid out succinctly, available to all members to discuss.

Texas lawyers also utilize the ubiquitous social media platform, Facebook.³⁴ Lawyer-mediator Andrew Tolchin created one such Facebook group; “Texas Lawyers’ is a one-size-fits-all Group for lawyers across the state.”³⁵ Tolchin further asserts that the TL group:

[E]xists within the F[acebook] ecosystem—which makes the user experience comparatively very different, and enables deeper and even instant communication and connectivity. TL does not flood an email box; posts do not include boilerplate or signature lines, enhancing user experience. . . . TL

29. See Greg Lambert, *Where Do Listservs Fit in a Social Media World*, 13 AM. ASS’N L. LIBRS. SPECTRUM 8, 8–9, 13 (2009) (providing the pros and cons of using listservs as a 21st century tool).

30. Sarah Mui, Molly McDonough & Lee Rawles, *Blawg 100 Hall of Fame*, ABAJOURNAL (Dec. 1, 2018, 12:05 AM), https://www.abajournal.com/magazine/article/blawg_hall_of_fame/ [<https://perma.cc/B2D7-Q992>] (providing law blogs—often called “blawgs”—are so popular today that the ABA rates and celebrates the best ones).

31. LINKEDIN, <https://www.linkedin.com> [<https://perma.cc/9V3R-3DWY>]. See generally SHAUNA C. BRYCE, LINKEDIN FOR LAWYERS: PROFILES, JOB SEARCH, NETWORKING, ETHICS, AND ETIQUETTE (2018) (explaining how to harness the power of LinkedIn for lawyers and law students).

32. TWITTER, <https://twitter.com> [<https://perma.cc/4QL7-KNWA>]. See generally JEAN BURGESS & NANCY K. BAYM, TWITTER: A BIOGRAPHY (2020) (describing the role of Twitter as a popular social medial platform).

33. See generally JOHN G. BROWNING, THE LAWYER’S GUIDE TO SOCIAL NETWORKING: UNDERSTANDING SOCIAL MEDIA’S IMPACT ON THE LAW (2010) (“[E]xamin[ing] the myriad ways in which information from sites like Facebook, MySpace, and Twitter is being put to use in everything from criminal and family law matters to personal injury, employment, and commercial cases nationwide.”).

34. FACEBOOK, <https://www.facebook.com> [<https://perma.cc/KZA4-CYLA>] (providing Facebook pages for groups that function somewhat similarly to legal listservs); see Texas Lawyers, *About This Group*, FACEBOOK, <https://www.facebook.com/groups/Texaslawyers/> [<https://perma.cc/8ACX-8PMN>] (displaying the members-only “Texas Lawyers” (TL) Facebook page that features discussion of general-practice issues). See generally JACOB MALHERBE, THE FACEBOOK EFFECT FOR LAWYERS: ADVERTISING FOR THE DIGITAL AGE (2018) (providing information “on how to launch Facebook pages, create ads, target them to reach the right people, and then convert their responses into client contracts”).

35. Texas Lawyers, *supra* note 34.

also surely has a higher volume of participation and participants [more than 14,000 users]. To me, listserv[s] have a purpose and functionality, but are also antiquated.³⁶

TL is a non-public group with a huge number of participants—now more than 15,000.³⁷ A comparison of it with the Texas Bankruptcy Listserv is instructive and highlights the benefits of the listserv. The two are alike in that both are electronic media used by Texas lawyers to pose questions and provide information to other members about legal issues and practice problems, on a private basis, free of charge, with searchable messages, and similar guidelines for the permissible content of messages.³⁸ They differ in that: (1) TL has ten times more users,³⁹ but the vast majority of messages are on topics other than bankruptcy; (2) TL is strictly moderated, and the SBOT listserv is not; (3) a TL user must navigate through Facebook to get to the group rather than look in her e-mail inbox for a daily compilation or, alternatively, for real-time e-mailed messages; (4) the most recent posts on the Facebook page are first to be viewed, but even slightly older posts are subject to display based on Facebook's evolving algorithms and generally are not in chronological order, while listserv messages are clearly dated and organized chronologically within stated topics.⁴⁰

The SBOT Bankruptcy Listserv came into existence soon after Trey Apffel, then-President-Elect of the Texas Bar organization, announced in 2014:

The newest addition to our social media portfolio is Texas Bar Connect, a members-only network that will launch in beta mode this year. Among other features, the new platform will offer special communities designed to *facilitate*

36. E-mail from Andrew Tolchin, Founder, Texas Laws. Grp., to Josiah M. Daniel, III, Fellow Emeritus, Am. Coll. of Bankr. (Apr. 27, 2020) (on file with author).

37. Texas Lawyers, *supra* note 34.

38. *Compare Code of Conduct*, TEX. BAR CONNECT, <https://connect.texasbar.com/codeofconduct> [<https://perma.cc/ATZ6-DHCC>] (providing guidelines for posts made on the Texas Bar Connect listserv), *with* Texas Lawyers, *supra* note 34 (providing guidelines for posts made on the Texas Lawyers Facebook group).

39. The State Bar of Texas Bankruptcy Section has around 1,500 members, while the Texas Lawyers Facebook group has over 15,000 members. E-mail Chain Correspondence Between Thomas Rice, Immediate Past Chair, State Bar of Texas Bankr. Section, and Todd Headden, Vice President of Membership, State Bar of Texas Bankr. Section, and Josiah M. Daniel, III, Fellow Emeritus, Am. Coll. of Bankr. (Apr. 14 & 20, 2020) [hereinafter Rice-Headden E-mail Chain] (on file with author); Texas Lawyers, *supra* note 34.

40. *See supra* note 38.

*discussion of specific legal questions, resource libraries that will allow users to easily upload and share documents and articles, and a directory to search for a former colleague or connect with an attorney in a specific field.*⁴¹

The login site was simply named "connect.texasbar.com."⁴² The following year, an SBOT staffer described Texas Bar Connect in a post as "a private community similar to LinkedIn" and echoed Apffel's explanation of the purposes but added one more available function: to "create blogs."⁴³ That is the only one of the advertised capabilities of Texas Bar Connect that the SBOT Bankruptcy Listserv has not utilized.

Members of the SBOT Bankruptcy Law Section are automatically members of the listserv, and only a few have opted out.⁴⁴ It is not open to the public or to non-members of this substantive law section of the bar organization. The listserv automatically forwards to all its registered users each message posted and each response.⁴⁵ This listserv is essentially self-moderated.⁴⁶ Any member may post any message, and any other member may respond, and the responses may be either posted for all to see or sent privately to the questioner.⁴⁷ The Texas Bar Connect web function for the Bankruptcy Section is a listserv; the SBOT Bankruptcy Listserv has continued to prosper since inception despite the recent ascendancy of other forms of social media.⁴⁸

41. Trey Apffel, *Send and Receive*, 77 TEX. BAR J. 304, 304 (April 2014) [hereinafter Apffel, *Send and Receive*] (emphasis added); Trey Apffel, *Three Words to Live By*, 77 TEX. BAR J. 460, 460 (June 2014) (adding: "I'm excited to say that a new members-only network called Texas Bar Connect has launched in beta mode, offering a new way for attorneys to connect and share information" a month after his initial publication); *2013-2014 State Bar of Texas: Committee Reports*, 77 TEX. BAR J. 624, 631 (July 2014) ("[The SBOT's Web Services C]ommittee oversaw the beta launch of the bar's private social network for lawyers, Texas Bar Connect . . .").

42. TEX. BAR CONNECT, *supra* note 8.

43. *Connect Tip*, TEX. BAR CONNECT: BANKR. SECTION (Mar. 16, 2015, 12:49 PM) (on file with author).

44. Rice-Headden E-mail Chain, *supra* note 39.

45. See *Welcome to Our New Private Online Community Texas Bar Connect*, *supra* note 18 (providing customizable options for members to receive listserv e-mails, including receiving them as they are made).

46. *Code of Conduct*, *supra* note 38 ("The State Bar of Texas does not actively monitor the site for inappropriate postings and does not on its own undertake editorial control of postings. However, in the event that any inappropriate posting is brought to the attention of State Bar of Texas it will take all appropriate action.").

47. *Welcome to Our New Private Online Community Texas Bar Connect*, *supra* note 18 (providing options for members to either respond directly to one member or to the entire group).

48. See *id.* (describing the importance of the listserv and its continued presence on updated software).

To save costs, in late 2020, the SBOT switched the Texas Bankruptcy Listserv to a different software provider.⁴⁹ The switchover became effective on September 21, 2020.⁵⁰ The new platform functions very much like the prior software.⁵¹ Listserv participants post their queries and comments and formulate the expression of the topic of the message, and the new platform sends out either instantaneous e-mails or else a daily summary of them to all the members participating.⁵² The e-mail to the lawyer shows the topic, the number of posts, and the names of the posters; the attorney then clicks a link to retrieve the message and its thread. As before, advertising is forbidden, and posts and threads will be archived for subsequent availability.⁵³ Posts and data from the prior listserv are being migrated, to the extent possible.⁵⁴ The new listserv platform, accessed through the SBOT Bankruptcy Section's webpage, is called "Bankruptcy Law Forum."⁵⁵ Because the new incarnation is a continuation of the prior listserv through a new software provider, this Article will continue to refer to this listserv as the SBOT Bankruptcy Listserv.

B. *Utilization of This Listserv by Texas Bankruptcy Lawyers*

The bulk of messages on the SBOT Bankruptcy Listserv originate from participating Texas bankruptcy lawyers who have encountered a legal issue or practice problem to which they do not know the answer or solution; it is easy then to post a query on the listserv about it and inquire on behalf of their client. The vast majority of posts are by solo practitioners and members of small law firms who typically represent individual debtors in cases under Chapters 7 and 13 of the Bankruptcy Code—this reflects the reality of life in the bankruptcy courts in which individual-debtor cases far outnumber business-debtor cases and in which creditors tend to hire lawyers from larger firms rather than solo practitioners. Posts do occasionally ask about Chapter 11 business reorganization matters, but far more numerous are queries ranging from straight liquidation under Chapter 7 to adjustments

49. E-mail from Joshua P. Searcy, Chair, State Bar of Texas Bankr. Section, to Josiah M. Daniel, III, Fellow Emeritus, Am. College of Bankr. (Sept. 21, 2020, 12:31 PM) (on file with author).

50. *Id.*

51. *See id.* ("In choosing a replacement platform much thought and consideration was given to try to preserve the functionality of the old listserv while improving the features available.")

52. *See id.* (articulating the functionality of the updated listserv).

53. *Id.*

54. *Id.*

55. *See id.* ("The FORUM is where posts and responses will be located.")

of debts of individuals with regular income pursuant to Chapter 13 of the Bankruptcy Code.

To begin, many postings ask about the “means test” of Bankruptcy Code Section 707—the gateway that divides Chapter 7 from Chapter 13 eligibility⁵⁶—and the complex official forms that execute these tests.⁵⁷ Typical queries include: “If the debtor’s young step-child (8 y[ea]rs old, if that matters) is in the home for part of the 6 months prior to filing, is there a way to account for those months where debtor and his wife had the child in the home?”⁵⁸; and “I am getting ready to file a [Chapter] 7 and she qualifies under the Means Test because the Means Test does not take into account her Social Security. However, in her Budget in the [Chapter] 7, the Social Security funds make it look like she has over \$1,000 left over every month. Can I disclose the S[ocial] S[ecurity] funds but not include them as income in the Budget? Or does it matter?”⁵⁹

Illustrations of Chapter 7 legal issues include: “If a divorcing spouse just filed a chapter 7 case and does not exempt the marital residence, what happens when the other spouse turns around and files his own chapter 7 . . . ?”⁶⁰; “If someone has an offer in compromise with the IRS, will the IRS cancel that agreement by that person filing chapter 7[?]”⁶¹; “Client is a landlord of one rental property, it’s his only source of income, he wants to file chapter 7 due to medical bills and is worried he will lose his rent house, advice?”⁶²; “In a no asset individual chapter 7 bankruptcy even a creditor who is not listed and does not meet statutory exceptions debt is

56. *See Means Test*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A test to determine whether an individual debtor’s Chapter 7 filing is presumed to be an abuse of the Bankruptcy Code requiring dismissal or conversion of the case to Chapter 13 or otherwise.”).

57. Bankruptcy “Official Form 122A-1 (Chapter 7 Statement of Your Current Monthly Income), Official Form 122A-1Supp (Statement of Exemption from Presumption of Abuse Under § 707(b)(2)), and Official Form 122A-2 (Chapter 7 Means Test Calculation) (collectively the ‘122A Forms’) are designed for use in [C]hapter 7 cases.” *Means Testing*, U.S. DEPT JUST., <https://www.justice.gov/ust/means-testing> [<https://perma.cc/U3FQ-ECBP>].

58. *Means Test Question*, TEX. BAR CONNECT: BANKR. SECTION (Aug. 11, 2019, 1:41 PM) (on file with author).

59. *Social Security Funds*, TEX. BAR CONNECT: BANKR. SECTION (Mar. 27, 2017, 11:38 AM) (on file with author).

60. *Competing Chapter 7s*, TEX. BAR CONNECT: BANKR. SECTION (June 4, 2019, 11:06 AM) (on file with author).

61. *Offer in Compromise and Ch 7*, TEX. BAR CONNECT: BANKR. SECTION (Apr. 16, 2018, 6:41 PM) (on file with author).

62. *Are Rental Properties Exempt?*, TEX. BAR CONNECT: BANKR. SECTION (Mar. 28, 2020, 11:48 AM) (on file with author).

discharged. Is that also true in a business chapter 7? There is no discharge, so does the debt have to be scheduled to be avoided, or are debts not scheduled still collectable?”⁶³

Instances of Chapter 13 issues include: “House is up for foreclosure Sept 4th. Wants to do chapter 13 and has the income to do so. My issue is: does she have any interest in the property?”⁶⁴; “I have a Chapter 13 debtor whose last [trustee] payment was due in August 2019 and was one month delinquent in her plan payments [Under] *In re Kessler* . . . [is] Debtor . . . still able to receive her discharge despite not making her mortgage payments after the 60 months of her Plan but before [her] case is discharged[?] I would appreciate your input”⁶⁵; and “I’ve been told my local Ch. 13 Trustee will force a 100% plan Debtor to finish in less than 5 years, forcing him to pay ALL disposable income into the plan. Has anyone else experienced this?”⁶⁶

Legal issues about adversary proceedings, which can be filed and prosecuted in cases under any of Chapters 7, 11, and 13, are also represented in the posts, such as: “What is the legal basis to move for [attorneys’] fees in a bankruptcy adversary proceeding? State or federal law?”⁶⁷; “I would like to file a lien cancellation/validity adversary proceeding The controversy will turn on the statute of limitations to file a foreclosure action. The home is estate’s property but located in a state different than the [home court] and will involve that particular state’s laws. Can I bring this action? Or will judge abstain . . . ?”⁶⁸

Examples of practical problems include posts asking: “[W]hat do you do when a state court ignores the automatic stay?”⁶⁹; “Ch. 7 trustee notified Debtors at a creditors’ meeting . . . that he intended to foreclose the IRS lien

63. *Chapter 7 Business Bankruptcy Question*, TEX. BAR CONNECT: BANKR. SECTION (Feb. 15, 2018, 9:32 AM) (on file with author).

64. *Rights of Surviving Spouse - Ch 13*, TEX. BAR CONNECT: BANKR. SECTION (Aug. 24, 2018, 11:50 AM) (on file with author).

65. *Chapter 13 Discharge Question*, TEX. BAR CONNECT: BANKR. SECTION (Mar. 2, 2020, 4:40 PM) (on file with author).

66. *Length of Over-Median Ch. 13*, TEX. BAR CONNECT: BANKR. SECTION (Sept. 15, 2016, 12:09 PM) (on file with author).

67. *Motion for Attorney’s Fees – Question*, TEX. BAR CONNECT: BANKR. SECTION (May 9, 2018, 10:11 AM) (on file with author).

68. *Bankruptcy Court Adversary Proceeding Jurisdiction as to Controversies Involving Out of State Properties and Laws*, TEX. BAR CONNECT: BANKR. SECTION (Apr. 6, 2018, 5:08 PM) (on file with author).

69. *JP Court “Ignoring” Bankruptcy Filing*, TEX. BAR CONNECT: BANKR. SECTION (Apr. 3, 2018, 6:12 PM) (on file with author).

on their homestead. . . . Has anyone else had this problem?”⁷⁰; and “I just got a notice from my credit card processor . . . cancelling my account because bankruptcy lawyers are on their list of prohibited industries (along with drug paraphernalia and massage parlors). . . . Does anyone know a processor who will handle bankruptcy attorneys?”⁷¹

The questions arise not only under the Bankruptcy Code and the Bankruptcy Rule (and local court rules), but also under what the Code calls “applicable nonbankruptcy law.”⁷² Occasionally, a lawyer just entering the practice of consumer bankruptcy law will simply ask for “mentoring.”⁷³ Usually within minutes, or at least in a few hours, the questioner receives a number of thoughtful, knowledgeable replies—the queries quoted above drew between nine and thirty-one responses—containing practical advice and, often, citations of authority.

Additionally, the SBOT Bankruptcy Listserv carries messages seeking recommendations for other professionals. If a listserv member needs to refer a bankruptcy case or case-related matter to another lawyer in another location, whether in Texas—“I need the names of some attorneys in the Houston, TX area that could take a pretty egregious discharge violation case against a mortgage company”⁷⁴—in neighboring states such

70. *Tax Lien on Homestead—Has Anyone Known a Ch. 7 Trustee to Foreclose the Lien?*, TEX. BAR CONNECT: BANKR. SECTION (Mar. 28, 2016, 9:16 AM) (on file with author).

71. *Credit Card Processing for Bankruptcy Attorneys*, TEX. BAR CONNECT: BANKR. SECTION (July 23, 2018, 5:00 PM) (on file with author).

72. “Applicable nonbankruptcy law” is a term referring to state and federal law that, either but for or despite bankruptcy statutes, would apply to determine a legal question arising in a case. The term is used in many Bankruptcy Code sections that figure in questions posted on the SBOT Bankruptcy Listserv. *See generally* 11 U.S.C. § 108(a) (2005) (covering extension of certain deadlines); 11 U.S.C. § 346 (2005) (outlining state and local tax treatment); 11 U.S.C. § 348 (2010) (covering the effect of conversion); 11 U.S.C. § 363 (2019) (covering the “[u]se, sale, or lease of property”); 11 U.S.C. § 365(c)(1)(A) (2005) (covering restriction on executory-contract assumption and assignment); 11 U.S.C. § 505 (2010) (outlining tax liability determination); 11 U.S.C. § 507 (2010) (outlining unsecured claim priorities); 11 U.S.C. § 511 (2005) (covering interest rates on tax claims); 11 U.S.C. § 521 (2014) (outlining a debtor’s duties); 11 U.S.C. § 523 (2020) (providing exceptions to discharge); 11 U.S.C. § 541 (2014) (covering property of the estate); 11 U.S.C. § 1308 (2010) (covering filing prepetition tax returns); 11 U.S.C. § 1322(c) (2010) (covering curing defaults in a plan); 11 U.S.C. § 1325(a)(5)(B)(i) (outlining lien treatment in Chapter 13 plans).

73. *New to Bankruptcy Work*, TEX. BAR CONNECT: BANKR. SECTION (Mar. 19, 2020, 2:17 PM) (on file with author).

74. *Attorney in the Houston, TX Area*, TEX. BAR CONNECT: BANKR. SECTION (May 12, 2016, 3:22 PM) (on file with author).

as Oklahoma⁷⁵ and Louisiana,⁷⁶ in distant states such as Virginia⁷⁷ and Delaware,⁷⁸ and even in foreign nations such as India,⁷⁹ she is free to do so. To seek a referral to a lawyer in a different or more specialized practice area, such as probate,⁸⁰ medical malpractice,⁸¹ and litigation,⁸² or to a lawyer or firm “with both sophisticated bankruptcy and SEC regulatory experience,”⁸³ she can simply post the request on the listserv and typically receives multiple recommendations from other listserv participants. Relatedly, a questioner occasionally asks for information about other players in cases, for example: “Do any of you know who typically represents John Deere in bankruptcy cases filed in Texas . . . ?”⁸⁴; and “Does anyone here have any experience with [a certain person] as a mediator?”⁸⁵

Furthermore, the listserv is a notification center for matters of interest to its participants, such as notices of the festivities attendant to a Texas bankruptcy judge’s retirement⁸⁶ or the investiture of a new one;⁸⁷ the

75. *Oklahoma (Broken Bow) Judicial F/C Referral*, TEX. BAR CONNECT: BANKR. SECTION (Apr. 1, 2020, 1:00 PM) (on file with author).

76. *Request for Referral – Louisiana*, TEX. BAR CONNECT: BANKR. SECTION (Nov. 2, 2017, 11:20 AM) (on file with author).

77. *Local Creditor Counsel for the Gymboree Corporation; Case No. 17-32986 (KLP) in the US Bankruptcy Court for the Eastern District of Virginia, Richmond Division*, TEX. BAR CONNECT: BANKR. SECTION (Sept. 6, 2017, 12:30 PM) (on file with author).

78. *Delaware Attorney*, TEX. BAR CONNECT: BANKR. SECTION (Nov. 20, 2018, 6:30 AM) (on file with author).

79. *Referral*, TEX. BAR CONNECT: BANKR. SECTION (Oct. 18, 2016, 10:53 AM) (on file with author).

80. *Probate Attorney Corpus Christi*, TEX. BAR CONNECT: BANKR. SECTION (Mar. 18, 2020, 3:07 PM) (on file with author).

81. *Attorney Referral // Med Mal*, TEX. BAR CONNECT: BANKR. SECTION (Sept. 26, 2018, 12:15 PM) (on file with author).

82. *BKR Litigation Attorney Needed (Western District)*, TEX. BAR CONNECT: BANKR. SECTION (Nov. 15, 2016, 2:32 PM) (on file with author).

83. *Referral Needed*, TEX. BAR CONNECT: BANKR. SECTION (July 6, 2017, 2:34 PM) (on file with author).

84. *Who Represents John Deere in Bankruptcy Cases Filed in Texas?*, TEX. BAR CONNECT: BANKR. SECTION (Aug. 10, 2016, 2:06 PM) (on file with author).

85. *Any Experience with This Mediator?*, TEX. BAR CONNECT: BANKR. SECTION (May 3, 2018, 12:03 PM) (on file with author).

86. *See generally Announcement - Judge Bohm Retirement Party*, TEX. BAR CONNECT: BANKR. SECTION (July 15, 2019, 10:09 AM) (on file with author) (announcing the retirement of a bankruptcy judge).

87. *See generally Investiture Ceremony for the Honorable Edward L. Morris*, TEX. BAR CONNECT: BANKR. SECTION (Oct. 17, 2018, 2:20 PM) (on file with author) (inviting members to an investiture ceremony).

adoption of new local rules or general orders;⁸⁸ the deaths of beloved colleagues;⁸⁹ and national developments, such as the evolving foreclosure moratoria and debtor-relief measures available during the COVID-19 pandemic.⁹⁰ All such matters are important and relevant communications on the listserv. Moreover, the listserv automatically routes attachments to posted messages into a searchable repository called the "Library." Examples of such attachments are a single-page "cheat sheet" of key elements and markers of consumer-debtor filing eligibility, debt dischargeability, and property exemptibility that a lawyer had crafted and generously wished to share,⁹¹ and a copy of IRS Document 25.18.4, "Collection of Taxes in Community Property States."⁹² The Texas Bar Connect website also features a link to the directory of all members of the SBOT, enables posting not only messages but also videos and web links, contains a link to the SBOT's continuing legal education (CLE) calendar, and provides a simple search engine.⁹³ A Code of Conduct is on the site,⁹⁴ and by using its service, the listserv participants accept the governing rules and guidelines and acknowledge the warnings not to disclose private information about a client or a case, and to avoid posting commercial or marketing material.⁹⁵ The SBOT disclaims liability.⁹⁶

One scholar who studied and wrote about a private legal listserv fifteen years ago aptly observed that a "listserv is best understood when it is situated within the culture of the bar organization, with its history of education and

88. *Orders from SDTX Regarding Wet Signatures and an Order Regarding Procedure for Temporary Reduction in Chapter 13 Plan Payments*, TEX. BAR CONNECT: BANKR. SECTION (Mar. 19, 2020, 9:12 PM) (on file with author).

89. *Remembering John Talton*, TEX. BAR CONNECT: BANKR. SECTION (Oct. 19, 2018, 1:20 PM) (on file with author); *Keith Harvey—Celebration of Life on 3-11-19 in Dallas*, TEX. BAR CONNECT: BANKR. SECTION (Feb. 16, 2019) (on file with author).

90. *See PowerPoint Presentation from Today's Webinar in the Southern District of Texas*, TEX. BAR CONNECT: BANKR. SECTION (Mar. 31, 2020, 7:55 PM) (on file with author) (posting a PowerPoint presentation related to COVID-19).

91. *Bankruptcy Quick Reference Info*, TEX. BAR CONNECT: BANKR. SECTION (Mar. 27, 2020, 2:25 PM) (on file with author).

92. *IRS Claim*, TEX. BAR CONNECT: BANKR. SECTION (Oct. 31, 2018, 5:07 PM) (on file with author).

93. *See generally* TEX. BAR CONNECT, *supra* note 8 (providing features of the listserv that are also available in the Bankruptcy Section of Texas Bar Connect).

94. *See Code of Conduct*, *supra* note 38.

95. *Id.*

96. *See id.* (disclaiming all responsibility or liability and providing the following warning: "Never share privileged information about clients or cases. . . . Use caution when posting messages and files. Information posted on the lists and in the libraries is available for all to see . . .").

efforts to improve the standing of the profession.”⁹⁷ Since its inception ten years ago, the SBOT’s Bankruptcy Law Section has pursued the objective to:

[P]rovide an opportunity for all practitioners of bankruptcy law licensed in Texas to meet and exchange information and ideas on a regular basis, including practitioners in both the consumer and business bankruptcy arenas, for those who represent creditors and debtors, and those who live in any geographic region. The Bankruptcy Section shall endeavor to have the membership of the Council reflect this broad diversity of its members. The Section shall also provide an opportunity for lawyers newly practicing Bankruptcy law to attain those skills, experience and relationships which will assist them to enhance the practice of Bankruptcy law in the State of Texas.⁹⁸

The Bankruptcy Law Section of the SBOT has fostered a hospitable and collegial culture and community of and for its members. It continually organizes and assists a variety of ongoing educational and professional opportunities, such as annual and special seminars and bench-bar conferences, both statewide and localized by judicial district.⁹⁹ The SBOT Bankruptcy Listserv is further vindication of those purposes of “meet[ing] and exchang[ing] information and ideas” and “attain[ing] those skills, experience and relationships [that] will assist them to enhance the practice of Bankruptcy law” by and among bankruptcy lawyers across all “geographic region[s]” of the State.¹⁰⁰ The listserv embodies the culture of the Section and is a significant service to its members.

III. SIMILAR LISTSERVS OF THE AMERICAN BAR ASSOCIATION AND OTHER BAR ORGANIZATIONS

A. *ABA Connect’s Multifarious Listservs*

The SBOT listserv preceded the ABA’s listserv network, called “ABA Connect,” which dates from late 2018.¹⁰¹ Similar to Texas Bar Connect,

97. Levin, *supra* note 25, at 614.

98. *About Us*, BANKR. LAW SECTION: STATE BAR TEX., <http://statebaroftexasbankruptcy.com/About> [<https://perma.cc/8ALL-APZ4>].

99. *See* BANKR. LAW SECTION: STATE BAR TEX., <http://statebaroftexasbankruptcy.com> [<https://perma.cc/KQC7-9PRH>] (displaying upcoming events at the bottom of the webpage).

100. *About Us*, *supra* note 98.

101. *Wayback Machine*, INTERNET ARCHIVE, https://web.archive.org/web/20181201000000*/http://connect.americanbar.org/home [<https://perma.cc/V66E-AS2B>] (showing the Internet

ABA Connect identifies itself as "a place to network, exchange ideas, get advice, and interact with fellow lawyers and legal professionals who share similar areas of interest in addition to exclusive member access to the ABA Member Directory."¹⁰² ABA Connect and Texas Bar Connect are stylistically and functionally similar. ABA Connect seems to have completely replaced a number of previously existing ABA-sponsored listservs such as "its SoloSez electronic mailing list" that targeted solo practitioners.¹⁰³ The ABA Connect site¹⁰⁴ states that it is "an easier interface for email exchanges, but it also includes an interactive online web platform that allows you to search for previous messages, peruse shared documents, and voluntarily join other communities right on the spot!"¹⁰⁵ It is a listserv with additional features just like the SBOT Bankruptcy Listserv.

While it is similar to the Texas listserv, ABA Connect also differs in several ways.¹⁰⁶ It features many more "communities," 286 altogether, of which forty-eight are highly specialized and focused on discrete issues and particular niches of business bankruptcy practice,¹⁰⁷ generally mirroring the extensive subcommittee structure of the Business Bankruptcy Committee of the ABA Business Law Section. For example, there are listservs for "Executory Contracts," "Avoiding Powers," and "Governmental Bankruptcies"; only one ABA community addresses "Consumer Bankruptcy."¹⁰⁸ However, all the ABA bankruptcy listservs are essentially unused.¹⁰⁹ The fact that ABA Connect listservs are bureaucratically

Wayback Machine dates ABA Connect on the Internet to as early as Feb. 23, 2018—though it may have existed earlier and simply not been recorded at that time).

102. *Welcome to ABA Connect*, ABA, <https://connect.americanbar.org/home> [<https://perma.cc/46N3-SFTU>].

103. *See* Buddensick, *supra* note 28, at 717 (discussing the ABA's then-existing SoloSez listserv had more than 3,000 members).

104. As with my citations to posts on Texas Bar Connect, because readers cannot access the listserv messages I quote and cite in this Article (unless a member of the ABA and registered to ABA Connect), and to substantially shorten the footnotes, I will hereinafter give the title of the message and the date of the cited message but omit the URL. Paper copies of all cited messages are retained in the author's file.

105. *User Guide & FAQ*, ABA, <https://connect.americanbar.org/support/user-guide#abaconnect> [<https://perma.cc/M4NV-485M>].

106. *Compare id.* (explaining ABA's differences from existing listservs), *with About Us, supra* note 98 (providing the mission statement and bylaws of the SBOT Bankruptcy Law Section).

107. *All Communities*, ABA (on file with author).

108. *Id.*

109. *See id.* (indicating there are very few active discussions in many of the groups).

moderated may be one reason for such low levels of utilization—posting a message is not user-friendly.¹¹⁰

B. *Listserve of State Bar Associations and Private Lawyer Groups*

“State and local bar associations often operate such lists,”¹¹¹ and they “tend to be limited to bar members,” one commentator observed in 2009,¹¹² but my research in 2020 found this to be an exaggeration. One such listserv, maintained by the South Carolina Bar Association, is called SC Bar Connect.¹¹³ Dating from 2015, the listserv focuses solely on consumer bankruptcy lawyers, but is only sporadically utilized.¹¹⁴ Another is D.C. Bar Connect, offered by the District of Columbia Bar Association,¹¹⁵ which solicits participation of its members as follows:

Set Up Your Profile Add a profile photo, connect your LinkedIn, add experience, and more!

Start a Discussion Collaborate with peers on industry topics, and get help from experts in your field!

Share a Resource Upload a white paper, case study, PDF, or other helpful resource!

Find a Peer Browse the directory to find DC Bar peers[.]¹¹⁶

110. Beginning April 1, 2020, while writing this Article, the author sought to post a simple, one-sentence notice on ABA Connect’s Business Bankruptcy-Governmental Bankruptcies listserv advising simply that his *Chapter 9 Bankruptcy and Pro Bono Lawyering* article, Daniel, *Ch. 9 & Pro Bono Lawyering*, *supra* note 6, is freely available via Google Scholar. It required three attempts over seventeen days and exchange of a total of seven e-mails with the moderator, an ABA staffer, to accomplish. The post now appears on this listserv. E-mail Chain Correspondence Between Graham Hunt, Technology Specialist, Am. Bar Ass’n, and Josiah M. Daniel, III, Fellow Emeritus, Am. Coll. of Bankr. (Apr. 1–20, 2020) (on file with author).

111. Buddensick, *supra* note 28, at 716.

112. *Id.* at 717 n.10.

113. SC BAR CONNECT, <https://connect.sbar.org/home> [<https://perma.cc/W7YE-DLSH>].

114. E-mail Chain Correspondence Between George B. Cauthen, Partner, Nelson Mullins Riley & Scarborough LLP, and Josiah M. Daniel III, Fellow Emeritus, Am. Coll. of Bankr. (Apr. 7, 2020, 4:49 PM) (on file with author) (“Can’t find any one [practicing bankruptcy law in South Carolina] that uses [the] current SC Bankruptcy list though [I] have learned the one in existence[, which] began as an organization open to all, evolved [in]to a bankruptcy consumer organization and then to [a] debtor consumer bankruptcy group only . . .”).

115. DC BAR CONNECT, <https://connect.dcb.org/home> [<https://perma.cc/KRE5-4JZT>].

116. *Www Dcbar Org Login*, LOGININSIDER (emphasis added), <https://logininsider.com/w-logins/www-dcbar-org-login.html> [<https://perma.cc/FLR9-H7HK>].

Like the Texas list, D.C. Bar Connect is limited to association members and is protected from public view,¹¹⁷ although its generally-available FAQ identifies its twenty-one communities including: "Administrative Law and Agency Practice," "Antitrust and Consumer Law," "Corporation, Finance, and Securities Law," "Family Law," "International Law," and "Taxation."¹¹⁸

Another state bar, the Kansas Bar Association, created a legal ethics listserv¹¹⁹ and made every licensed lawyer of the state instantly a member.¹²⁰ The inaugural e-mail message to all Kansas lawyers stated:

As part of our ongoing effort to be of service to the bar, we have created the KSEthics listserv for the purpose of sending ethics hypotheticals by email to all subscribers on a bi-weekly basis. Each hypothetical will include the answer and an explanation of the answer, including citations to the applicable Kansas Rule(s) of Professional Conduct.¹²¹

Other legal listservs are sponsored by private associations of lawyers, such as the successful listserv program of the private New York State Trial Lawyers Association known as NYSTLA "List Server Forums."¹²²

Launched in the late 1990s, the New York group's original listserv was called "General Forum."¹²³ Examining the precursor listserv fifteen years ago, a scholar, Leslie C. Levin, found:

For the predominantly solo and small firm lawyers who post messages on the NYSTList, the listserv provides some of the benefits of working in a larger law office. Rather than walk down the hall to ask a question, these lawyers are just a mouse click away from a wealth of information from their professional community. Indeed, it may be easier in some respects to seek

117. See DC BAR CONNECT, *supra* note 115 (indicating one must sign in to access the site's content).

118. *FAQs*, DC BAR, <https://www.dcbbar.org/about/faqs> [<https://perma.cc/WH4N-SRV3>] (listing the different communities under the drop-down menu titled "How do I post to D.C. Connect from my email?").

119. KAN. BAR ASS'N, <https://www.ksbar.org/page/connect> [<https://perma.cc/AQ4A-JWWR>].

120. Larry N. Zimmerman, *KSEthics Listserv*, J. KAN. BAR ASS'N, July–Aug. 2015, at 15.

121. *Id.*

122. See *List Server Forums*, NYSTLA, <https://www.nystla.org/index.cfm?pg=DiscussionGroups> [<https://perma.cc/GTR9-JKDI>] ("Get advice and strategies from New York trial lawyers[.]").

123. Levin, *supra* note 25, at 598.

advice from the listserv than it is in a law office, because lawyers may be more willing to admit what they do not know to relative strangers.¹²⁴

Today, the Association has created more specialized listservs in two groups: (i) Plaintiff-Only General and Medical Malpractice Plaintiff-Only; and (ii) General, Medical Malpractice, Women's Caucus, New Lawyer, Paralegal, and Forms & Documents.¹²⁵ The Texas Trial Lawyers Association maintains a similar "TTLA List Server" that is "a robust networking tool that puts the research power and experience of more than 1,000 of Texas'[s] best trial lawyers at your fingertips."¹²⁶ Members of the listserv can "ask questions, float case strategies and gather information via e-mail from the best trial lawyers in the state."¹²⁷

Professor Levin asked in 2005 "whether equally successful legal listservs can be found or replicated within other legal organizations."¹²⁸ My research indicates that they are, as of now, quite scarce.¹²⁹ Among the tiny handful, NYSTLA List Server Forums and the SBOT Bankruptcy Listserv are the primary exemplars. As Levin stated of the New York predecessor listserv, both have "a very positive impact on the participating lawyers" by educating them and promoting competency.¹³⁰ Moreover, she added, the listserv "counsels ethical conduct by lawyers."¹³¹

IV. A PROPOSED DEFINITION OF "LISTSERV LAWYERING"

In stark contrast to the nearly innumerable ABA bankruptcy listservs,¹³² the single SBOT Bankruptcy Listserv serves a larger number of members,

124. *Id.* at 615.

125. *See List Server Forums*, *supra* note 122 (including a list of "List Server Addresses," which now includes a "COVID-19 Response Forum" in addition to the others).

126. *Your Virtual Law Firm*, TEX. TRIAL LAWS. ASS'N, <https://www.tla.com/index.cfm?pg=HowToAndDemos> [<https://perma.cc/7SHE-3WUE>].

127. *Id.*

128. Levin, *supra* note 25, at 623.

129. A few other consumer-bankruptcy related listservs, all closed to nonmembers, include the National Association of Consumer Bankruptcy Attorneys, the National Association of Chapter 13 Trustees, and the American Bankruptcy Institute. NAT'L ASS'N CONSUMER BANKR. ATT'YS, <https://www.nacba.org> [<https://perma.cc/9BGR-R8PG>]; NAT'L ASS'N CHAPTER 13 TRS., <https://www.nactt.com> [<https://perma.cc/4LDR-V7SQ>]; *Listserv Guidelines*, AM. BANKR. INST., <https://www.abi.org/listserv-guidelines> [<https://perma.cc/7UFQ-EDD9>].

130. Levin, *supra* note 25, at 621.

131. *Id.*

132. *See* discussion *supra* notes 106–108.

about 1,500, who are significantly more active.¹³³ Usage has gained momentum over the past six years, totaling 776 threads comprising 3,400 messages posted as of April 21, 2020. Several observations and assessments follow from my examination of the listserv discussions and activities that have provided the primary source material for my analysis, preliminary to formulating a definition of what is going on there.

First, the listserv's communication of the multiple types of questions, answers, notifications, and other messages is the sort of back-up and mutual assistance that is characteristic of lawyers practicing in "multi-staffed legal organizations"—law firms that are large enough to house more than one lawyer in the same practice area.¹³⁴ But the SBOT listserv is obviously not a law firm, and many, if not most, of its members are solo or small firm practitioners.¹³⁵ Such lawyers often lack easy access to pricey resources such as *Collier on Bankruptcy*,¹³⁶ the leading bankruptcy encyclopedia, and specialized treatises such as *Collier Consumer Bankruptcy Practice Guide*,¹³⁷ *Collier on Bankruptcy Taxation*,¹³⁸ *Bloomberg Law: Bankruptcy Treatise*,¹³⁹ and HeinOnline for access to bankruptcy-topical journals and articles within the broad universe of law-journal literature.¹⁴⁰

Access to the knowledge and experience of other lawyers participating in the SBOT Bankruptcy Listserv can be a partial substitute for books on the

133. See Rice-Headen E-mail Chain, *supra* note 39 (discussing the number of members in the SBOT Bankruptcy Listserv as of April 2020).

134. See *Types of Law Firms*, FINDLAW, <https://hirealawyer.findlaw.com/choosing-the-right-lawyer/types-of-law-firms.html> [<https://perma.cc/N33S-J5JS>] ("Law firms come in a variety of shapes and sizes, ranging from single-attorney law practices to multi-state, multi-staffed legal organizations."); see also Levin, *supra* note 25, at 616 (describing the culture in the NYSTLA listserv that encourages members to ask questions).

135. *Law Firm*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "law firm" as "[a]n association of lawyers who practice law together, [usually] sharing clients and profits, in a business organized traditionally as a partnership but often today as either a professional corporation or a limited-liability company").

136. HENRY J. SOMMER & RICHARD LEVIN, *COLLIER ON BANKRUPTCY* (16th ed. 2013).

137. HENRY J. SOMMER & RICHARD LEVIN, *COLLIER CONSUMER BANKRUPTCY PRACTICE GUIDE WITH FORMS* (2003).

138. MYRON M. SHEINFELD ET AL., *COLLIER ON BANKRUPTCY TAXATION* (Todd F. Maynes ed., 2019).

139. See *Bloomberg BNA Introduces Bloomberg Law: Bankruptcy Treatise, First-of-its-Kind Online Solution Offering Real-Time Updates*, CISION PR NEWSWIRE (Dec. 3, 2014, 12:00 PM), <https://www.prnewswire.com/news-releases/bloomberg-bna-introduces-bloomberg-law-bankruptcy-treatise-first-of-its-kind-online-solution-offering-real-time-updates-300003826.html> [<https://perma.cc/6RW6-9LAE>] (describing the new online treatise published by Bloomberg BNA).

140. HEINONLINE, <https://www.heinonline.com> [<https://perma.cc/TGV2-66QS>].

shelf or online access to encyclopedias and treatises. The advice and guidance given by SBOT Bankruptcy Listserv members can sometimes even be superior to reading the national treatises and practice guides.¹⁴¹ Consider the following typical exchange on the SBOT Bankruptcy Listserv:

[Q:] Are school loans used for your education to become a dentist considered non consumer in the Northern District [of Texas] Dallas Division? . . . [D]o the school loans count toward the limits on unsecured debt[?]

[A:] In my experience student loans are considered consumer debt. And we recently were told by Judge Mullin in [Fort Worth] that student loans do count toward the debt limit in Chapter 13.¹⁴²

The response to the question is local, specific, timely, and informed by real experiences of the responding lawyer.

Second, no participant attempts to charge or expects to receive a fee for her answer, input, or advice responsive to queries through the listserv;¹⁴³ the advice is freely given. But the listserv is not a form of *pro bono publico* legal services because, with rare exception, the client for whom the listserv member is seeking answers or advice—and for whose benefit the listserv answers and advice are directed—is indeed paying fees to that attorney who posed the question.¹⁴⁴ The only paid fees related to the listserv are the annual dues paid by the listserv's members to the SBOT for practicing law and a smaller additional fee for membership in the SBOT's Bankruptcy Law Section. There is no charge, then, for access to the listserv.

Third, the discussions do not constitute CLE. No one presenter or panel of two or three lawyers is declaiming for up to an hour, at a previously established date and time, on what the law is or offering suggestions on the practicalities of law practice in the area.¹⁴⁵ No specific CLE credit is

141. Cf. Levin, *supra* note 25, at 616 (alteration in original) (describing the attitude of lawyers on the NYSTLA listserv who encourage recent graduates to ask even simple questions rather than “stick their head in a book until [3 a.m.]”).

142. *Chapter 7 Non Consumer BK Question*, TEX. BAR CONNECT: BANKR. SECTION (Mar. 3, 2020) (on file with author).

143. See 11 U.S.C. § 504 (2005) (describing the inability to share fees).

144. See *Pro Bono Policy – FAQ 2014*, STATE BAR TEX., <https://www.texasbar.com/Content/NavigationMenu/LawyersGivingBack/LegalAccessDivision/ProBonoFAQ.pdf> [<https://perma.cc/C36S-LAYT>] (defining pro bono services as “[t]he direct provision of legal services to the poor without an expectation of compensation . . .”).

145. Cf. *State Bar Rules*, STATE BAR TEX. (Mar. 2020), https://www.texasbar.com/AM/Template.cfm?Section=Governing_Documents1&Template=/CM/ContentDisplay.cfm&ContentI

available for reading, responding to, or otherwise participating in the listserv. At most, one might say the listserv discussions resemble the question-and-answer sessions that typically occupy the final few minutes of certified, payment-required CLE presentations; but no bar-type organization, such as the SBOT's CLE department, accredits the provisioning of instruction and advice given on the subject-matter topics addressed in the SBOT Bankruptcy Listserv discussions. And, unlike most CLE programs of the SBOT, there is no charge for participating in discussions on the listserv.

Fourth, while the listserv participants make recommendations in response to questions about finding other lawyers in other locales and in other practice areas, it is not a lawyer-referral service.¹⁴⁶ Those services are typically provided by a local bar association for the benefit of the members of the general public who can call in to an established telephone number to request assistance in locating an appropriate lawyer to hire.¹⁴⁷ It may be noted that the SBOT's "Find a Lawyer" function on its main website is useful for that purpose also.¹⁴⁸

All the questions posed on the listserv arise in the course of real representations by lawyers who have been employed by clients, and the posts concern specific issues in bankruptcy cases or adversary proceedings. The participants are lawyers who are specialized in, or have largely limited their practices to, bankruptcy and who, therefore, must be regarded as specially skilled and knowledgeable, if not always thoroughly experienced, in that field.¹⁴⁹ The lawyers who post on this listserv are usually in the early

D=49878 [https://perma.cc/3TGX-2QE8] (providing the Texas state bar rules which define continuing legal education activity as "any organized legal educational activity accredited by the Committee [on Minimum Continuing Legal Education]").

146. See discussion *supra* notes 74–83.

147. See *Lawyer Referral Service*, DALL. BAR ASS'N, <https://www.dallasbar.org/index.cfm?pg=LawyerReferralService> [https://perma.cc/2NJY-8DRX] (providing an example of a bar association that provides legal-referral services).

148. See STATE BAR TEX., <https://www.texasbar.com> [https://perma.cc/R22Q-45KC] (providing an electronic form for the public to "Find a Lawyer").

149. Cf. Kerry Haydel Ducey, *Bankruptcy, Just for the Rich? An Analysis of Popular Fee Arrangements for Pre-petition Legal Fees and a Call to Amend*, 54 VAND. L. REV. 1665, 1667 (2001) (discussing the importance of obtaining a certified attorney that is well equipped to handle bankruptcy law); *Consumer Bankruptcy Law*, TEX. BD. LEGAL SPECIALIZATION, <https://www.tpls.org/specialtyarea/CB> [https://perma.cc/YJE5-V3MS] (providing a board certification application for Consumer Bankruptcy Law); *Business Bankruptcy Law*, TEX. BD. LEGAL SPECIALIZATION, <https://www.tpls.org/specialtyarea/BB> [https://perma.cc/5X96-PJJZ] (providing a board certification application for Business Bankruptcy Law); *Certification Areas*, AM. BD. CERTIFICATION, <https://www.abeworld.org/certification-areas> [https://perma.cc/BAB3-DE8G] (offering certification in specialty areas).

stages of cases or matters that involve questions of substantive law, both under the Bankruptcy Code and applicable nonbankruptcy law, both state and federal; questions of legal process and court procedure; and practicalities of accomplishing the clients' goals. The posting attorneys are (to borrow from my definition of "lawyering") thus "invok[ing] and manipul[at]ing, or advis[ing] about," debtor-creditor disputes and the restructuring of debts and other "dispute-resolving or transaction-effectuating processes of the legal system for the purpose of solving a problem or causing a desired change in, or preserving, the status quo for" real clients.¹⁵⁰ In short, the listserv participants' activities constitute a specific type of "lawyering" under my definition of that broad term.¹⁵¹

If I am correct that the lawyers—who participate in the types of communication and activities seen today on the SBOT Bankruptcy Listserv—are engaging in a new and unique form of lawyering, two steps necessarily follow: first, to posit a specialized definition of those activities, and second, to evaluate their compliance with legal ethics. Here I propose to denominate and define those activities as "*listserv lawyering*":

"Listsर्व lawyering" is the collective, collaborative work of members of a geographically diverse group of lawyers, who are affiliated only through membership in a bar organization, generally, and its legal-specialty listserv, more specifically, and who are communicating and participating in mutual discussions through the listserv, for the purpose of assisting another listserv member lawyer who is currently serving a fee-paying client, by means of responding to a query that lawyer posted on the listserv and answering, or providing helpful information about, that lawyer's legal issue or suggesting solutions to a practical problem of accomplishing the objective of that lawyer's client.

This definition is intended to embrace the activities of those lawyers who participate not only through Texas Bar Connect, but also ABA Connect and all other listservs sponsored by bar organizations, and not only in the field of bankruptcy but for all substantive law practice areas. Importantly, as I observed in formulating my original definition of lawyering, my new definition subsumes, and does not displace, regnant understandings of the terms "'practice of law,' legal ethics, and professionalism."¹⁵²

150. See Daniel, *Proposed Definition*, *supra* note 1, at 215 (adapting the definition of lawyering).

151. *Id.*

152. *Id.*

V. LEGAL-ETHICAL ASPECTS OF LISTSERV LAWYERING

Also important in understanding this type of lawyering is the next step of examining the communications and activities of the participants under the legal-ethical rules, constraints, and considerations otherwise governing all lawyers.¹⁵³ While the New York tort lawyers on the listserv Professor Levin studied were highly focused on ethical issues particularly germane to their tort-law practice—business solicitation, conflicts of interest, and contingency fees—the Texas lawyers on the SBOT Bankruptcy Listserv rarely raise ethical questions in their posts.¹⁵⁴ But the gamut of prevailing ethical rules do apply in bankruptcy cases and proceedings¹⁵⁵ and in the communications occurring among attorneys on the listserv.

153. See *supra* text accompanying note 3; see also Josiah M. Daniel, III, *Am I a "Licensed Liar"?: An Exploration into the Ethic of Honesty in Lawyering . . . and a Reply of "No!" to the Stranger in the La Fiesta Lounge*, 7 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 32, 63 (2016) [hereinafter Daniel, *Am I a "Licensed Liar"?*] ("American lawyering, today as well as at the time of Bentham, Lincoln, and Bierce, occurs within limits, with the boundaries set by, today, the ethical rules of the jurisdictions in which a licensed attorney practices . . ."); Robert K. Vischer, *Moral Engagement Without the "Moral Law": A Post-Canons View of Attorneys' Moral Accountability*, 2008 J. PROF. LAW. 213, 213 (2008) ("The primary objective, when it comes to lawyers, is to attain the client's stated objectives to the extent permitted by law."); Carrie Menkel-Meadow, *Private Lives and Professional Responsibilities? The Relationship of Personal Morality to Lawyering and Professional Ethics*, 21 PACE L. REV. 365, 373 (2000) (discussing "occupational morality"); Broadus A. Spivey, *Ethics: Lawyering and Professionalism*, 33 ST. MARY'S L.J. 721, 723 (2002) (discussing how "[l]awyers are regulated in all aspects of the practice of law" and how those regulations influence societal views of lawyers). See generally GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* (4th ed. 2004).

154. See *Ethical Issue*, TEX. BAR CONNECT: BANKR. SECTION (Oct. 24, 2017, 4:34 PM) (on file with author) (providing a few of those messages: "Trustee is 'requesting'/'demanding' that I and my client 'agree' to put the exempt homestead proceeds into MY trust account and only remit those funds to the client for the purchase of a new homestead even though this is a conditional exemption for [six] months. I feel strongly that this presents a direct conflict of interest between myself and my client?"); see also *Bankruptcy - Divorce*, TEX. BAR CONNECT: BANKR. SECTION (Apr. 7, 2017, 11:10 AM) (on file with author) ("Wife files pro se for divorce, and husband is pro se in the divorce. . . . [I]s it a conflict [for their joint bankruptcy counsel to file a lift-stay motion for the divorce to proceed] since the parties are adverse in the divorce . . . ?").

155. See *In re Fahey*, No. 09–00501, 2009 WL 2855728, at *5 (Bankr. S.D. Tex. Sept. 1, 2009) (holding "[t]he Court has always had inherent power to regulate the practice of counsel appearing before the Court"); see also *Wright v. United States (In re Placid Oil Co.)*, 158 B.R. 404, 411 (Bankr. N.D. Tex. 1993) (recognizing a bankruptcy court has inherent authority to discipline attorneys before it); *Cunningham v. Ayers (In re Johnson)*, 921 F.2d 585, 586 (5th Cir. 1991) (recognizing bankruptcy courts have "statutory and inherent authority to deny attorneys and others the privilege of practicing"); *Galderma Lab'ys, L.P. v. Actavis Mid Atl. LLC*, 927 F. Supp. 2d 390, 394 (N.D. Tex. 2013) ("Fifth Circuit precedent requires the court to consider several relevant ethical standards in determining whether there has been an ethical violation."); *In re Am. Airlines, Inc.*, 972 F.2d 605, 610 (5th Cir. 1992) (indicating a court should determine whether the attorney's behavior prejudiced the client or "threatened interference with the fair administration of justice"); *In re Dresser Indus., Inc.*, 972 F.2d

To begin, because the SBOT listserv is not open to the public, listserv participants should not be concerned about the electronic communications inadvertently creating an attorney-client relationship between them and a member of the general public.¹⁵⁶ Nor should it do so for a listserv participant and another participant's client, because a formal ABA ethics opinion found in 1998 that "[n]o client-lawyer relationship between [a] consulting lawyer's client and [a] consulted lawyer arises as a result of [an informal] consultation . . ."¹⁵⁷ Additionally, conflict-of-interest questions are extremely rare because the Bankruptcy Code contains its own conflict rules¹⁵⁸ along with rules governing attorney's fees;¹⁵⁹ bankruptcy lawyers quickly internalize them because the bankruptcy court can order forfeiture and even regurgitation of fees for a breach by the lawyer.¹⁶⁰ Lastly, except for the possibility of divergent interests in the joint representation of both spouses in a single case, the respective interests of individual consumer clients of a lawyer focusing on Chapter 7 and Chapter 13 cases would hardly ever collide. But other key Texas ethical rules do apply to the listserv.¹⁶¹

The most important rule, one with some bite, is Texas Disciplinary Rule 1.05 regarding "Confidentiality of Information."¹⁶² It provides, in relevant part, that "a lawyer shall not knowingly . . . [r]eveal confidential

540, 543 (5th Cir. 1992) (indicating federal courts should also consider "the ethical rules announced by the national profession in the light of the public interest and the litigants' rights").

156. See Buddensick, *supra* note 28, at 719 ("In the context of legal professional e-mail lists, inadvertent formation of the attorney-client relationship through list correspondence is unlikely.").

157. ABA Comm. on Ethics & Prof'l Resp., Formal Op. 98-411 (1998) (hereinafter ABA Formal Op. 98-411).

158. See 11 U.S.C. § 327 (1986) (stating the court shall disapprove employment if a conflict of interest exists but "a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is an objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest").

159. See 11 U.S.C. § 330 (2005) (providing the rules for allowance of fees of professionals employed by debtor or the estate).

160. See *Arens v. Boughton* (*In re Prudhomme*), 43 F.3d 1000, 1003 (5th Cir. 1995) (stating, even apart from the statutes and the rules, "the court's broad discretion in awarding and denying fees paid in connection with bankruptcy proceedings empowers the bankruptcy court to order disgorgement as a sanction to debtors' counsel"); see also *Barron v. Countryman*, 432 F.3d 590, 598 (5th Cir. 2005) ("[T]he bankruptcy court had a sound basis to order Barron to disgorge his undisclosed postpetition fees.").

161. See generally TEX. DISCIPLINARY RULES OF PROF'L CONDUCT, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A. (West 2020) (providing Texas Rules of Professional Conduct, or Texas ethics).

162. *Id.* at R. 1.05.

information of a client . . . [to] a person that the client has instructed is not to receive the information; or [with exceptions] anyone else."¹⁶³ ABA Model Rule 1.6(a) is more succinct: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation . . ."¹⁶⁴ A comment to the ABA rule adds: "A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation."¹⁶⁵

"Confidential information" is essentially information either the client provided the lawyer or information the lawyer learned about during the representation.¹⁶⁶ Confidential information may be subdivided into unprivileged confidential information, which is not protected by the attorney-client privilege, and privileged confidential information, which is.¹⁶⁷ The latter may not be divulged except in extreme circumstances such as to "prevent commission of [a] prospective crime or fraud."¹⁶⁸ But Rule 1.05(d) permits an attorney to disclose unprivileged information when impliedly authorized or when necessary to "carry out the representation effectively."¹⁶⁹ Helpfully, ethics opinions from both the ABA and the SBOT explain these exceptions cover and validate the communications among lawyers on legal discussion groups, such as the SBOT Bankruptcy Listserv.¹⁷⁰ 81

In 1998, ABA Formal Opinion No. 98-411 acknowledged a lawyer often may seek another lawyer's advice about "an atypical fact pattern, a knotty problem, a novel issue, or a matter that requires specialized knowledge. . . . Even the most experienced lawyers sometimes will find it useful to consult others who practice in the same area . . ."¹⁷¹ Such conferences do not create an attorney-client relationship, as noted.¹⁷² Next, the 2017 ABA

163. *Id.*

164. MODEL RULES OF PROF'L CONDUCT R. 1.6 (AM. BAR ASS'N 2020).

165. *Id.* at R. 1.6 cmt. 2.

166. *See id.* at R. 1.6 cmt. 3 ("The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.").

167. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.05(a).

168. *Id.* at R. 1.05 cmt. 13.

169. *Id.* at R. 1.05(d).

170. *See* discussion *infra* notes 171–177.

171. ABA Formal Op. 98-411, *supra* note 157, at 2.

172. *Id.* at 1; *see also supra* note 157 and accompanying text.

Formal Opinion No. 477R addresses lawyers' use of e-mail as their primary mode of communicating with clients, opponents, and third parties.¹⁷³ Observing the ABA had amended its Rule 1.1 five years earlier to make familiarity with new technologies a requirement for attorney competence, the opinion approved use of e-mail by lawyers.¹⁷⁴ Then in 2018, the SBOT's Professional Ethics Committee issued its Opinion No. 673 that tackled and approved attorney participation in "an online discussion group consisting of Texas lawyers."¹⁷⁵ The opinion found that "[i]t is common for lawyers to have informal lawyer-to-lawyer consultations touching on client-related issues," including "when a lawyer seeks advice from members of an online discussion group . . . to test their knowledge, exchange ideas, and broaden their understanding of the law, with the realistic goal of benefitting their clients."¹⁷⁶ Such seeking and giving of advice is ethically permissible.

The ABA and Texas opinions emphasize that the fundamental issue is protection of client confidentiality. Whether in a one-on-one consultation or in a broad discussion in the SBOT Bankruptcy Listserv, both Texas Rule 1.05 and ABA Rule 1.6 prohibit release of a client's confidential information, whether privileged information "protected by the lawyer-client privilege" or unprivileged information "acquired by the lawyer during the course of or by reason of the representation of the client."¹⁷⁷ The Texas opinion found the lawyer's implied client consent "to reveal a limited amount of unprivileged confidential information to . . . further the representation by obtaining the responding lawyers' experience or expertise for the benefit of the client," includes participation in online discussion groups but, it emphasized, in a careful manner to avoid prejudice to the client.¹⁷⁸

173. ABA Comm. on Ethics & Pro. Resp., Formal Op. 477R (2017).

174. *See id.* ("[T]he use of unencrypted routine email generally remains an acceptable method of lawyer-client communications."); *see also* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01 cmt. 8 (clarifying lawyer competence includes required proficiency with relevant technology).

175. Tex. Comm. on Prof'l Ethics, Op. 673, 81 Tex. B.J. 624, 624 (2018) [hereinafter Texas Op. 673].

176. *Id.*

177. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(a); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 3 (AM. BAR ASS'N 2020) (explaining lawyer-client confidentiality applies to both privileged information and information the lawyer learned that "relat[es] to the representation, whatever its source").

178. Texas Op. 673, *supra* note 175 (laying out the opinion located at 81 Tex. B.J. 624, 624–25).

In order to avoid a breach of the confidentiality requirement, Texas Opinion No. 673 and ABA Opinion No. 98-411 agree the inquiring lawyer should "employ a hypothetical that does not identify the client,"¹⁷⁹ "[l]imit the [i]nformation [r]evealed," or ask the question anonymously.¹⁸⁰ Professor Buddensick identified the necessity to "frame his [or her] questions in a hypothetical or very general form" as an important ethical imperative for participating in legal listservs.¹⁸¹ Her examination of several legal listservs in 2009 revealed "some of the background facts were so specific that another attorney or party involved in the litigation would be likely to recognize them."¹⁸²

This is the most significant shortcoming of the SBOT Bankruptcy Listserv. Few posters on the Texas listserv bother to put their questions in hypothetical terms. Queries frequently contain information about the client, thereby enabling a creditor or adversary—assuming that such party's lawyer reads the message on the listserv—to identify the poster's client and learn what that client's legal issues or infirmities are. Moreover, any lawyer learning these matters is free to represent such an adverse party.¹⁸³ The lawyer who posts a question must comply with the confidentiality requirement for the lawyer's client or potential client, and the best way to do so is to utilize hypothetical facts and questions.

The SBOT listserv contains a terse notice about confidentiality: "Never share privileged information about clients or cases."¹⁸⁴ To strengthen the notice and assist in ethical compliance, it could add: "any material disclosed over the list will not remain confidential, and . . . any exchanges transmitted over the list shall not constitute legal advice."¹⁸⁵ Additionally, the notice could provide that, by participating in the listserv, inquiring lawyers agree to precede queries with the adverb "hypothetically" to bring themselves within the ambit of Texas Opinion No. 673 and ABA Opinion No. 98-411.¹⁸⁶

179. *Id.*

180. ABA Formal Op. 98-411, *supra* note 157, at 3.

181. *See* Buddensick, *supra* note 28, at 721–22 (explaining client confidentiality is "[p]erhaps the most important ethical issue" posed by legal listservs).

182. *Id.* at 724 n.60.

183. *See id.* at 722 ("[B]ecause no attorney-client relationship is typically created as a result of the mere consultation, the consulted attorney has no automatic duty to . . . refrain from representing a party adverse to the consulting attorney's client.").

184. *Code of Conduct*, TEX. BAR CONNECT, *supra* note 38.

185. Buddensick, *supra* note 28, at 730.

186. *See supra* notes 179–80 and accompanying text.

Another ethical principle set forth in the Texas Disciplinary Rules of Professional Conduct provides: “A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer’s competence.”¹⁸⁷ The official comments add that competence is “possession of the legal knowledge, skill, and training reasonably necessary for the representation,” and that competent representation requires “reasonable thoroughness in the study and analysis of the law and facts”¹⁸⁸ An attorney may undertake an unfamiliar matter for a client but, if so, must “become more competent in regard to relevant legal knowledge by additional study and investigation.”¹⁸⁹

To the extent a lawyer on a listserv is completely ignorant of bankruptcy laws and asks the Texas Bankruptcy Listserv lawyers for fundamental advice on “how to get started” in handling a matter for a client in the absence of such knowledge, a lawyer triggers this competence rule. Even for “[a] lawyer possessing the normal skill and training reasonably necessary for the representation of a client in” bankruptcy, a lawyer is ethically required to study and investigate the legal issues presented by a client.¹⁹⁰ The listserv can materially assist in filling that requirement; however, consumer bankruptcy lawyers—who typically charge low fees regulated by the court and therefore handle large caseloads to generate income—should guard against a risk of over-reliance on shortcuts, such as accessing this legal listserv.

Furthermore, a comment to ABA Model Rule 1.1 states: “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice[.]”¹⁹¹ While “lawyers must not rely merely on [listserv] advice as a substitute for independent thought and research,”¹⁹² almost any lawyer is assured, as result of the listserv discussions, to find that what the lawyer “thinks” the applicable statutory and caselaw rules mean is indeed what experienced and knowledgeable lawyers also “think.” Any lawyer learning from knowledgeable and experienced lawyers via the listserv fosters competence and benefits clients.

187. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01(a), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A. (West 2020).

188. *Id.* at R. 1.01 cmt. 1.

189. *Id.* at R. 101 cmt. 4.

190. *Id.*

191. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8 (AM. BAR ASS'N 2020).

192. Buddensick, *supra* note 28, at 728.

Relatedly, other ethical precepts affirmatively encourage a Texas lawyer to utilize resources such as the SBOT Bankruptcy Listserv. For instance, the Texas Disciplinary Rules of Professional Conduct provide: "In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice."¹⁹³ A comment to this rule states: "Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as costs or effects on other people, are predominant."¹⁹⁴ The corollary ABA Model Rule states: "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."¹⁹⁵ Its comment adds: "A client is entitled to straightforward advice expressing the lawyer's honest assessment."¹⁹⁶ The lawyer's advice to clients depends on, or is at least improved by, ongoing education about legal issues and professional judgment development based on examples of results in bankruptcy court and accomplishing the client's objectives—these are staple discussions on the Texas Bankruptcy Listserv.

Texas lawyers must always remember the overarching ethical mandates of honesty and fidelity, including while participating in this listserv.¹⁹⁷ For instance, the Texas Disciplinary Rule of Professional Conduct regarding misconduct provides:

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 such violation occurred in the course of a client-lawyer relationship; . . . [or] (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]¹⁹⁸

The Texas Disciplinary Rule titled "Truthfulness in Statements to Others" provides: "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third

193. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 2.01.

194. *Id.* at R. 2.01 cmt. 2.

195. MODEL RULES OF PROF'L CONDUCT R. 2.1.

196. *Id.* at R. 2.1 cmt. 1.

197. *See generally* TEX. DISCIPLINARY RULES PROF'L CONDUCT preamble (describing a lawyer's overarching responsibilities, such as honest and zealous representation); MODEL RULES OF PROF'L CONDUCT Preamble (describing the same).

198. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.04(a).

person[.]”¹⁹⁹ ABA Model Rule 8.4 is similar: “It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]”²⁰⁰ Indeed, Texas lawyers are continually obligated to “maintain the highest standards of ethical conduct,” including during participation in a legal listserv.²⁰¹

These and any other ethical issues regarding the SBOT Bankruptcy Listserv deserve closer identification and continued study, and relevant bankruptcy literature is sparse.²⁰² My 2009 definition of the general term “lawyering” has found utility in the work of legal scholars concerned with the legal profession.²⁰³ I hope my proposed definition of the specific term “*listserv lawyering*” will prove “valuable [by] facilitat[ing] analysis of the work, activities, and mentalities of [a] lawyer” participating in such activities to “inform[] an appreciation and understanding of the outcomes generated by these [lawyers]’ work for their [clients].”²⁰⁴

VI. THE FUTURE OF LISTSERV LAWYERING

The SBOT Bankruptcy Listserv is a practical solution to the needs of solo and small-firm, consumer-debtor bankruptcy lawyers of Texas for timely “discussion of specific legal questions,” access to functional libraries of “share[d] documents and articles,” and is a good way “to search for a former colleague or connect with an attorney in a specific field.”²⁰⁵ Hosted on the SBOT platform, the listserv serves lawyers well, helping them represent their clients. Other substantive law practice groups of the SBOT have not

199. *Id.* at R. 4.01(a). *See generally* Daniel, *Am I a “Licensed Liar”?*, *supra* note 153 (exploring the ethics “of honesty in lawyering”).

200. MODEL RULES OF PROF’L CONDUCT R. 8.4.

201. TEX. DISCIPLINARY RULES PROF’L CONDUCT preamble ¶ 1.

202. *See, e.g.*, Mark Duedall et al., *The Ethics Panel: Ethics 2.0—The Ethical Challenges and Pitfalls Web 2.0 Presents to Bankruptcy Attorneys*, 26 EMORY BANKR. DEV. J. 245, *passim* (2010) (discussing blogs and listservs as tools for lawyers to develop business or channels for finding prospective clients).

203. Mary Helen McNeal, *Slow Down, People Breathing: Lawyering, Culture and Place*, 18 CLINICAL L. REV. 183, 210 n.117 (2011); Lauren E. Bartlett, *A Human Rights Code of Conduct: Ambitious Moral Aspiration for a Public Interest Law Office or Law Clinic*, 91 ST. JOHN’S L. REV. 559, 561 n.10 (2017); Liton Chandra Biswas, *Suitability of the Underlying Theories of Zealous Advocacy in Ensuring Justice: Laying the Ground to Look Beyond the Zealous Advocacy*, 92 N.D. L. REV. 61, 76 n.76 (2016); Joan MacLeod Hemingway, *Business Lawyering in the Crowdfunding Era*, 3 AM. U. BUS. L. REV. 149, 165 n.38 (2014); E. Lea Johnston, *Representational Competence: Defining the Limits of the Right to Self-Representation at Trial*, 86 NOTRE DAME L. REV. 523, 543 n.134 (2011); E. Lea Johnston, *Setting the Standard: A Critique of Bonnie’s Competency Standard and the Potential of Problem-Solving Theory for Self-Representation at Trial*, 43 U.C. DAVIS L. REV. 1605, 1642 n.237 (2010).

204. Daniel, *Proposed Definition*, *supra* note 1, at 217–18.

205. Apffel, *Send and Receive*, *supra* note 41, at 304.

taken advantage of the Texas Bar Connect opportunity, and the peculiar collegiality of bankruptcy practice may account for that; however, the other practice groups of the bar organization should consider the exemplar of the bankruptcy listserv and consider this option anew. The SBOT Bankruptcy Listserv demonstrates listservs retain vitality and promise. The Texas listserv should become known as the model, particularly for the somnolent bankruptcy listservs on the ABA Connect platform²⁰⁶ and for other bar associations, public and private, in other states.

Today, listservs such as the SBOT Bankruptcy Listserv prepare law students for real-world client representation immediately. Toward that goal, law schools have more frequently rounded out the inculcation of the most important bodies of law from doctrinal faculty with coaching by adjunct and clinical faculty.²⁰⁷ Clinical instruction in bankruptcy law practice, particularly in the representation of individual debtors in Chapter 7 and 13 cases, should include an introduction to any relevant listservs such as the SBOT Bankruptcy Listserv.

Lastly, the criteria of a profession such as law are:

First, . . . a definable body of organized knowledge, an expertise that derives from extensive academic training. . . . Second, . . . a moral commitment of service to the public that goes beyond the test of the market or the desire for personal profit. . . . [And, third,] the relative independence or autonomy of professional life . . . [with] the right as a separate entity in society to regulate their own affairs and define their own standards.²⁰⁸

Listservs for professional groups, such as bankruptcy lawyers, subsume these characteristics, always on an ethical basis, and should therefore be encouraged. Attorneys must always remember their profession is "a model and guide to a special kind of accomplishment[;]" it is an occupation, yes, but "offer[ing] much more than economic betterment . . . offer[ing] a way of life" based upon values of authority and honor combined with duty and

206. See *supra* note 109 and accompanying text.

207. Cf. Jordan Rothman, *Law Schools Should Hire More Adjunct Professors*, ABOVE LAW (June 5, 2019, 12:45 PM), <https://abovethelaw.com/2019/06/law-schools-should-hire-more-adjunct-professors/> [<https://perma.cc/S7UR-PX4C>] (discussing the benefits of hiring adjunct professors, who often have more practical experience than full-time law professors).

208. Nathan O. Hatch, *Introduction: The Professions in a Democratic Culture*, in *THE PROFESSIONS IN AMERICAN HISTORY* 1–2 (Nathan O. Hatch ed., 1988).

responsibility.²⁰⁹ Facilities such as the SBOT Bankruptcy Listserv are rare, and the numerous ABA Connect listservs of bankruptcy lawyers have been unsuccessful. I therefore urge state bar organizations that have bankruptcy sections or recognize bankruptcy as a specialty—as well as other substantive law specialties—to follow the lead of the SBOT and foster *listserv lawyering* in the interest of the profession.

209. SAMUEL HABER, THE QUEST FOR AUTHORITY AND HONOR IN THE AMERICAN PROFESSIONS 1750–1900, at 105, 124, 360–61 (1991).