STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

MARTIN FRANTZ,

Plaintiff,

vs.

HAWLEY TROXELL ENNIS & HAWLEY, LLP,

Defendant.

Case No. **CV 2015 1406**

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS OR ABATE, AND ORDER DENYING PLAINTIFF'S MOTION FOR PRO HAC VICE ADMISSION

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on the "Motion to Dismiss or Abate" defendant Hawley, Troxell, Ennis & Hawley (Hawley Troxell), against plaintiff, Martin Frantz (Frantz). Frantz' positions taken in this case demonstrate his misunderstanding of state and federal bankruptcy laws and their interaction. The relief sought by Frantz and the legal theory underpinning that requested relief demonstrate the absurdity of this litigation. Frantz is currently represented in this litigation in state court, and in his concurrent litigation in federal bankruptcy court, by his son, attorney Jonathon Frantz.

Frantz' misunderstanding of our laws is discussed below. The relief sought in the Complaint and Jury Demand filed on February 20, 2015, are damages sustained by Frantz caused by Hawley Troxell's "legal malpractice and/or breach of fiduciary duty". Complaint and Jury Demand, p. 9, ¶ B. The legal theory espoused in that Complaint and Jury Demand is Frantz' claim that when Frantz filed bankruptcy in October 2011,

Hawley Troxell, representing a creditor, Idaho Independent Bank (IIB), used confidential information against Frantz to prove to the bankruptcy court that Frantz' debt to IIB was non-dischargeable "due to Mr. Frantz's allegedly fraudulently reporting of the value of his assets." *Id.,* p. 2, ¶ 3. The fatal *factual* problem with Frantz' theory is that Hawley Troxell did not represent Frantz as an attorney in that prior litigation, thus, no conflict, and no malpractice in the bankruptcy proceeding. The fatal *legal* problem with Frantz' theory is that the Honorable Terry L. Myers, Presiding Chief Judge of the United States Bankruptcy Court, *already decided that precise issue* on December 10, 2014, after a two-day evidentiary hearing. Judge Myers found Merlyn Clark, an attorney for Hawley Troxell, was hired in this earlier litigation by Frantz' attorneys, Bruce Owens and Regina McCrea, to provide expert testimony, not to act as Frantz' attorney. Affidavit of John C. Riseborough, May 7, 2015, Exhibit IX, p. 12, Ll. 10-15. Frantz breathed not a word about that prior decision in his Complaint and Jury Demand filed before this Court, filed two months *after* Judge Myers' decision.

While not relevant to resolving this case, the Court feels compelled to note the manner in which Frantz alleges he sustained his damages in this case. Essentially, Frantz claims in his Complaint and Jury Demand that he did not lie to IIB and the bankruptcy court about his assets, but if he did lie, the only way the bankruptcy court could have found out that Frantz lied to IIB and the bankruptcy court was by Hawley Troxell disclosing confidential information to IIB and the bankruptcy court which was obtained in that prior litigation. Frantz alleges:

> 23. Mr. Frantz's personal financial statements provided to IIB were not fraudulent. The only basis for a claim that they may have been fraudulent is if the claimant had knowledge of Mr. Frantz's business entity and the entity's ownership of the Guardian Angel Homes project.

Complaint and Jury Demand, p.5, ¶ 25. Let that sink in for a moment. The only way

Frantz can establish damages in this state court case is to admit he lied to IIB and the bankruptcy court. Otherwise, Frantz has no damages. Had Frantz told the truth to IIB and the bankruptcy court, his debt to IIB would be dischargeable, and thus, no damages in this state court action.

At least Frantz was honest with this Court in his Complaint and Jury Demand about what he tried doing before the bankruptcy court (pursuing disqualification of Hawley Troxell as IIB's counsel in bankruptcy court), as Frantz alleges in this state court action:

> 25. As a result of Defendant's use of information relating to Defendant's prior representation of Mr. Frantz to Mr. Frantz's disadvantage in the current proceedings, Mr. Frantz immediately began to pursue disqualification of Defendant from representing IIB in the bankruptcy proceeding as well as other proceedings in which Frantz' financial status was a significant issue.

Id., p. 5, ¶ 25. However, Frantz was completely silent in his complaint about what Judge Myers did with Frantz' effort to disqualify. As mentioned above, Frantz conveniently omitted any reference in his Complaint and Jury Demand filed before this Court the fact that two months *earlier* Judge Myers' decided Frantz had absolutely no basis upon which to disqualify Hawley Troxell.

The wake of litigation left by Frantz is described as follows:

In 2008, Frantz was at that time pursuing an attorney malpractice lawsuit against the law firm of Witherspoon, Kelley, Davenport & Toole, P.S. (Witherspoon Kelley). Affidavit of John C. Riseborough, May 7, 2015, Exhibit I, p. 2, ¶ 2. This Court is more than familiar with that litigation, being assigned to preside over *Marty D. Frantz v. Witherspoon, Kelley, Davenport & Toole, P.S.,* Kootenai County Case No. CV 2008 2630. On June 8, 2009, this Court issued a "Memorandum Decision and Order on Defendant's Motion for Summary Judgment" in that case.

In that litigation, on December 16, 2008, Regina MCrea, counsel for Frantz in *Frantz v. Witherspoon Kelley*, contacted Merlyn Clark, a partner with Hawley, Troxell, Ennis & Hawley (Hawley Troxell), to provide expert witness testimony regarding the standard of care for the attorney malpractice claim. Affidavit of John C. Riseborough, May 7, 2015, Exhibit III. Clark informed McCrea and Bruce Owens, McCrea's co-counsel, that "any information [he] received would be discoverable in the Malpractice Lawsuit by the defendants in that case and that they should not provide [him] any information they would not want defendants to discover." Affidavit of John C. Riseborough, May 7, 2015, Exhibit V, p. 4, ¶ 14. McCrea sent Clark materials he would need to review in order to render an opinion. Affidavit of John C. Riseborough, May 7, 2015, Exhibit III. "Mr. Clark reviewed the materials and authored a 21 page report dated May 4, 2009, reflecting his opinions." Memorandum of Points and Authorities in Support of Motion to Dismiss or Abate (I.R.C.P. 12(B)(8)), p. 2; Affidavit of John C. Riseborough, May 7, 2015, Exhibit I, p. 2, ¶ 5. That report was sent to McCrea. Memorandum of Points and Authorities in Support of Motion to Dismiss or Abate (I.R.C.P. 12(B)(8)), p. 3; Affidavit of John C. Riseborough, May 7, 2015, Exhibit I, p. 2, ¶ 5. After this Court's June 8, 2009, "Memorandum Decision and Order on Defendant's Motion for Summary Judgment", the attorney malpractice case *Frantz v. Witherspoon Kelley* resolved through mediation. Affidavit of John C. Riseborough, May 7, 2015, Exhibit I, p. 2, ¶ 7.

In "June 2010, Idaho Independent Bank (IIB) retained Hawley Troxell Ennis & Hawley to pursue claims against Mr. Frantz for failure to pay a loan that fully matured." Complaint and Jury Demand, p. 4, ¶ 18. On June 28, 2010, Hawley Troxell, in its capacity as counsel for IIB, sent a demand letter to Davidson, Backman, Medeiros, PLLC, counsel for the guarantors on the obligation; one of those guarantors was

Frantz. Affidavit of John C. Riseborough, May 7, 2015, Exhibit IV. In October 2011, Frantz filed for bankruptcy. *Id.*, p. 4, ¶ 19. Hawley Troxell represented IIB as a creditor in the bankruptcy proceedings against Frantz. Complaint and Jury Demand, p. 4, ¶ 20.

During the bankruptcy proceedings Frantz and his wife, Cynthia M. Frantz, sought to disqualify Hawley Troxell as counsel for IIB pursuant to Idaho Rule of Professional Conduct 1.9. Affidavit of John C. Riseborough, May 7, 2015, Exhibit IX, p. 7, Ll. 24–25 through p. 8, Ll. 1–2. Idaho Rule of Professional Conduct 1.9 instructs: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." I.R.C.P. 1.9(a). "The defendants assert[ed] that in 2008, Merlyn Clark, a partner at Hawley Troxell formed an attorney-client relationship with Marty Frantz." Affidavit of John C. Riseborough, May 7, 2015, Exhibit IX, p. 8, Ll. 5–7. The bankruptcy court held a two-day hearing on this matter, heard testimony from four witnesses, all of whom were subject to cross-examination, and the court reviewed an extensive number of exhibits. *Id.*, p. 6, Ll. 4–25 through p. 7, Ll. 1–15. The Honorable Terry L. Myers, Presiding Chief Judge of the United States Bankruptcy Court for the District of Idaho, concluded "Mr. Clark was acting as a testifying expert witness only. As such, an attorney-client relationship was not created." *Id.*, p. 12, Ll. 10–13.

Specifically, Judge Myers made the following findings of fact and conclusions of law:

> The defendants' motion to disqualify Hawley Troxell as counsel for the plaintiff urges that disqualification based on Idaho Rule of Professional Conduct 1.9. And as all the parties acknowledge, the IRPC are applicable in adversary proceedings in this Court under our local Bankruptcy Rule 9010.1(g).

The defendants assert that in 2008, Merlyn Clark, a partner at Hawley Troxell formed an attorney-client relationship with Marty Frantz. Idaho Rule of Professional Conduct 1.9 instructs that a lawyer who has formerly represented a client in a matter shall not, thereafter, represent another person in the same or a substantially related matter in which that person's interests are materially averse to the interest of the former client, unless the former client gives informed consent confirmed in writing.

The plaintiff responds to this contention by noting that in 2008, Merlyn Clark was retained and acted solely as a testifying expert witness and did so on the subject of professional malpractice in Marty Frantz'[s] State Court lawsuit against Witherspoon Kelley in which Mr. Frantz was represented by Owens & Crandall. The plaintiff argues that Mr. Clark was not retained as co-counsel, nor did he in any way act as an attorney to Mr. Frantz. Thus plaintiff argues no attorney-client relationship was ever formed.

The defendants respond that Clark, even if initially hired as an expert witness, became a consulting attorney expert when he reviewed confidential information and provided opinions on damages with the attorneys at Owens & Crandall, particularly Ms. McCrea.

At hearing Mr. Clark was clear and direct and credible in his testimony. He testified, and the Court finds and concludes that his role in the malpractice litigation was solely that of a testifying expert witness. In that capacity he prepared and affidavit, Exhibit 200, to which he attached his expert opinions. Within that report Mr. Clark listed all the information he reviewed and considered in forming his opinion, as would be required for expert disclosure. No confidential information was there listed. Indeed, Mr. Clark stated that he did not receive any confidential information while evaluating the malpractice case as a testifying expert witness in such case.

Mr. Clark was also clear that not only did he not review confidential information, he discussed with Owens & Crandall the fact that any information provided to him would be subject to discovery by the State Court defendants and thus, obviously, should not be included in any of the information provided to him. Such a warning is consistent with the limited role of a testifying expert witness, not one as a retained attorney or as co-counsel.

The defendants have placed a great deal of emphasis on the words, quote, "confidential and privileged," close quote, that appear on the top of Mr. Clark's communications with Owens & Crandall, as well as on his statement that he was hired, quote, "as an expert witness to provide advice and testimony on the subject of the alleged professional malpractice," close quote, as in Exhibit 200 at 9.

Mr. Clark credibly testified that the word "advice" was in effect, as in advising Owens & Crandall which he would be able to testify to and what his opinion would be. Moreover the confidential and privileged nomenclature was intended, consistent with the rules that Mr. Clark and Owens & Crandall understood to reflect the fact that if they decided not to disclose him as a testifying expert witness, the report he created would not be subject to discovery. In this context and given the whole of the

evidence about the retention and use of Mr. Clark by Owens & Crandall, the use of the term "confidential" does not and did not create an attorney-client relationship.

The Court has also considered carefully the testimony of Ms. McCrea, one of Marty Frantz'[s] State Court attorneys. She stated that Mr. Clark was hired as an expert to establish and later testify to the standard of care in the malpractice litigation.

While she testified that she asked Mr. Clark questions about damages, her testimony was not materially inconsistent with Mr. Clark's; and the question of what sorts of damages might be recoverable was certainly part and parcel of the charge to an expert on this subject. Moreover she did not recall providing any of the documents attached to her notes to Mr. Clark. Instead she asserted that her questions for Mr. Clark were based on his review of the depositions and the exhibits attached to those depositions. She did not testify that Mr. Clark provide advice beyond what Mr. Clark himself testified to. He did not believe certain damages were available and he would not provide expert testimony on that aspect of the litigation. But again, such discussions would be consistent with an expert's analysis of the facts in defining the testimony the expert is willing to provide in the litigation and the opinion that he would provide in his report.

Ms. McCrea's testimony was responsive to questioning. I was impressed that she acted not as an advocate for the defendants' motion but as a percipient fact witness and she was careful and measured and clear in her testimony and in that was she was credible. Her testimony did not establish that Mr. Clark was a consulting expert, nor that he had entered into an attorney-client relationship with either her firm or with her firm's client.

Marty Frantz testified as well. He testified as to the retention and use of Mr. Clark by his former malpractice lawyers at Owens & Crandall. But his testimony in that regard was not probative. He was not engaged in the discussions. He never spoke with Mr. Clark. He had no firsthand knowledge of the facts. Instead, he was simply interpreting the other evidence and expressing his opinion about its significance or its consequence.

Whether it was volunteered from the witness stand or, more often than not, proffered in response to patently leading questions, it was not entitled to weight, even where arguably relevant.

The Court concludes plaintiffs' analysis of the facts and the law is supported by the record. Mr. Clark was acting as a testifying expert witness only. As such, an attorney-client relationship was not created. There's no basis to disqualify Hawley Troxell under IRPC 1.9 and defendants['] motion . . . will, therefore, be denied.

Id., p. 7, L. 24 – p. 12, L. 15.

On February 20, 2015, in the instant case before the undersigned, Frantz filed his Complaint and Jury Demand against the defendant Hawley Troxell for attorney

malpractice and breach of fiduciary duty. *See* Complaint and Jury Demand. The allegations stem from Mr. Clark's role as an expert witness in the case between Frantz and Witherspoon Kelley. *Id.* Specifically Frantz claims Hawley Troxell:

> Represent[ed] IIB, a party with materially adverse interests to Mr. Frantz, in litigation and bankruptcy proceedings that are substantially related to the matter in which Defendant represented Mr. Frantz; [and]
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> Us[ed] information related to Hawley Troxell's representation of Mr. Frantz to Mr. Frantz's financial disadvantage in the bankruptcy proceeding by claiming the Mr. Frantz's financial statements were fraudulent.

Complaint and Jury Demand, pp. 5–6, ¶¶ 29(a), (d); p. 7, ¶¶ 38(a), (c). The bankruptcy case was ongoing at the time the Complaint in this instant case was filed. *See* Declaration of Jonathon Frantz in Support of Response to Hawley Troxell Ennis & Hawley, LLP's Motion to Dismiss or Abate (I.R.C.P. 12(B)(8)), Exhibit A.

Hawley Troxell now "seeks dismissal of the instant action because issues fundamental to Plaintiff's claims herein, including whether an attorney with defendant Hawley Troxell formed an attorney-client relationship with Plaintiff, has been raised by Plaintiff Frantz and litigated in an action currently pending in the United States Bankruptcy Court . . . ." Memorandum of Points and Authorities in Support of Motion to Dismiss or Abate (I.R.C.P. 12(B)(8)), p. 1. In support, on May 7, 2015, Hawley Troxell filed a "Motion to Dismiss or Abate (I.R.C.P. 12(B)(8)"; Memorandum of Points and Authorities in Support of Motion to Dismiss or Abate (I.R.C.P. 12(B)(8))"; and the "Affidavit of John C. Riseborough". On July 14, 2015, Frantz filed his "Response to Hawley Troxell Ennis & Hawley, LLP's Motion to Dismiss or Abate (I.R.C.P. 12(B)(8))"; and the "Jonathon Frantz in Support of Response to Hawley Troxell Ennis & Hawley, LLP's Motion to Dismiss or Abate (I.R.C.P. 12(B)(8))". On July 21, 2015, Hawley Troxell filed "Defendant's Reply Re Dismissal/Abate".

Hearing on this matter was held on July 28, 2014. For the reasons set forth below the Court grants Hawley Troxell's Motion to Dismiss or Abate. At that July 28, 2015, hearing, counsel for Frantz admitted Frantz' bankruptcy court matter was still a pending case. Frantz' counsel also admitted the adversary proceeding in bankruptcy court was still proceeding, but claimed that proceeding was now moot, the only issue to be decided was attorney fees.

Frantz' attorney's claim that the adversary proceeding is moot is not well taken. Attached as Exhibit B to the Response of the Defendant Re: Pro Hac Vice Objection, is the Affidavit of Sheila Schwager, dated July 20, 2015. Schwager is a partner in Hawley Troxell, and has been involved in Frantz' bankruptcy proceeding. Schwager's Affidavit states in pertinent part:

> 4. I have reviewed the Declaration of Jonathon Frantz and in particular the assertions that the Adversary Proceeding has been dismissed as moot. That is inaccurate, as indicated by the entire Docket of the Adversary Proceeding, attached hereto as Exhibit A, and incorporated herein by reference.
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> 5. On the eve of the two week trial of the Adversary Proceeding, Mr. and Mrs. Frantz filed a Section 727 Waiver of Discharge in their Bankruptcy Case, conceding the non-dischargability relief requested om the Adversary Proceeding, thus rendering a determination of dischargability moot. Specifically, the 727 Waiver of Discharge meant that none of the obligations owed to IIB would be discharged and therefore a trial on the section 523 non-discharge issues were not necessary. Accordingly, the trial date was vacated. However, despite counsel's suggestion to the contrary, no Order of Dismissal has been entered, and in fact the Adversary Proceeding remains pending.
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> 6. In that regard, IIB filed in the Adversary Proceeding on June 2, 2015, Docket No. 117, a Motion for Sanctions, which was argued on June 15, 2015. The court deemed the matter submitted and under advisement, with a decision to be forthcoming. *See* Ex. A, Docket No. 127. Further, on June 3, 2015, IIB filed a Motion for Attorney Fees and Costs as the prevailing party in the Adversary Proceeding. That Motion is set for hearing for July 28, 2015. *See* Ex. A, Docket No. 121, 122, 123, 128. In short, no final order has been entered at this point in the Adversary Proceeding. If either or both of the motions are granted, a judgment will be entered accordingly.

Response of the Defendant Re: Pro Hac Vice Objection, Exhibit B, Affidavit of Sheila Schwager, dated July 20, 2015, pp. 2-3, ¶¶ 4-6. The Court has reviewed the bankruptcy court docket attached as Exhibit A to Schwager's affidavit.

II. STANDARD OF REVIEW.

The determination of whether to proceed with an action where a similar case is pending before another court is committed to the sound discretion of the trial court. *Klaue v. Hern*, 133 Idaho 437, 439, 988 P.2d 211, 213 (1999) (citing *Zaleha v. Rosholt, Robertson & Tucker, Chtd.,* 129 Idaho 532, 533, 927 P.2d 925, 926 (Ct. App. 1996)). On appeal, the appeals court reviews the trial court decision to determine "(1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) and whether the court reached its decision by an exercise of reason." *Id.* (citing *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.,* 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991)).

III. ANALYSIS OF MOTION TO DISMISS OR ABATE.

A. Frantz is Judicially Estopped from Pursuing this Malpractice Claim due to the Pending Bankruptcy Proceeding.

While not addressed by the parties in briefing, the Court must first address whether Frantz, a debtor in a bankruptcy proceeding, has standing to pursue this cause of action against Hawley Troxell for claims arising during the pending bankruptcy proceeding. This Court finds he does not have standing.

A debtor in a bankruptcy proceeding is required to disclose all existing and potential assets. *McCallister v. Dixon*, 154 Idaho 891, 895, 303 P.3d 578, 582 (2013) (citing 11 U.S.C. §§ 521(1), 541(a)(7)). "[T]itle to the debtor's assets, including causes of action that belong to the debtor when bankruptcy is filed, vest in the bankruptcy

estate." *Id.* at 898, 303 P.3d at 585 (citing *Kane v. Nat'l Union Fire Ins. Co.,* 535 F.3d 380, 385 (5th Cir.2008)). The bankruptcy trustee is the only party with standing to pursue a cause of action that belongs to the bankruptcy estate. *Id.* (citing *Kane*, 535 F.3d at 385).

The doctrine of "[j]udicial estoppel precludes a party from advantageously taking one position, then subsequently seeking a second position that is incompatible with the first." *Id.* at 894, 303 P.3d at 581 (citing *A & J Const. Co. v. Wood,* 141 Idaho 682, 684, 116 P.3d 12, 14 (2005). At oral argument in this state court case on July 28, 2015, this Court asked counsel for Frantz about standing. Counsel for Frantz was unclear whether this state court case was disclosed as an asset in the bankruptcy litigation, but the inference this Court is left with was it was not disclosed. The Court makes that inference based on Frantz' counsel's remark in oral argument to this Court. That remark was that Frantz only had a duty to disclose assets to the bankruptcy court which were in existence "at the time the bankruptcy case was filed." And, since this case was filed on February 20, 2015, "…this case and Frantz' claim against Hawley Troxell, arose after the bankruptcy." Frantz' counsel's legal claim is contrary to the law.

Judicial estoppel will be applied "when the debtor has knowledge of enough facts to know that a potential cause of action exists *during the pendency of the bankruptc*y, but fails to amend his schedules or disclosure statements to identify the cause of action as a contingent asset." *Id.* at 895, 303 P.3d at 582 (citing *A&J Const. Co.,* 141 Idaho at 686, 116 P.3d at 16 (quoting *Burnes v. Pemco Aeroplex, Inc.,* 291 F.3d 1282, 1286 (11th Cir. 2002)) (emphasis added). It is necessary "to discourage debtors from concealing potential assets." *Id.* (citing *Hamilton v. State Farm Fire & Cas. Co.,* 270 F.3d 778 (9th Cir.2001); *Burnes*, 291 F.3d at 1286; *Oneida Motor Freight, Inc. v. United*

Jersey Bank, 848 F.2d 414, 419 (3d Cir.1988)). The focus of the inquiry is the on knowledge of the party, not the intent of the party. *Id*. (citing *McKay v. Owens*, 130 Idaho 148, 155, 937 P.2d 1222, 1229 (1997)).

In this case, the doctrine of judicial estoppel precludes Frantz from pursuing this instant cause of action before this Court against Hawley Troxell. It is clear that the cause of action in this present case arose during the pendency of Frantz' bankruptcy proceedings.

As mentioned above, in 2008, Frantz was pursuing an attorney malpractice lawsuit against Witherspoon Kelley. Affidavit of John C. Riseborough, May 7, 2015, Exhibit I, p. 2, ¶ 2. On December 16, 2008, counsel for Frantz in that case against Witherspoon Kelley contacted Merlyn Clark, an attorney with Hawley Troxell, to serve as an expert witness for that case. Affidavit of John C. Riseborough, May 7, 2015, Exhibit III. Clark informed Frantz' counsel at the time in that lawsuit that "any information [he] received would be discoverable in the Malpractice Lawsuit by the defendants in that case and that they should not provide [him] any information they would not want defendants to discover." Affidavit of John C. Riseborough, May 7, 2015, Exhibit V, p. 4, ¶ 14. Counsel for Frantz sent Clark materials to review that he would need to render an opinion about whether Witherspoon Kelley had violated the standard of care. Affidavit of John C. Riseborough, May 7, 2015, Exhibit III. "Mr. Clark reviewed the materials and authored a 21 page report dated May 4, 2009, reflecting his opinions." Memorandum of Points and Authorities in Support of Motion to Dismiss or Abate (I.R.C.P. 12(B)(8)), p. 2; Affidavit of John C. Riseborough, May 7, 2015, Exhibit I, p. 2, ¶ 5. That report was sent to counsel for Frantz. Memorandum of Points and Authorities in Support of Motion to Dismiss or Abate (I.R.C.P. 12(B)(8)), p. 3; Affidavit of John C. Riseborough, May 7, 2015, Exhibit I, p. 2, ¶ 5. The attorney malpractice case

against Witherspoon Kelley resolved through mediation. Affidavit of John C. Riseborough, May 7, 2015, Exhibit I, p. 2, ¶ 7.

In "June 2010, Idaho Independent Bank (IIB) retained Hawley Troxell Ennis & Hawley to pursue claims against Mr. Frantz for failure to pay a loan that fully matured." Complaint and Jury Demand, p. 4, ¶ 18. On June 28, 2010, Hawley Troxell, in its capacity as counsel for IIB, sent a demand letter to Davidson, Backman, Medeiros, PLLC, counsel for the guarantors on the obligation, which included Frantz. Affidavit of John C. Riseborough, May 7, 2015, Exhibit IV. In October 2011, Frantz filed for bankruptcy. *Id.*, p. 4, ¶ 19. Hawley Troxell represented IIB as a creditor in the bankruptcy proceedings against Frantz. Complaint and Jury Demand, p. 4, ¶ 20.

In this present case, Frantz filed his Complaint against Hawley Troxell for attorney malpractice and breach of fiduciary duty on February 20, 2015. *See* Complaint and Jury Demand. The allegations stem from Clark's role as an expert witness in the case between Frantz and Witherspoon Kelley. *Id.* Specifically Frantz claims Hawley Troxell:

> Represent[ed] IIB, a party with materially adverse interests to Mr. Frantz, in litigation and bankruptcy proceedings that are substantially related to the matter in which Defendant represented Mr. Frantz; [and]
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Complaint and Jury Demand, pp. 5–6, ¶¶ 29(a), (d); p. 7, ¶¶ 38(a), (c). The bankruptcy case was ongoing at the time the Complaint was filed. *See* Declaration of Jonathon Frantz in Support of Response to Hawley Troxell Ennis & Hawley, LLP's Motion to Dismiss or Abate (I.R.C.P. 12(B)(8)), Exhibit A.

The focus of this Court's inquiry is when Frantz became aware of the potential malpractice. Based on the foregoing, it is clear that Frantz had knowledge of any potential legal malpractice claims against Hawley Troxell during the bankruptcy proceeding, when he was unable to discharge the debt against IIB. Once Frantz filed for bankruptcy, any potential malpractice claim he had against Hawley Troxell was no longer his to assert; it was no longer his asset. Rather, it became an asset of the bankruptcy estate that only the bankruptcy trustee has standing to assert. It is immaterial that the bankruptcy proceeding was filed before the instant action. There is no evidence before this Court that Frantz claimed the malpractice as a potential asset in the bankruptcy proceeding. In any event, whether Frantz included it as an asset before the Bankruptcy Court is of no import to this Court. "Property that is not disclosed on the asset schedule, or otherwise administered by the time the bankruptcy case closes, remains property of the bankruptcy estate forever." *McCallister*, 154 Idaho at 898, 303 P.3d at 585. There is no evidence that Frantz amended his asset schedule in the pending bankruptcy proceeding to reflect this subsequent state court lawsuit. Moreover, Frantz has not provided this Court with any evidence that, having initially claimed or amended his asset schedule to include the potential malpractice asset, the bankruptcy trustee waived the potential asset as property for the bankruptcy estate. As such, Frantz is judicially estopped from asserting this cause of action against Hawley Troxell.

B. Dismissal pursuant to I.R.C.P. 12(b)(8).

Alternatively, even if the Court found Frantz was not judicially estopped from brining this suit, the Court finds Idaho Rule of Civil Procedure 12(b)(8) merits dismissal of this action.

Under Idaho Rule of Civil Procedure 12(b)(8), a trial court may dismiss an action where there is "another action pending between the same parties for the same cause." I.R.C.P. 12(b)(8). There are two tests used to determine whether a lawsuit should proceed in such an instance: "First, the court should consider whether the other case has gone to judgment, in which event the doctrines of claim preclusion and issue preclusion may bar additional litigation. The second test is whether the court, although not barred from deciding the case, should nevertheless refrain from deciding it." *Klaue v. Hern*, 133 Idaho 437, 440, 988 P.2d 211, 214 (1999) (internal citations omitted). Each of these tests will be discussed in turn below.

1. Test One: *Res Judicata.*

Relitigation of a matter that was previously adjudicated is precluded by the doctrine of *res judicata*. *Aldape v. Akins*, 105 Idaho 254, 256, 668 P.2d 130, 132 (Ct. App. 1983). *Res judicata* encompasses both claim preclusion and issue preclusion or collateral estoppel. *Ticor Title Co. v. Stanion*, 144 Idaho 119, 123, 157 P.3d 613, 617 (2007) (citing *Hindmarsh v. Mock,* 138 Idaho 92, 94, 57 P.3d 803, 805 (2002)). "Claim preclusion bars a subsequent action between the same parties upon the same claim or upon claims 'relating to the same cause of action ... which might have been made.' Issue preclusion protects litigants from litigating an identical issue with the same party or its privy." *Id.* (internal citations omitted).

a. Claim preclusion.

For claim preclusion to apply, the subsequent action must have the same parties or their privies, same claim and a final judgment. *Id.* at 124, 157 P.3d at 618 (citing *Hindmarsh*, 138 Idaho at 94, 57 P.3d at 805; *Farmers Nat'l Bank v. Shirey,* 126 Idaho 63, 68, 878 P.2d 762, 767 (1994)); *see also Foster v. City of St. Anthony,* 122 Idaho

883, 888, 841 P.2d 413, 418 (1992). "To be privies, a person not a party to the former action must "derive[ ] his interest from one who was a party to it, that is, ... he [must be] in privity with a party to that judgment." *Id.* (citing *Foster,* 122 Idaho at 888, 841 P.2d at 418 (quoting *Kite v. Eckley,* 48 Idaho 454, 459, 282 P. 868, 869 (1929))). Attorneys are in privity with their clients from a prior action when "their only interest in the present action ar[ises] from their representation of their clients in the former action, and they were named solely for their alleged conduct in that capacity." *Berkshire Investments, LLC v. Taylor*, 153 Idaho 73, 81, 278 P.3d 943, 951 (2012).

Moreover, "[c]laim preclusion bars adjudication not only on the matters offered and received to defeat the claim, but also as to 'every matter which might and should have been litigated in the first suit.'" *Ticor Title Co. v. Stanion*, 144 Idaho at 126, 157 P.3d at 620 (citing *Magic Valley Radiology, P.A. v. Kolouch,* 123 Idaho 434, 437, 849 P.2d 107, 110 (1993)).

Here, the Court finds that since at the present time there is no final judgment in the bankruptcy proceeding (at least in the proof presented to this Court), claim preclusion does not bar litigation of the malpractice and fiduciary duty claim in the instant action. In the near future, there may be a final judgment in the bankruptcy action. At that time this state court action would be barred based on the additional ground of claim preclusion. However, at the time of this decision by this Court there is no final judgment. Thus, claim preclusion does not apply at this moment.

b. Issue Preclusion.

For issue preclusion to bar the relitigation of an issue determined in a prior proceeding, five factors must be met:

> (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the

> issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation.

Ticor Title Co., 114 Idaho at 124, 157 P.3d at 618 (citing *Rodriguez v. Dep't of Corr.,* 136 Idaho 90, 93, 29 P.3d 401, 404 (2001)).

The matter litigated before the bankruptcy court was whether Hawley Troxell should have been disqualified as counsel for IIB in the bankruptcy proceeding based on Idaho Rule of Professional Conduct 1.9. Affidavit of John C. Riseborough, May 7, 2015, Exhibit IX, p. 7, Ll. 24–25 through p. 8, Ll. 1–2. Idaho Rule of Professional Conduct 1.9 instructs: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." I.R.C.P. 1.9(a). "The defendants assert[ed] that in 2008, Merlyn Clark, a partner at Hawley Troxell formed an attorney-client relationship with Marty Frantz." Affidavit of John C. Riseborough, May 7, 2015, Exhibit IX, p. 8, Ll. 5–7. The bankruptcy court held a two-day hearing on this matter, heard testimony from four witnesses whom were subject to cross-examination, and reviewed an extensive number of exhibits. *Id.*, p. 6, Ll. 4–25 through p. 7, Ll. 1–15. The bankruptcy court concluded, "Mr. Clark was acting as a testifying expert witness only. As such, an attorney-client relationship was not created." *Id.*, p. 12, Ll. 10–13.

The cause of action in this present case is for attorney malpractice against Hawley Troxell, alleging the same misconduct by Merlyn Clark. *See* Complaint. The four elements of a legal-malpractice claim are: "(1) there is an attorney-client relationship between the plaintiff and defendant; (2) the defendant lawyer owed a duty

of care to the plaintiff; (3) the lawyer breached the duty; and (4) the lawyer's negligence was a proximate cause of the client's damage." *Soignier v. Fletcher*, 151 Idaho 322, 324, 256 P.3d 730, 732 (2011) (citing *Johnson v. Jones,* 103 Idaho 702, 706, 652 P.2d 650, 654 (1982)).

The first element was clearly litigated in front of the bankruptcy court. Judge Myers held a two-day hearing solely on the issue of whether Merlyn Clark had formed an attorney-client relationship with Frantz during the litigation between Frantz and Witherspoon Kelley. Judge Myers definitively found no such attorney-client relationship was created. Frantz argues that "the issue raised in the [bankruptcy p]roceeding, although similar, is legally distinct and would not have any preclusive effect." Response to Hawley Troxell Ennis & Hawley, LLP's Motion to Dismiss or Abate (I.R.C.P. 12(B)(8)), p. 4. Frantz claims, "[a] legal malpractice claim requires that an attorney owe a duty to the Plaintiff, a different requirement than the 'former client' of Rule 1.9 that encompasses a broader category of individuals." *Id.*

While it is true that a claim for attorney malpractice requires a showing that the defendant attorney owed a duty to the plaintiff, it also requires an attorney-client relationship. All four elements must be present for a plaintiff to prevail on a malpractice claim. Frantz had a full and fair opportunity to litigate the attorney-client relationship issue in the bankruptcy case. It is identical to one of the elements required for a malpractice cause of action, and a finding against Frantz on that one element is dispositive of the entire cause of action before this Court.

Moreover, the bankruptcy court actually decided the issue of whether an attorney-client relationship existed between Merlyn Clark, a partner for Hawley Troxell, and Frantz. While Hawley Troxell was not a party to the bankruptcy action, as stated in the preceding section, Hawley Troxell, as counsel for IIB in the bankruptcy proceeding,

was in privity with a party to the litigation. Based on the foregoing, there is evidence before this court that factors 1, 2, 3, and 5 for issue preclusion have meet met.

The Court now turns to the final requirement for issue preclusion: "was a final judgment on the merits in the prior litigation". Both parties agree there is no final judgment in this case. Memorandum of Points and Authorities in Support of Motion to Dismiss or Abate (I.R.C.P. 12(B)(8)), p. 6; Response to Hawley Troxell Ennis & Hawley, LLP's Motion to Dismiss or Abate (I.R.C.P. 12(B)(8)), pp. 3–4. "The ninth circuit has defined a final bankruptcy decision as one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. [Moreover], an order that grants relief from the automatic stay is final for the purposes of appeal." *Farmers Nat. Bank v. Shirey*, 126 Idaho 63, 70, 878 P.2d 762, 769 (1994) (internal quotations and citations omitted). Among other things, an automatic stay ends at the time the debtor's discharge is granted or denied. 11 U.S.C. § 362. There has been no evidence presented to this Court showing Frantz was granted a discharge of the debt owing to IIB, or was denied or waived discharge of the debt owing to IIB. Absent such a showing, there is no evidence before this Court of a final judgment on the merits in the bankruptcy proceeding. As such, issue preclusion cannot be used to bar Frantz' malpractice suit at this time.

2. Test Two: Another Pending Action.

"The determination of whether to proceed with a case where a similar case is pending elsewhere, and has not gone to judgment, is discretionary, and will not be overturned absent an abuse of that discretion." *Klaue,* 133 Idaho at 440, 988 P.2d at 214 (citing *Zaleha v. Rosholt, Robertson & Tucker, Chtd.,* 129 Idaho 532, 533, 927 P.2d 925, 926 (Ct. App.1996); *Wing v. Amalgamated Sugar,* 106 Idaho 905, 908, 684 P.2d

307, 310 (Ct. App.1984)). "In deciding whether to exercise jurisdiction over a case when there is another action pending between the same parties for the same cause, a trial court must evaluate the identity of the real parties in interest and the degree to which the claims or issues are similar." *Diet Ctr., Inc. v. Basford*, 124 Idaho 20, 22-23, 855 P.2d 481, 483-84 (Ct. App. 1993) (citing *Wing,* at 106 Idaho at 908, 684 P.2d at 310). Moreover, the court should "consider whether the court in which the matter already is pending is in a position to determine the whole controversy and to settle all the rights of the parties." *Id.* (citing 21 C.J.S. *Courts* § 188, at 222 (1990)).

As discussed above, the matter before the bankruptcy court involves the same parties, Hawley Troxell being in privity with a party to the bankruptcy litigation, IIB, as counsel in that case, and the same issue, whether an attorney-client relationship existed between Frantz and Merlyn Clark of Hawley Troxell. The bankruptcy court has "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). "'[A]rising in' proceedings are those that are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy." *In re Old Cutters, Inc.*, 474 B.R. 219, 226 (Bankr. D. Idaho 2012) (citing *Eastport Assocs. v. City of Los Angeles (In re Eastport Assocs.),* 935 F.2d 1071,1076 (9th Cir.1991)). In other words, but for the bankruptcy, the claim would not exist. *See also A.H. Robins Co. v. Dalkon Shield Claimants Trust*, 86 F.3d 364, 372 (4th Cir. 1996).

Here, the legal malpractice and breach of fiduciary duty claims did not originate from any work Hawley Troxell did for Frantz in the bankruptcy case. This is not a case where Hawley Troxell represented Frantz in the bankruptcy proceeding and then provided him with negligent advice during those proceedings. *See A.H. Robins Co. v.*

Dalkon Shield Claimants Trust, 86 F.3d 364 (4th Cir. 1996). However, Frantz' claims would not exist but for IIB not discharging Frantz's debt during the title 11 bankruptcy proceeding. In the instant action for attorney malpractice and breach of a fiduciary duty, Frantz claims in part that Hawley Troxell:

> Represent[ed] IIB, a party with materially adverse interests to Mr. Frantz, in litigation and bankruptcy proceedings that are substantially related to the matter in which Defendant represented Mr. Frantz; [and]
>
> ***
>
> Us[ed] information related to Hawley Troxell's representation of Mr. Frantz to Mr. Frantz's financial disadvantage in the bankruptcy proceeding by claiming the Mr. Frantz's financial statements were fraudulent.

Complaint and Jury Demand, pp. 5–6, ¶¶ 29(a), (d); p. 7, ¶¶ 38(a), (c). As such, the Court finds this case arises under the title 11 bankruptcy proceedings.

In the alternative, even if this Court could find that this case does not arise under title 11 (and, as just stated, this Court does not), it is a "related to" proceeding. *See In re Old Cutters, Inc.*, 474 B.R. at 226. To determine whether a proceeding is "related to", the Ninth Circuit Court of Appeals adopted the following test:

> [W]hether *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy*. . . . Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate.

Id. (citing *Celotex Corp. v. Edwards,* 514 U.S. 300, 308, 115 S.Ct. 1493, 131 L.Ed.2d 403 (1995) (quoting *Pacor, Inc. v. Higgins,* 743 F.2d 984, 994 (3d Cir.1984) (emphasis in original)). "In vesting jurisdiction over matters "related to" bankruptcy cases in the district courts, and in allowing those district courts to refer such matters to bankruptcy courts, 'Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the

bankruptcy estate.'" *In re Old Cutters, Inc.*, 474 B.R. at 226 (citing *Celotex Corp.,* 514 U.S. at 308, 115 S.Ct. 1493, 131 L.Ed.2d 403 (1995) (quoting *Pacor, Inc.,* 743 F.2d at 994)).

IIB's claim against Frantz was not discharged from the bankruptcy proceeding due to fraud on the part of Frantz. Defendant's Reply Re Dismissal/Abate, p. 4; Complaint and Jury Demand, p. 4, ¶ 22. Frantz maintains that IIB would not have claimed his financial statements were fraudulent without the knowledge it gained from Hawley Troxell because of its prior relationship with Frantz during the Witherspoon Kelley malpractice action. Complaint and Jury Demand, p. 6, ¶ 29(d); p. 7, ¶ 38(c). The malpractice and breach of fiduciary duty claims arose during the pendency of the bankruptcy proceedings. As stated above, once Frantz filed for bankruptcy, any potential claims he had against Hawley Troxell no longer belonged to him, but rather became an asset of the bankruptcy estate. As property of the estate the claims are clearly "related to" the bankruptcy proceeding. The outcome of the action would alter the administration of the bankruptcy estate.

This Court find that this case falls within the "comprehensive jurisdiction [of] the bankruptcy courts." As such, the Court, in its discretion, dismisses this action pursuant to Idaho Rule of Civil Procedure 12(b)(8) as "another action pending between the same parties for the same cause" exists. The same parties in the present case are (and have) litigating (and have litigated) the same issues in the bankruptcy case.

It is noted that the Court "may take into account the occasionally competing objectives of judicial economy, minimizing costs and delay to litigants, obtaining prompt and orderly disposition of each claim or issue, and avoiding potentially inconsistent judgments." *Diet Ctr., Inc.*, 124 Idaho at 22–23, 855 P.2d at 483–84 (citing *Wing,* 106 Idaho at 908, 684 P.2d at 310). Hawley Troxell does discuss these additional factors in

its briefing. Memorandum of Points and Authorities in Support of Motion to Dismiss or Abate (I.R.C.P. 12(B)(8)), pp. 10–11. Frantz has not responded to these issues. While the Court agrees with Hawley Troxell's arguments regarding judicial economy, minimizing costs and delay to litigants, obtaining prompt and orderly disposition of each claim or issue, and avoiding potentially inconsistent judgments, it is unnecessary to evaluate those factors in light of the analysis reached above, ie., another action is pending between the same parties for the same cause.

IV. PLAINTIFF'S MOTION FOR ADMISSION PRO HAC VICE IS DENIED.

On April 7, 2015, counsel for Frantz filed a Motion for Pro Hac Vice Admission of Jeffery Katz. Katz is an attorney licensed in Illinois, Kentucky and Wisconsin, but not Idaho. Motion for Pro Hac Vice Admission p. 1.

While dismissal of Frantz' case due to lack of standing and alternatively, due to another action pending, causes the issue of Frantz' Motion for Admission Pro Hac Vice to now be moot, this Court will briefly discuss the same in case there is a claim on appeal that this Court denied Frantz a competent attorney to represent him in this state court litigation. Also, at oral argument on July 28, 2015, counsel for Frantz made the claim that he had intended Katz to handle the oral argument on Hawley Troxell's Motion to Dismiss or Abate, and were it not for Katz' hospitalization, Katz would have handled the argument. It is unknown how or why counsel for Frantz planned on having Katz make argument regarding the Motion to Dismiss or Abate, because on July 28, 2015, Katz had yet to be admitted *pro hac vice*.

On April 22, 2015, counsel for Hawley Troxell filed an "Objection to Motion for Pro Hac Vice Admission". Hawley Troxell claims that Katz violated the provisions of Idaho Rule of Professional Conduct 4.2 by making "unauthorized contact with the defendant's client, Idaho Independent Bank ("IIB", in connection with this action, at a

time that Mr. Katz was fully aware that IIB was represented by Hawley Troxell." Objection to Motion for Pro Hac Vice Admission, p. 1. On March 9, 2015, Jack Gustaval, CEO of IIB, forwarded to John F. Kurtz, an attorney of the firm Hawley Troxell representing IIB in the bankruptcy matter, which read: "I represent Marty Frantz in a newly filed action against his former attorneys at the Howley (sic) Troxell firm. I would like to discuss this matter with you and discuss how it may be financially beneficial to you." Affidavit of John F. Kurtz, Jr., p. 3, ¶ 9. On June 1, 2015, Frantz filed his "Response to Objection to Motion for Pro Hac Vice Admission." On June 26, 2015, Hawley Troxell filed its "Reply Re: Objection to Motion for Pro Hac Vice Admission." Oral argument on this motion was held on June 30, 2015, at which time this Court asked counsel how, in light of that email, could Katz not become a witness in this case. That is an additional and separate issue from the unauthorized contact issue.

Idaho Rule of Professional Conduct 3.7 "Lawyer as Witness" reads:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
> (1) the testimony relates to an uncontested issue;
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
> (3) disqualification of the lawyer would work substantial hardship on the client.

The Court finds Katz will likely have to testify in this case. The Court finds none of the three exceptions to IRPC 3.7 (a) apply to Katz as a witness. Thus, this Court finds that it would be improper to allow admission *pro hac vice* of an out of state attorney who would, if appointed, violate the Idaho Rules of Professional Responsibility, possibly for unauthorized contact (the Court does not decide that issue now), but without a doubt as to the prohibition of likely being a witness in a matter. It would be irresponsible of this Court to knowingly put Katz in that position. Accordingly, plaintiff Frantz' Motion for Admission Pro Hac Vice is denied.

V. CONCLUSION AND ORDER.

For the reasons stated above,

IT IS HEREBY ORDERED defendant Hawley Troxell's Motion to Dismiss or Abate is GRANTED.

IT IS FURTHER ORDERED plaintiff Frantz' Motion for Admission Pro Hac Vice is DENIED.

IT IS FURTHER ORDERED defendant Hawley Troxell is the prevailing party in this action as against Martin Frantz.

IT IS FURTHER ORDERED counsel for defendant Hawley Troxell prepare a Judgment consistent with this Memorandum Decision and Order.

Entered this 29th day of July, 2015.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of August, 2015, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
Johnathon Frantz	208-262-3894	John C. Riseborough	509-838-0007

Hon. Terry L. Myers, U.S. Bankruptcy Court Judge
Via fax 208 334-1334

_____
Jeanne Clausen, Deputy Clerk