

How the U.S. Trustee Program and Trustees Promote Diversity and Inclusion in the Bankruptcy System



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The U.S. Trustee Program's (Program or USTP) mission is to promote the integrity and efficiency of the bankruptcy system for the benefit of all stakeholders—debtors, creditors, and the public. As the “watch dog” of the bankruptcy system, the Program achieves its mission, in part, by also promoting diversity and inclusion in the bankruptcy process. What does “diversity and inclusion” mean in the context of the bankruptcy system? What can the Program do to assure diversity and inclusion in all aspects of the bankruptcy system and for all stakeholders? This article provides the background of the Program's role and guidance for trustees to ensure diversity, inclusion, and fairness in the system that provides a fresh start to those in financial distress.

The USTP was Created to Ensure Fairness and Equity for all Stakeholders

From 1898 until September 30, 1979, the Bankruptcy Act governed all bankruptcy proceedings. The Commission on the Bankruptcy Laws of the United States was established in June 1971 to “study, analyze, evaluate, and recommend changes.”¹ The Commission filed its report on July 30, 1973. In its report, it described, relevant to our discussion:²

- The appearance of political patronage.
- Trustees affected by their own economic interests.
- A division of administrative responsibilities rendering the system ineffective.
- The opportunity for a small number of professionals to control the system for their own benefit.
- Lack of creditor access and participation.
- No effective rehabilitation of individual debtors.
- Lack of uniformity across the nation.

One of the central tenets to these recommendations was the formation of a new authority to oversee the administration of the bankruptcy system and appoint private trustees.³

On October 1, 1979, the United States Bankruptcy Code became effective. With the vision of an impartial, independent, and neutral process for the oversight of bankruptcy cases and the work of trustees, the USTP was born as a pilot. The Program, which expanded nationwide in 1986, established its role as the impartial, independent, and neutral “watchdog.” For more than three decades, the Program has promoted and protected the integrity and efficiency of the bankruptcy system for the benefit of all stakeholders, especially the American Public.

How is Diversity and Inclusion Defined for the USTP as a Federal Agency?

To answer this question, we turn to several resources that impact the work of the USTP ranging from the appointment and oversight of private trustees to the employees who work for the Program.

When it comes to the appointment of private case trustees, under 28 C.F.R. § 58.5 (non-discrimination in appointment of trustees), diversity includes, “race, color, religion, sex, national origin or age.”

There are also several sources for the definition of diversity and inclusion as it relates to those who work for the Program. The U.S. Department of Justice's Equal Employment Opportunity Policy is broader than 28 C.F.R. § 58.5 and includes, “race, color, religion, national origin, sex—including gender identity, sexual orientation, or pregnancy status—or because of age (over 40), physical or mental disability, protected genetic information, parental status, marital status, political affiliation, or any other non-merit-based factor.”

In 2021 the White House issued a series of executive orders dealing with diversity, equity, inclusion, and accessibility (DEIA), that further expand this definition. Among them is Executive Order 13985,⁴ Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, which enhanced and expanded the definition of diversity. Executive Order 13985 provides:

“individuals who belong to underserved communities that have been denied such [equi-



table] treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.”

This definition is an important measure to inform federal agencies of individuals who are protected and to assist all federal agencies charged with improving policies and practices to ensure DEIA in all parts of the federal workforce.⁵ The goals of the government-wide strategic plan to advance DEIA in the federal workforce were laid out in Executive Order 14035, which establishes that it is the policy of the Administration to cultivate a workforce that draws from the full diversity of the nation.⁶ Although they are not employees, the Program uses this expansive definition in the outreach and recruitment of private trustees.

The USTP’s Demonstrated Commitment to Promoting DEIA in the Bankruptcy System

Like efforts applied to its own internal hiring processes for government staff, the Program engages in outreach and recruitment of private trustees and regularly reviews hiring processes to ensure that they align with

the Program’s core values of integrity, fairness, respect, excellence, and accountability. The Program also provides annual training and communicates regularly with private trustees as part of their trustee oversight duties. In 2022, the Program implemented mandatory national diversity and inclusion training for private trustees.

Private trustee appointment and oversight is a foundational statutory USTP responsibility. The Program is committed to recruiting private trustees whose background and experiences reflect our nation’s rich diversity. The Program is expanding its efforts to engage in broad outreach to attract historically underrepresented candidates that reflect a range of personal and professional experiences and skillsets. Similarly, the Program has expanded advertisement of vacancies for positions within the USTP to more national and local affinity groups, historically black colleges and universities, and social media. The Program is also participating in national and local recruitment events and national affinity conferences.

In addition to the recruitment efforts discussed above, the USTP is increasing its collaboration with government and non-government affinity organizations. Further, the Program annually nominates a trial attorney to The National Conference of Bankruptcy Judges’ Honorable Cornelius Blackshear Fellowship, which honors the life and career of the late judge, who was a strong advocate for diversity, inclusion, and equity in the bankruptcy system throughout his career. The

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Program is also a member of the Bankruptcy Diversity Equity and Inclusion Consortium.⁷ The Consortium's purpose is to identify ways to simplify access to bankruptcy career opportunities, advance recruitment efforts to better reach historically underrepresented populations, and increase representation within the ranks of those participating in the bankruptcy system. The Program looks forward to future opportunities to collaborate with its bankruptcy partners and local and national affinity groups to achieve these goals.

Promoting Access to the Bankruptcy System

The Program's core mission to uphold the integrity of the bankruptcy system by providing oversight and policing abuse also promotes access to the bankruptcy system. For example, in December, the Program initiated a pilot project to conduct consumer debtor meetings of creditors by videoconference and develop procedures and best practices to ensure accessibility for all participants. Nearly 98% of chapter 7 and 13 filings are non-business filings, and together they make up more than 96% of all bankruptcy filings. The Program intends to expand this policy nationwide starting this summer. The shift to videoconference meetings of creditors represents a significant improvement for individual debtors and creditors by reducing the need to take time off from work and incur travel and childcare burdens while promoting greater participation and protecting the integrity of the consumer bankruptcy process. To provide greater functionality for trustees to connect to an interpreter through the Zoom platform, the Program also continues to improve tele-interpretive services for debtors of limited English proficiency.

The Program also issued guidance to its employees related to bifurcated fee agreements in chapter 7 cases. Some courts have found the arrangement impermissible, but in jurisdictions where it is allowed, it provides an alternative to debtors who need relief but who cannot afford to pay in full the fees associated with filing a chapter 7 case before the case is filed. The Program's guidance strikes a balance between providing flexibility to debtors who need bankruptcy relief while guarding against misconduct by debtor's counsel and the resulting harm to consumers.

The Important Role of the Private Trustee

Trustees play an important role in promoting fairness and assuring diversity and inclusion in the bankruptcy system. Trustees are fiduciaries entrusted with certain duties and obligations.⁸ Underlying these obligations is the goal of bringing objectivity, fairness, business acumen, and integrity to the bankruptcy system and those involved in the system.⁹ The trustee's demeanor

toward all parties must be appropriate and professional.¹⁰

To assure fairness in the performance of their duties, private trustees should focus on professionalism, and:¹¹

- *Demonstrate respect and consideration for others during all interactions.*
- *Extend civility and courtesy and maintain a calm, consistent disposition during all interactions.*
- *Conscientiously pay attention to tone of voice, facial expressions, eye contact and body language and gestures, including posture.*
- *Be culturally sensitive, such as not requiring removal of head coverings or using tele-interpretive services when appropriate to facilitate communications.*

Second, private trustees should promptly report any conduct that impinges on the integrity of the bankruptcy system to the U.S. Trustee. The Program's partnership with trustees is critical to the efforts of ensuring fair access to the bankruptcy system. Professional, effective, and efficient administration, consistent with the Bankruptcy Code and Rules and in line with the Program's core values, aid the Program in its watchdog responsibilities. Compliance with the *Handbooks* serve to enhance these goals by ensuring that the bankruptcy system functions fairly and efficiently for all stakeholders.

Third, in carrying out all duties and obligations, trustees should:¹²

- *Bring objectivity, fairness, business acumen, and integrity to the bankruptcy system and those involved in the system.*
- *Focus on facts and conduct.*
- *Be intentional in communications by avoiding ruminating and imposing personal views on others.*
- *Generally, follow the established docket order during 341 meetings, but be flexible to address circumstances or needs of an individual.*
- *Avoid appearing to favor or disfavor certain groups, such as all clients of a certain attorney, individuals with limited English proficiency, or pro se debtors.*
- *Ask the standard questions of each debtor.*
- *Limit questions to facts and circumstances directly tied to the administration of the case.*
- *Respond promptly and appropriately to requests for interpreter services.*
- *Provide the Bankruptcy Information Sheet in the individual's native language, when possible.*

- *Notify the Program immediately if aware of a debtor's disability, such as hearing impairment, so that an appropriate accommodation, if any, can be determined.*
- *Observe and report patterns that may suggest community-wide environmental issues such as: (i) a debtor with low income but whose monthly living expenses are high because they have to purchase bottled water for drinking and all household purposes and who shares that no one in their neighborhood can use tap water due to a local contamination issue; (ii) battery acid spills; (iii) lead exposure; (iv) gas station tank leaks; (v) asbestos releases; or (vi) discarded electronic equipment.*
- *Be aware of and report to the Program suspected Elder Abuse, Spousal Abuse, and Affinity Fraud.*
- *Keep an eye out for mortgage or foreclosure rescue abuse, other financial frauds, Ponzi schemes, credit card bust outs, identity theft, tax fraud, suspected criminal conduct or any other suspicious activity.*
- *Report deficient or abusive practices by consumer debtor attorneys that harm their clients, creditors, or the integrity of the bankruptcy system to the U.S. Trustee.*
- *Report anything that appears to be a barrier to diversity and inclusion or otherwise threatens the integrity of the bankruptcy system to the U.S. Trustee.*

When a trustee's conduct falls below the level of professionalism required by statutory requirements and the Handbook, the Program acts promptly to ensure fairness and protect all parties and the integrity of the bankruptcy system. Trustees may be suspended or removed from the panel for cause, including abusive practices.¹⁵

Conclusion

The Program was founded on the principles of equity and fairness. The Program has worked to achieve these goals by promoting diversity and inclusion in the bankruptcy system, including in the oversight and supervision of private trustees. Trustees serve an integral role in promoting diversity and inclusion because they are often the public's first, and sometimes only, interaction with the bankruptcy system. The users of the bankruptcy system represent individuals from all backgrounds and communities. The integrity of the bankruptcy system is maintained for the benefit of everyone who needs the "fresh start" afforded by the Bankruptcy Code. The Program continues to strive to

ensure fairness and equity because promoting diversity and inclusion in the bankruptcy process benefits the system as a whole. 🏠

Endnotes

¹ See Joint Resolution of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468 (as amended by Joint Resolution of July 1, 1973, Pub. L. No. 93-56, 87 Stat. 140).

² See H.R. Rep. No. 93-137, pt. I, ch. 5 (1973).

³ See generally, *id.* at pt. I-III.

⁴ Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

⁵ *Id.*

⁶ Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce, Exec. Order No. 14035, 86 Fed. Reg. 34593 (June 25, 2021).

⁷ DEI Consortium members are experienced bankruptcy attorneys, judges, and other professionals, including representatives from the National Association of Bankruptcy Trustees, National Association of Chapter 13 Trustees, American Bankruptcy Institute, Business Bankruptcy Committee of the Business Law Section of the American Bar Association, American College of Bankruptcy, National Association of Consumer Bankruptcy Attorneys, National Conference of Bankruptcy Judges, Association of Chapter 12 Trustees, and the Association of Insolvency and Restructuring Advisors.

⁸ See U.S. Dep't of Justice, Exec. Off. For U.S. Tr., Handbook for Chapter 7 Trustees (2012), <https://www.justice.gov/ust/private-trustee-handbooks-reference-materials/chapter-7-handbooks-reference-materials> (as amended Mar. 15, 2022) [hereinafter Handbook for Chapter 7 Trustees]; U.S. Dep't of Justice, Exec. Off. For U.S. Tr., Handbook for Chapter 13 Standing Trustees (2012), <https://www.justice.gov/ust/private-trustee-handbooks-reference-materials/chapter-13-handbooks-reference-materials> (as amended Oct. 15, 2021) [hereinafter Handbook for Chapter 13 Standing Trustees].

⁹ *Id.*

¹⁰ 28 U.S.C. § 586; 28 C.F.R. § 58.3 (2023); Handbook for Chapter 7 Trustees and Handbook for Chapter 13 Standing Trustees, *supra* note 8.

¹¹ See *supra* note 8.

¹² *Id.*

¹³ See 28 C.F.R. § 58.6 (2023).