AMERICAN BANKRUPTCY INSTITUTE

2019 Annual Spring Meeting

CONCURRENT SESSION

Hosted by the American Board of Certification

Ain't Misbehaving

J. Scott Bovitz, Moderator
Bovitz & Spitzer; Los Angeles

Wesley Howard Avery, Facilitator
Law Offices of Wesley H. Avery, APC; Pasadena, Calif.

Hon. James M. Carr
U.S. Bankruptcy Court (S.D. Ind.); Indianapolis

Hon. David W. Hercher
U.S. Bankruptcy Court (D. Ore.); Portland

Hon. Jerry C. Oldshue, Jr.
U.S. Bankruptcy Court (S.D. Ala.); Mobile

Hon. James J. Tancredi
U.S. Bankruptcy Court (D. Conn.); Hartford

Hon. Madeleine C. Wanslee
U.S. Bankruptcy Court (D. Ariz.); Phoenix

2019

Ain't Misbehaving: Regulating the Conduct of Consumer Debtor Lawyers

... the Interplay Between 11 U.S.C. §§329(b), 526 and 707(b)(4) and Federal Rules of Bankruptcy Procedure 2017 and 9011

April 13, 2019, 10:00 a.m.
American Bankruptcy Institute, Annual Spring Meeting, Washington, D.C.

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Hon. James M. Carr
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Chapter 7 bankruptcy trustee
Chapter 12 bankruptcy trustee
Law Offices of Wesley H. Avery, APC
Pasadena
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Debtors' transactions with attorneys

House and Senate Reports (Reform Act of 1978)

[11 U.S.C. §329], derived in large part from current Bankruptcy Act § 60d, requires the debtor's attorney to file with the court a statement of the compensation paid or agreed to be paid to the attorney for services in contemplation of and in connection with the case, and the source of the compensation. **Payments to a debtor's attorney provide serious potential for evasion of creditor protection provisions of the bankruptcy laws, and serious potential for overreaching by the debtor's attorney, and should be subject to careful scrutiny.**

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11 U.S.C. § 329

(a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a **statement of the compensation paid or agreed to be paid**, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and **the source of such compensation**.

(b) If such compensation exceeds the reasonable value of any such services, **the court may cancel any such agreement, or order the return of any such payment**, to the extent excessive, to

(1) the estate, if the property transferred—
(A) would have been property of the estate; or
(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 …; or

(2) the entity that made such payment.

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Federal Rule of Bankruptcy Procedure 2017

(a) Payment or Transfer to Attorney Before Order for Relief. On motion by any party in interest or on the court's own initiative, the **court after notice and a hearing may determine whether any payment of money or any transfer of property by the debtor, made directly or indirectly and in contemplation of the filing of a petition under the Code by or against the debtor or before entry of the order for relief in an involuntary case, to an attorney for services rendered or to be rendered is excessive**.

(b) Payment or Transfer to Attorney After Order for Relief. On motion by the debtor, the United States trustee, or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property, or any agreement therefor, by the debtor to an attorney after entry of an order for relief in a case under the Code is excessive, whether the payment or transfer is made or is to be made directly or indirectly, if the payment, transfer, or agreement therefor is for services in any way related to the case.

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"Debt relief agency"

Michael D. Fielding, What is a "Debt Relief Agency" and Why Does it Matter?
https://www.abcworld.org/articles/what-%E2%80%9Cdebt-relief-agency%E2%80%9D-and-why-does-it-matter

> A "debt relief agency" is "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration." 11 U.S.C.A. § 101(12A). However, the Bankruptcy Code specifically excludes five general groups from the definition of "debt relief agency." … Notably, the lynchpin of a "debt relief agency" requires that the bankruptcy assistance be provided to an "assisted person." The Bankruptcy Code defines "assisted person" as "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $192,450 [Avery: prior to April 1, 2019]." 11 U.S.C.§ 101(3). …
>
> Attorneys that provide assistance to "assisted persons" constitute "debt relief agencies." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 130 S. Ct. 1324, 176 L. Ed. 2d 79 (2010); *see also Hersh v. U.S. ex rel. Mukasey*, 553 F.3d 743, 750 (5th Cir. 2008) ("[U]nder the plain language of 11 U.S.C. § 101(12A), attorneys qualify as 'debt relief agencies.'"); *In re Brown*, 505 B.R. 716, 723 (Bankr. W.D. Va. 2014) ("an attorney representing a consumer debtor who qualifies as an 'assisted person' is a 'debt relief agency.'").

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11 U.S.C. § 526

(a) A debt relief agency shall not—

(1) fail to perform any service that such agency informed an assisted person or prospective assisted person it would provide in connection with a case or proceeding under this title;

(2) make any statement, or counsel or advise any assisted person or prospective assisted person to make a statement in a document filed in a case or proceeding under this title, that is untrue or misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue or misleading . . . . .

(b) Any waiver by any assisted person of any protection or right provided under this section shall not be enforceable against the debtor by any Federal or State court or any other person, but may be enforced against a debt relief agency.

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11 U.S.C. § 526 (cont.)

(c) (1) Any contract for bankruptcy assistance between a debt relief agency and an assisted person that does not comply with the material requirements of this section, § 527, or § 528 shall be void and may not be enforced by any Federal or State court or by any other person, other than such assisted person.

(2) Any debt relief agency shall be liable to an assisted person in the amount of any fees or charges in connection with providing bankruptcy assistance to such person that such debt relief agency has received, for actual damages, and for reasonable attorneys' fees and costs if such agency is found, after notice and a hearing, to have—

(A) intentionally or negligently failed to comply with any provision of this section, § 527, or § 528 with respect to a case or proceeding under this title for such assisted person;

(B) provided bankruptcy assistance to an assisted person in a case or proceeding under this title that is dismissed or converted to a case under another chapter of this title because of such agency's intentional or negligent failure to file any required document including those specified in § 521; or

(C) intentionally or negligently disregarded the material requirements of this title or the Federal Rules of Bankruptcy Procedure applicable to such agency.

11 U.S.C. § 526 (cont.)

(3) In addition to such other remedies as are provided under State law, whenever the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this section, the State—

(A) may bring an action to enjoin such violation;

(B) may bring an action on behalf of its residents to recover the actual damages of assisted persons arising from such violation, including any liability under paragraph (2); and

(C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorneys' fees as determined by the court.

(4) The district courts of the United States for districts located in the State shall have concurrent jurisdiction of any action under subparagraph (A) or (B) of paragraph (3).

(5) Notwithstanding any other provision of Federal law and in addition to any other remedy provided under Federal or State law, if the court, on its own motion or on the motion of the United States trustee or the debtor, finds that a person intentionally violated this section, or engaged in a clear and consistent pattern or practice of violating this section, the court may—

(A) enjoin the violation of such section; or

(B) impose an appropriate civil penalty against such person.

11 U.S.C. § 707(b)(4)(A)

(A) The court, on its own initiative or on the motion of a party in interest, in accordance with the procedures described in rule 9011 of the Federal Rules of Bankruptcy Procedure, may order the attorney for the debtor to reimburse the trustee for all reasonable costs in prosecuting a motion filed under section 707(b), including reasonable attorneys' fees, if— (i) a trustee files a motion for dismissal or conversion under this subsection; and
(ii) the court— (I) grants such motion; and
(II) finds that the action of the attorney for the debtor in filing a case under this chapter violated rule 9011 of the Federal Rules of Bankruptcy Procedure.

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11 U.S.C. § 707(b)(4)(B)

(B) If the court finds that the attorney for the debtor violated rule 9011 of the Federal Rules of Bankruptcy Procedure, the court, on its own initiative or on the motion of a party in interest, in accordance with such procedures, may order— (i) the assessment of an appropriate civil penalty against the attorney for the debtor; and
(ii) the payment of such civil penalty to the trustee, the United States trustee (or the bankruptcy administrator, if any).

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11 U.S.C. § 707(b)(4)(C)

(C) The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has— (i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and
(ii) determined that the petition, pleading, or written motion— (I) is well grounded in fact; and
(II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).

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11 U.S.C. § 707(b)(4)(D)

(D) The signature of an attorney on the petition shall constitute a certification that **the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect**.

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Discussion: no knowledge

"The attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect." What does that mean?

Actual knowledge? Is it the "should have known" test?

How much inquiry is enough?

Can the attorney rely on the intake questionnaire?

What independent research and investigation is required in the $1,000 flat fee case?

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Federal Rule of Bankruptcy Procedure 9011

10-9011 Collier on Bankruptcy P 9011.04

Rule 9011 places an affirmative duty on attorneys and litigants to make a reasonable (under the circumstances) investigation of the facts and the law before signing and submitting any petition, pleading, motion or other paper.

Attorneys and parties are required to "think first and file later"; to "look before leaping." They may not file suit hoping that discovery will later show that a claim was proper or "drop papers into the hopper and insist that the court or opposing counsel undertake bothersome factual and legal investigation." However, an attorney is entitled to make reasonable inferences from the available facts. The scope of reasonable inquiry in any given factual setting may be subject to dispute.

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Federal Rule of Bankruptcy Procedure 9011 (b), (c)

(b) Representations to the Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances--

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation. …

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Inherent power to sanction

Nguyen v. Golden (In re Pham), 2017 Bankr. LEXIS 3844 (B.A.P. 9th Cir. Nov. 6, 2017)

This is the second appeal arising from the bankruptcy court's award of sanctions for discovery abuses. …

Federal courts, including bankruptcy courts, have inherent power to impose sanctions for a broad range of willful or improper litigation conduct. In re Dyer, 322 F.3d at 1196. This inherent power includes the authority to sanction the conduct of a nonparty who participates in abusive litigation practices or whose actions or omissions cause the parties to incur additional expenses. Corder v. Howard Johnson & Co., 53 F.3d 225, 232 (9th Cir. 1994). … Before imposing inherent power sanctions on a nonparty, the court must make an explicit finding of bad faith or improper purpose.

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How has 11 U.S.C. §707(b)(4)(D) been applied?

Amendments to the Code occasioned by passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") significantly augmented an attorney's duties concerning the accuracy of information included in bankruptcy filings. For example, the new 11 U.S.C. § 707(b)(4)(D) provides that:

> The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect.

Only a handful of bankruptcy courts have examined this provision since it became effective. One explained that the language of this provision and the history surrounding Rule 9011 suggests that the "inquiry" referred to in the statute "need only be a 'reasonable' one." In re Withrow, 391 B.R. 217, 227 (Bankr. D. Mass. 2008) (Boroff, J.) aff'd 405 B.R. 505 (1st Cir. BAP 2009). Withrow cautioned courts to exercise care before imposing burdens on debtors' counsel which are impractical to satisfy under the real-life circumstances implicated in bankruptcy cases. Id.

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More on 11 U.S.C. § 707(b)(4)(D)

However, commenting upon the debtor's attorneys' new heightened duty of verification, another court explained:

> [the] general drift [of BAPCPA's amendments] is clear: debtors' counsel are to exercise significant care as to the completeness and accuracy of all recitations on their clients' schedules, after they have made a factual investigation and legal evaluation that conforms to the standards applicable to any attorney filing a pleading, motion, or other document in a federal court. The content of a debtor's petition and schedules is relied on, and should have the quality to merit that reliance.

In re Robertson, 370 B.R. 804, 8-9 n. 8 (Bankr. D. Minn. 2007) (Kishel, J.)

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In re Withrow, 391 B.R. 217, 227 (Bankr. D. Mass. 2008) (Boroff, J.) aff'd 405 B.R. 505 (1st Cir. BAP 2009)

- Counsel files "skeleton" chapter 13 bankruptcy petition on behalf of Debtor. Less than two weeks later, the case is converted to chapter 7 and counsel files schedules, a statement of financial affairs and Official Form B22A.
- At the meeting of creditors, the chapter 7 trustee informs counsel that he has not exempted the debtor's residence or automobile. Counsel promises the chapter 7 trustee he will do so.
- Litigation ensues between counsel and the chapter 7 trustee as to whether the debtor's overtime is accurately reported in documentation filed by counsel with the court. Counsel prepares and files a Response Affidavit signed by the debtor re the overtime issue which *inter alia* also declares that amended schedules have been filed when they have not.
- As his fees mount, counsel files an interim application for compensation [required by previous court order as to this attorney] for $1,195.00 to which the chapter 7 trustee and the U.S. Trustee object. At the contested matter of the interim fee application, counsel proposes to pay the chapter 7 trustee $1,000 to settle the matter which is not opposed by the U.S. Trustee but is rejected by the court. The court issues an order to show cause regarding possible FRBP 9011 violations by counsel.

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In re Withrow, 391 B.R. 217, 227 (Bankr. D. Mass. 2008) (cont'd)

- At the OSC, counsel admits the schedules were erroneous because they did not include an exemption for the debtor's residence or his vehicle, that he told the trustee at the §341 meeting that he intended to amend the schedules, and that he helped the debtor prepare his Response Affidavit which stated that the amended schedules had been filed when, in fact, they were not filed until 10 days *after* the filing of the debtor's Response Affidavit.
- When questioned about discrepancies between the debtor's Rebuttal Affidavit and his actual Form B22A regarding the debtor's average current monthly income, counsel admitted that he had made a mistake, but was unable to explain why or elaborate further.
- When questioned about discrepancies between the debtor's Schedule J, which provided that the debtor had no reason to anticipate a reduction in income, and his Affidavit Rebuttal, which provided that the debtor would have less income due to support provided to his mother, counsel testified that the omission was due to the fact that the debtor did not provide monetary support to his mother at the start of the case. This testimony, however, was inconsistent with the debtor's Response Affidavit wherein he stated that he began providing support to his mother months before filing his case.

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Discussion: lawyer fibbing and irresponsibility

"Counsel prepares and files a Response Affidavit signed by the debtor re the overtime issue which *inter alia* also declares that amended schedules have been filed when they have not." Why would an attorney do this?

"When questioned about discrepancies … counsel admitted that he had made a mistake, but was unable to explain why or elaborate further." Do you care about the attorney's excuse for a misrepresentation?

In your courtroom, how do you treat false statements from an attorney? Does it matter if the statement was a dropped fly ball (a baseball term) or an intentional statement?

Why are some attorneys prone to fudging the truth?

Do you refer liars to the State Bar?

"Counsel promises the chapter 7 trustee he will" amend the schedules. But he does not do so. Should the innocent client suffer for attorney sloth?

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In re Withrow, 391 B.R. 217, 227 (Bankr. D. Mass. 2008) (cont'd)

- The Court issued a Memorandum of Decision concluding that Counsel had violated § 707(b)(4)(C) and Bankruptcy Rule 9011 in his preparation of the Debtor's schedules, statement of financial affairs and the rebuttal. The bankruptcy court stated:

  > On the facts here, this Court can not find that Attorney Lafayette has met his Rule 9011 and §707(b)(4)(C) obligations. After all of the argument and testimony, the Court still is not sure what the Debtor earned in the six months prior to the filing of the petition or what the Debtor earns now. Nor is the Court sure whether the Debtor intended to mislead the Court with respect to the information provided in his bankruptcy papers or his Section 341 meeting testimony. But the Court is sure of this -- that Counsel, at the very least, failed to (1) properly review information provided by the Debtor with respect to his prepetition income; (2) identify contradictions and inconsistencies in the schedules, Statement of Financial Affairs, Rebuttal and affidavits submitted on behalf of the Debtor before the filing of those documents; (3) promptly correct those contradictions and inconsistencies, even when identified by the Chapter 7 Trustee, on anything close to a timely basis; and (4) to place himself in a position of being able to explain the reasons for those contradictions and inconsistencies to the Court even in the context of an evidentiary hearing of which he had more than adequate notice. Certainly, there is no bright line that surrounds § 707(b)(4)(C) and (D) and Rule 9011. But wherever that line lies, this Court agrees with the Chapter 7 Trustee and the UST that Attorney Lafayette has crossed it.

- Based on these findings, the Court sanctioned counsel the sum of $3,585.00.

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Discussion: bright line test

"[T]here is no bright line that surrounds § 707(b)(4)(C) and (D) and Rule 9011. But wherever that line lies, this Court agrees with the Chapter 7 Trustee and the UST that Attorney Lafayette has crossed it."

Where is the bright line on misrepresentations to the court?

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Discussion: judicial perspectives

Knowing what you know now about your role as a judge, what would you have done differently from the first day on the bench?

What is your favorite part of the job?

What is your least favorite part of the job?

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In re Clink, 770 F.3d 719 (8th Cir. 2014) (Kelly, J.)

- Bankruptcy counsel represents debtor in chapter 7 case. Just before debtor filed for bankruptcy, debtor wrote a $3,000 check to her mother as partial payment of a $5,000 loan. Counsel instructed debtor in an email that she should not send the check but that if she did, she should "make sure it cannot be traced & stick with the story, it did not happen." Counsel tells debtor that the schedules to be filed with the court will also fail to disclose the horses she owns.
- Chapter 7 Trustee finds out about the horses, settles with the debtor, and then files a motion for the disgorgement of fees by counsel. The bankruptcy court sanctions counsel under § 526(a(2) for advising the debtor prepetition to file false schedules, and under §707(b)(4) for filing false schedules.

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Discussion: pre bankruptcy planning

"Counsel instructed debtor in an email that she should not send the check but that if she did, she should make sure it cannot be traced & stick with the story, it did not happen." Did this really happen? Why would an attorney advise a client to stick with a false story?

Why would an attorney put this advice in writing?

"Counsel tells debtor that the schedules to be filed with the court will also fail to disclose the horses she owns." OK, how is the debtor going to hide her horses? These are pretty big animals!

What are the tools available to a judge, when faced with obvious false statements from a debtor on her schedules? Is this a problem for both the debtor and her lawyer?

28

In re Vargas, 257 B.R. 157 (Bankr. D. N. J. 2001) (Lyons, J.)

- Bankruptcy attorney files four reaffirmation agreements to reaffirm unsecured debts, one of which was *de minimis* ($224.70), and none of which were listed on the Schedule of Intention.
- The debtors' Schedule of Intention listed three mortgages on their residence and a car loan that were to be reaffirmed; debtors' counsel neglected to file reaffirmation agreements on any of these debts and did not amend the debtors' Schedule of Intention.
- Each reaffirmation agreement bore the declaration of the debtors' attorney stating that he had represented the debtors in negotiating the reaffirmation agreement, that the agreement represented a fully informed and voluntary agreement by the debtors, and that it did not impose an undue hardship. The court scheduled a hearing on the three reaffirmation agreements in excess of $1,000 and asked the debtors' attorney and each creditor to supply additional information, including a copy of any security agreement, proof of perfection and the fair market value for any collateral.

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In re Vargas, 257 B.R. 157 (Bankr. D. N. J. 2001) (cont.)

- Schedules I and J showed no net monthly income. The debtor husband is disabled and the debtor wife works as a bookkeeper.
- The debtors have no non-exempt property. Chapter 7 trustee filed a no asset report.
- The debtors' attorney submitted two letters in response to the OSC. The first letter stated that one reaffirmation agreement had been filed in error and was being withdrawn. A second letter stated that the attorney mistakenly believed that the subject claim was secured but did not withdraw it. There was no response by the debtors' attorney in support of the third proffered reaffirmation agreement.
- Neither the debtors nor their counsel showed up to the OSC. One of the two remaining creditors appeared, and the court determined that its claim was unsecured. Neither of the two remaining reaffirmation agreements were approved.

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Discussion: orders to show cause

"Neither the debtors nor their counsel showed up to the OSC." What do you do when an attorney fails to appear at a hearing on an order to show cause?

If the attorney appears, what are you looking for?

What is the purpose of an order to show cause?

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In re Vargas, 257 B.R. 157 (Bankr. D. N. J. 2001)(cont.)

- Judge Lyons held that: (1) if debtors' attorneys certify their clients' reaffirmation agreements, they have a duty to independently assess their clients' financial circumstances; (2) courts may require debtors' attorneys to refund fees for failing to make reasonable inquiries and, thus, for failing to have rational bases on which to certify reaffirmation agreements.
- Because debtors' counsel failed to examine his clients' financial status and inform them of the effect of the proposed reaffirmation agreements pursuant to 11 U.S.C. § 524(c), counsel violated FRBP 9011(b)(3). Counsel was removed from the case and ordered to disgorge his fees based on his failure to provide a valuable service to his clients pursuant to § 329(b).

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Discussion: reaffirmation agreements

"Each reaffirmation agreement bore the declaration of the debtors' attorney stating that he had represented the debtors in negotiating the reaffirmation agreement, that the agreement represented a fully informed and voluntary agreement by the debtors, and that it did not impose an undue hardship."

What do you expect the attorney to do in connection with reaffirmation negotiations ("duty to independently assess their clients' financial circumstances")? How can an attorney do this?

Is it practical to require an independent assessment, when the attorney's fee is only $1,000 to file a simple chapter 7?

Is access to justice denied for the poorest debtors, if regular bankruptcy practitioners charge an extra $1,000 or more to cover the costs of investigations before filing petitions?

33

In re Dean, 401 B.R. 917 (Bankr. D. Idaho 2008) (Pappas, J.)

- Counsel (a former chapter 7 and chapter 13 trustee), was retained to analyze the dismal financial situation of a husband and wife, to advise them about their prospects if they filed for bankruptcy relief, and if that course was selected, to prepare and file the necessary petition, schedules, and related documents, and to represent them in the bankruptcy case.
- One of the debtors' principal assets was a motorhome. The motorhome was important because the husband debtor used it as his residence when working at his job in Nevada. Debtors borrowed money from the wife debtor's mother in order to purchase the motorhome, and informed counsel that the mother had been granted a security interest in same although they were unable to provide evidence that a security interest had been granted or perfected.
- Fearing there may be a problem with the enforceability of the mother's security interest in a bankruptcy case, counsel became concerned about the potential of a conflict of interest if, in representing debtors, he also helped one of their creditors to perfect a lien. **As a result, counsel advised debtors that they should seek independent legal counsel to advise and assist them in perfecting the mother's lien before any bankruptcy petition was filed.** Counsel referred the debtors to another attorney in Boise.

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Discussion: pre-bankruptcy planning

"Counsel advised debtors that they should seek independent legal counsel to advise and assist them in perfecting the mother's lien before any bankruptcy petition was filed." Does this seem to be a legitimate area of pre-bankruptcy planning (get friendly creditors to perfect their security interests in the debtors' assets and wait for the preference period of 90 days or one year to expire)?

Is there a conflict, if the debtor (borrower) wants the debtor's lawyer to document the loan and security interest for the lender?

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In re Dean, 401 B.R. 917 (Bankr. D. Idaho 2008) (cont.)

- Debtors sought the advice of the other attorney, but they decided not to retain him because his fees were too high. Instead, they unsuccessfully attempted to document and perfect the mother's lien on their own.
- When debtors next consulted counsel, they told counsel they had contacted the other lawyer, and that the lien on the motorhome was now in order. They did not, however, tell counsel that they elected not to hire a separate attorney, or that they had attempted to perfect the mother's lien on their own.
- Based upon debtors' assurances, counsel filed debtors' chapter 7 bankruptcy petition on February 11, 2008. **In the bankruptcy schedules** he prepared for debtors, and that they signed, counsel listed the motorhome as an asset in Debtors' schedule B, claimed the motorhome as a homestead in Schedule C, and **listed the mother as a secured creditor in Schedule D**. Counsel testified that Debtors initialed each page of the petition and schedules prior to filing them.

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In re Dean, 401 B.R. 917 (Bankr. D. Idaho 2008) (cont.)

- Significantly, prior to filing the bankruptcy case, counsel did not ask debtors to produce any documents evidencing the mother's lien. Counsel also acknowledges that, prior to filing debtors' bankruptcy case, he did not review state records to verify that the mother was listed as a lienholder on the motorhome.
- Prior to the first meeting of creditors, the chapter 7 trustee sent an email to counsel indicating that a title report reflected that there was no lien on the motorhome, and his intent to seek turnover of same.
- Counsel phoned the debtor wife about this problem, and counsel was told that it was probably an oversight and that the debtors would take care of it. At that time, counsel advised the debtor wife about the pitfalls associated with attempting to perfect a lien on their assets post-petition; counsel advised her to take no further action to perfect the lien. Despite this advice, debtors took the steps required to perfect the mother's purported lien post-petition in violation of the automatic stay.

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Discussion: accuracy of the schedules

"Counsel did not ask debtors to produce any documents evidencing the mother's lien." Should an attorney always look at the documentation of secured claims before preparing the schedules?

Can an attorney ever rely upon the debtor's representations? (Trust but verify?)

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In re Dean, 401 B.R. 917 (Bankr. D. Idaho 2008) (cont.)

- The day after the initial meeting of creditors, the trustee (Mr. Jeremy Gugino) filed an objection to the debtors' claim of exemption in the motorhome. The exemption was subsequently withdrawn.
- Two days after the initial meeting of creditors, the trustee initiated an adversary proceeding against the debtors and the mother to avoid the post-petition lien and to recover possession of the motorhome. Eventually, the mother agreed to release her lien. The motorhome was turned over to trustee and sold at auction.
- Though debtors ultimately received a discharge of their debts, **the trustee brought a motion under § 329(b) to compel counsel to disgorge his fees**. In that motion, the trustee argued that the debtors did not receive adequate representation, and that had counsel been more vigilant in his role as their attorney prior to filing debtors' petition, they would not have lost this important asset.

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In re Dean, 401 B.R. 917 (Bankr. D. Idaho 2008) (cont.)

- At the hearing on the § 329(b) motion, the trustee argued that if the mother's loan balance had been properly secured by an unavoidable lien on the motorhome, the motorhome would not have been lost. In response, counsel explained, quite adamantly, that he felt he could not properly assist debtors in their efforts to protect mother or to help perfect her purported lien on the motorhome because of what counsel perceived to be a conflict of interest. Rather than abandon the debtors, or advise them they should not seek bankruptcy relief, counsel referred them to a colleague he felt could competently assist them in perfecting the mother's security interest. Counsel argued that he should not be faulted, nor should his fees be jeopardized, for deferring to appropriate ethical concerns.
- In his affidavit, counsel explained that he assumed the mother's lien was valid because the debtor wife had told him so and because debtors later initialed the schedules indicating that they were accurate. Counsel argues this assumption was reasonable because he had previously referred debtors to another attorney and he had no reason to believe that the lawyer had not assisted them in perfecting the lien. The court disagreed that counsel's inquiry was adequate under these circumstances.

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In re Dean, 401 B.R. 917 (Bankr. D. Idaho 2008)(cont.)

- The court found that counsel's performance was lacking when debtors returned and told him the issue of the mother's lien had been take care cf. Prior to placing the motorhome within the grasp of a grasping bankruptcy trustee, the court found counsel should have exercised more care and initiative in determining that the mother's lien had now been perfected [and presumably not preferential], and that Debtors would not be prejudiced by a bankruptcy filing.
- Several of the questions framed by Judge Boroff in the Withrow case, *supra*, for determining whether a debtor's attorney had satisfied his statutory duties under 11 U.S.C. § 707(b)(4)(D) were used by Judge Pappas in the case *sub judice*:

  > (1) did the attorney impress upon the debtor the critical importance of accuracy in the preparation of documents to be presented to the Court;
  >
  > (2) did the attorney seek from the debtor, and then review, whatever documents were within the debtor's possession, custody or control in order to verify the information provided by the debtor;
  >
  > (3) did the attorney employ such external verification tools as were available and not time or cost prohibitive (e.g., on-line real estate title compilations, on-line lien search, tax "scripts") ...

- See In re Withrow, 391 B.R. at 228.

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In re Dean, 401 B.R. 917 (Bankr. D. Idaho 2008)(cont.)

- Although Counsel's practice of asking his clients to initial each page of the petition and schedules to verify their accuracy arguably allowed him to answer the first prong in the affirmative, the record facts show counsel's performance fell short under the latter two standards.
- Counsel recognized there was a problem with the mother's lien to the extent that he advised debtors to seek other counsel to address the issue. But counsel conceded that, when the debtors returned to him, he never obtained or reviewed debtors' contract with the mother, or documents evidencing the notation of the lien on the certificate title to the Motorhome.
- Counsel also never confirmed the perfection of the lien through accessing state records.
- Moreover, counsel never attempted to contact the other attorney, although a simple phone call could have alerted him to the fact that debtors had decided to forgo the other attorney's help and to adopt a "do-it-yourself" approach to resolving the lien issues.

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In re Dean, 401 B.R. 917 (Bankr. D. Idaho 2008) (cont.)

- Having previously identified that a problem existed with the mother's lien, **counsel could not reasonably rely upon his clients' statements** that it was resolved to satisfy his responsibility to present accurate schedules and to protect debtors' interests in the bankruptcy case. Following up on the validity of the mother lien was not an impractical burden that could not be easily accomplished by counsel under these circumstances.
- In this case, as an experienced bankruptcy lawyer and former chapter 7 trustee, counsel appreciated that any lien on the motorhome would be carefully scrutinized by trustee, particularly since the lienholder was an insider and the motorhome was also claimed as a homestead. Given counsel's familiarity with the potential for avoidance of liens in bankruptcy cases, and the importance of the motorhome to the debtors, prior to filing debtors' petition, counsel did not adequately inquire as to the accuracy of the information reported by debtors in the schedules as required by § 707(b)(4)(D).
- Under these circumstances, the court concluded that the fee counsel collected from the debtors exceeded the reasonable value of his services, and was order to disgorge one-half to the debtors pursuant to § 329(b).

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Discussion: the debtor's representations

"Counsel could not reasonably rely upon his clients' statements." Really? Must an attorney treat his debtor like a child? We can't rely on what a debtor says?

44

Discussion: quality of attorney services

"The trustee brought a motion under § 329(b) to compel counsel to disgorge his fees." Are such motions common? If not, why aren't they more common?

"Counsel should have exercised more care and initiative in determining that the mother's lien had now been perfected, and that Debtors would not be prejudiced by a bankruptcy filing." How can a court measure the quality of attorney services?

If the quality of work is lacking, how do you calculate the reduction in fees or other sanctions?

What are the tools in the judge's toolbox for pushing attorneys to do their best work, even in a volume debtor practice?

Do most of the attorneys in your jurisdiction do a satisfactory job?

Is there a difference between the consumer and business bar? If so, what? Why?

45

In re D'Arata, 587 B.R. 819 (Bankr. S.D.N.Y. 2018) (Lane, J.)

- The debtor (who is disabled) lived on a monthly income of $1,435, with his monthly expenses exceeding his income by $20. The Debtor spent 65% of his monthly income ($953) on rent, food, and basic supplies alone. Given his financial circumstances, it took debtor a year to save the money to pay the fee of the respondent, his bankruptcy counsel. Debtor paid the $900 legal fee in installments over eight months, with the last installment paid some three months before the chapter 7 bankruptcy case was filed. The debtor never met counsel in his office prior to the petition date, but instead communicated with him online and over the telephone.
- As a chapter 7 case is often administered without the need for the debtor to appear before the court, a § 341(a) meeting of creditors may be the most significant event in such a case for an individual debtor, particularly in a no-asset case such as this. No-asset cases are normally … streamlined because they are quickly closed after discharge. But notwithstanding the straightforward nature of Debtor's case, difficulties arose almost immediately.

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In re D'Arata, 587 B.R. 819 (Bankr. S.D.N.Y. 2018) (cont.)

- At the first meeting of creditors (the "First MOC"), **counsel did not appear to represent the debtor. Instead, an appearance was made on behalf of the debtor by so-called "appearance counsel" who was not an employee of counsel's law firm**. While the debtor knew that an attorney would represent him at the First MOC, the debtor did not know that it would not be the counsel he hired.
- During this First MOC, the debtor testified that the information in the original set of schedules filed by counsel with the petition was incorrect in several significant ways: (1) the original schedules included a bank account that the debtor closed prior to the filing of the petition; (2) the original schedules reported that the debtor had previously sought bankruptcy relief when he had not [not an uncommon error]; and (3) the original schedules improperly listed student loan obligations. The debtor testified that he had identified those errors and reported them to counsel in November 2017—before the petition and the original schedules were filed—but that these errors had not been corrected. During the First MOC, the debtor also explained that the petition contained a version of his signature that did not match the signature he affixed to the petition and original schedules.

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In re D'Arata, 587 B.R. 819 (Bankr. S.D.N.Y. 2018) (cont.)

- At no point during the First MOC did appearance counsel assist the debtor or the chapter 7 trustee in addressing any of these concerns. In fact, appearance counsel was not at all familiar with the debtor's case.
- At the conclusion of the First MOC, the chapter 7 trustee explained that he could not examine the debtor without the correct schedules so he continued the examination so that the counsel could file corrected schedules. The chapter 7 trustee also told appearance counsel to have counsel meet with the debtor to correct the schedules. Of course, all this meant a second trip downtown for debtor, a particular hardship for this disabled debtor.
- Things continued to go downhill for the debtor after the First MOC. Prior to the second meeting of creditors (the "Second MOC"), **the debtor sent letters to the court**, which explained that he had been unable to contact counsel, that counsel failed to correctly amend his schedules, and that incorrect information had been provided to the chapter 7 trustee. Counsel did not respond to those letters. It was not until one day prior to the Second MOC that counsel finally filed an amended voluntary petition, amended schedules, and amended summary of assets and liabilities and creditor matrix.

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Discussion: letters from debtors

"The debtor sent letters to the court." How do judges treat letters from debtors or third parties? Do you place these letters in the bankruptcy court file? Do judges read them?

49

Discussion: appearance counsel

Are "appearance counsel" common in your jurisdiction?

If so, what is the usual role of appearance counsel?

Are appearance counsel just warm bodies? Or do they play an important role by keeping down the cost of filing bankruptcy?

How should a primary attorney prepare the appearance counsel?

When appearance counsel reported a problem at the 341(a) examination, what should the primary attorney have done?

How do appearance counsel identify and keep track of conflicts of interest?

50

In re D'Arata, 587 B.R. 819 (Bankr. S.D.N.Y. 2018) (cont.)

- At the Second MOC, the debtor once again appeared and testified under oath. Counsel again chose not to appear. Instead, **counsel sent a different appearance counsel** to represent the debtor. To make matters worse, this second appearance counsel advised the chapter 7 trustee that she had never met the debtor before that morning, and that she was not informed prior to that morning about the issues relating to the debtor's filings. Second appearance counsel stated that she had learned of the problems at the First MOC only on the morning of the Second MOC and not in time to have a meaningful consultation with the debtor. Thus, like the first appearance counsel, the second appearance counsel was unable to adequately represent the debtor.
- At the Second MOC, the debtor explained that the amended schedules were still not correct. The debtor also testified during the Second MOC about other problems in his case, including that:
  - Counsel failed to advise debtor that he would not appear at the second meeting and would send another appearance counsel whom the debtor had never met;
  - Counsel failed to obtain the debtor's consent to file the amended Schedules; and
  - **Without the debtor's review or approval, counsel affixed a copy of debtor's signature from a different document to the amended Schedules and filed them**.

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Discussion: signature of a person

"Without the debtor's review or approval, counsel affixed a copy of debtor's signature from a different document to the amended Schedules and filed them."

U.S. Bankruptcy Court, Central District of California, Local Bankruptcy Rule 9011-1(a):

"…every signature on a filed document must be handwritten in ink (holographic). …the filer must scan the signature page and insert it into the electronic (.pdf) version of the document. … Under no circumstances may a reproduction of the same holographic signature be used on multiple pages or in multiple documents."

U.S. Bankruptcy Court, Central District of California, Local Bankruptcy Rule 9011-1(d):

"…the Filer must maintain the executed original of any filed document for a period of five years…"

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Discussion: attorney signature

U.S. Bankruptcy Court, Central District of California, Local Bankruptcy Rule 3015-1(v)(4):

"The attorney's signature…certifies that before the case was filed the attorney personally met with, counseled, and explained to the debtor all the matters [in the Rights and Responsibilities Agreement for chapter 13 cases]."

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In re D'Arata, 587 B.R. 819 (Bankr. S.D.N.Y. 2018) (cont.)

- In response to the debtor's letters, **the court issued an Order to Show Cause** (the "OSC") upon counsel. Both the United States Trustee and the chapter 7 trustee filed statements in support of requiring counsel to disgorge the fee that he received from the debtor. In his submission to the Court on the OSC, the Chapter 7 trustee sums up the real world consequences of the improper use of appearance counsel at a 341 meeting in a case like this one, noting that individual debtors such as the debtor at bar:

  > most often have never hired a lawyer. They are overwhelmed by debt. They are in need of help. **They nearly all are honest debtors.** They are not proud to be filing for bankruptcy. The day they appear for examination by the trustee is the lowest day of their lives. If ever there was a day when they need the help of their lawyer, it is the day of their §341 examination.

- Additional filings in response to the Order to Show Cause were submitted by other members of the bar who serve as chapter 7 trustees. Despite not having filed any written response, counsel appeared at the OSC.

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Discussion: honest debtors

"They nearly all are honest debtors."

Are most debtors honest?

Are most attorneys doing a competent job in your courtroom?

Would you look favorably at declarations from other members of the bar and trustees (to help you fix the standard of care in the community)?

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Discussion: law school

What was your favorite class in college?

What was your least favorite class in law school?

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In re D'Arata, 587 B.R. 819 (Bankr. S.D.N.Y. 2018) (cont.)

- In evaluating the value of legal services under § 329, the court opined that "the question is whether the [sum] that counsel as paid was excessive for what he accomplished for debtor in this case." In re Nakhuda, 544 B.R. 886, 903 (9th Cir. BAP 2016) (upholding disgorgement of fees paid where debtor's attorney filed documents in violation of local electronic filing orders). The Court has wide discretion in making this determination so long as the fees at issue are evaluated in light of the services actually performed. See Karsch v. LaBarge (In re Clark), 223 F.3d 859, 863-64 (8th Cir. 2000). "The Court may reduce the compensation if it finds that the amount requested is excessive or of poor quality." In re Carmine Alessandro, 2010 WL 3522255, at *2 (Bankr. S.D.N.Y. Sept. 7, 2010). The value of legal services is lessened where an attorney has violated an ethical standard. See In re Damon, 40 B.R. 367, 376 (Bankr. S.D.N.Y. 1984) (holding that forfeiture of attorney's fee is mandated where an ethical standard is violated).
- Applying the standards under § 329, the court concluded that counsel should return the fee to the debtor -- counsel did not adequately represent his client either in the documents that were filed or at the 341 meetings.

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Discussion: excessive fees

"The question is whether the [fee] that counsel as paid was excessive for what he accomplished for debtor in this case."

What factors help you determine "excessive" fees?

58

Discussion: tips for bankruptcy lawyers

What are your top three tips for bankruptcy professionals?

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Discussion: the role of legal specialization

The primary role of legal specialization is to help consumers, lawyers, and the media find competent lawyers in a given location and field of law. Another important role is to encourage lawyers to continue with their professional growth.

Certified specialists have demonstrated their ethics, experience, and capabilities. Congress recognized this in 11 U.S.C. §330(a)(3)(C) ("In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including … with respect to a professional person, whether the person is ***board certified*** or otherwise has demonstrated skill and experience in the bankruptcy field … ").

How has legal specialization helped our panelists in their careers? (About 35 sitting judges were or are board certified by The American Board of Certification – about 10% of all authorized judgeships.)

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