AMERICAN BANKRUPTCY INSTITUTE

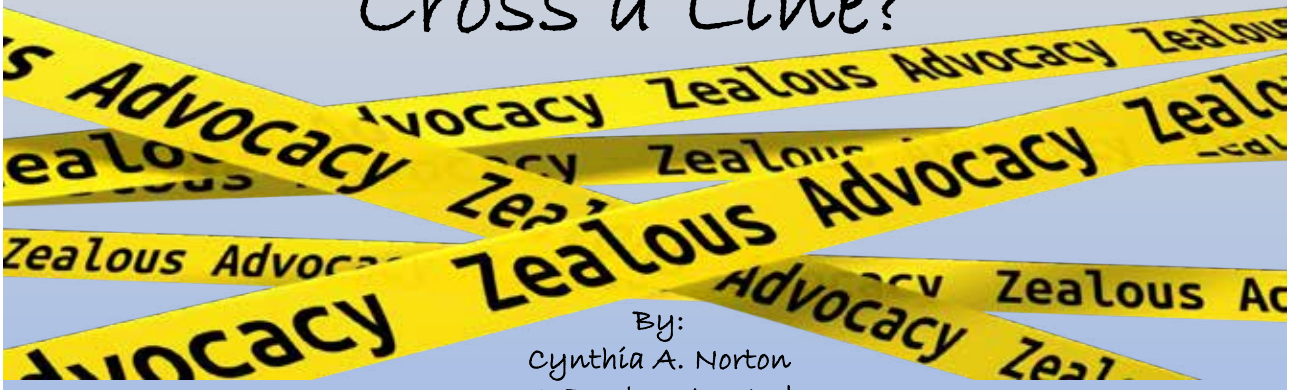
Alexander L. Paskay Memorial Bankruptcy Seminar

Ethics Jeopardy

Hon. Cynthia A. Norton
U.S. Bankruptcy Court (W.D. Mo.) | Kansas City

2024

When Does Zealous Advocacy Cross a Line?



By:
Cynthia A. Norton
U.S. Bankruptcy Judge
W.D. Missouri

ABI Paskay Bankruptcy Seminar
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. . . to protect the client at all hazards and costs . . . is the highest and most unquestioned of his duties; and he must not regard the alarm – the suffering – the torment – the destruction – which he may bring upon any other

Rule 1.3

A lawyer shall act with reasonable diligence and promptness in representing a client

MRPC Comments about "Zeal"

A lawyer must act with zeal in advocacy but is not bound to press for every advantage

MRPC Comments about "Zeal"

As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system

MRPC Comments about "Zeal"

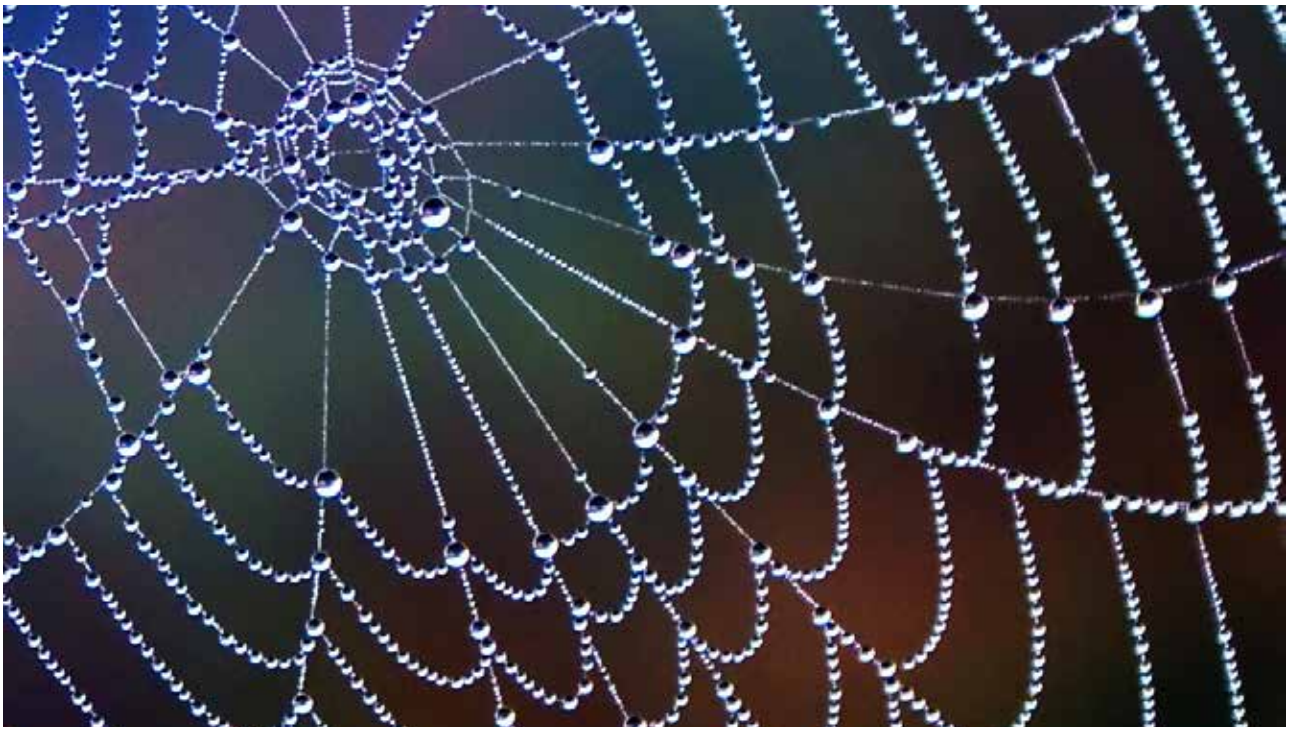
When an opposing party is well-represented, a lawyer can be a zealous advocate

These principles include

1. the lawyer's obligation zealously to protect and pursue a client's legitimate interests

2. within the bounds of the law

3. while maintaining a professional, courteous and civil attitude towards all persons involved in the legal system

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Crossing the line from zealous advocacy to

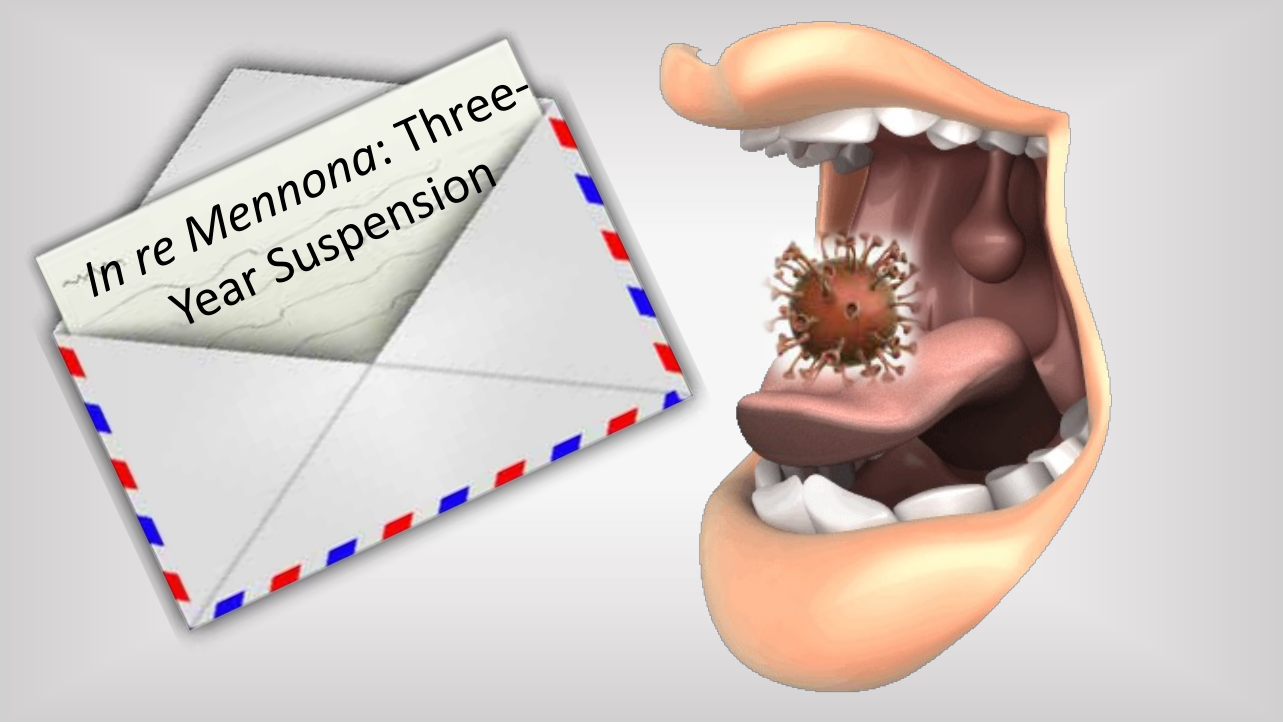
Plain pettifoggery

To Summarize:

- Distinguish zeal as an advocate vs. other lawyer roles
- Must follow procedural rules and court's orders
- Not required to use every tool in your toolbox
- But can use more tools against a represented party
- Duty to protect client's "legitimate interests"
- Within the bounds of the law
- While acting professionally and civilly to all persons

Sanctions	Disgorgement	Misc.
$0	$0	None
$7,500	$500	Order to Show Cause
$15,000	$2,500	Vacation of Order
$70,000	$5,000	Disciplinary Referral
$400,000	$60,000	Suspension
$9,500,000	$350,000	Criminal Referral

Scenario #1: Am I being too zealous if I try to infect & kill my opponent?



Scenario # 2: I'm just being a zealous advocate by sweetening the pot

In re Butler: Criminal Referral

Scenario # 3: I have a right to call it like I see it

In re NG: The contempt power is not designed to redress hurt feelings

Scenario # 4: My heart is in the right place

In re Khan: "A professional owes a duty not to let passion or policy concerns overwhelm professional judgment"

"This court cannot condone an officer of the court's deliberate decision to violate a court order, no matter how noble his motivations"

Scenario # 6:
How should I know?

In re Roedel: "This case is a close call, but the Court does not believe counsel should be punished for his client's repeated misstatements."

Scenario # 7: Well, what was I supposed to do! I disclosed it sooner than later!

In re Lee: When an attorney ineptly or incompetently renders services on behalf of debtors, the court may order disgorgement of all fees

Scenario # 8: How could I ethically disclose that asset?

In re Varan: "A lawyer's duty of candor to the court must always prevail in any conflict with the duty of zealous advocacy"

Scenario #9: But I'm just so tired!

Lack of Zeal is as bad as too much zeal

In re Gerstner: Defendant's Counsel

- $5,000 disgorgement of fees
- One-year bar on filing new cases
- Disciplinary referral

In re Cortellesso: Plaintiff's Counsel

- Sanction of $7,500 under 28 USC § 1927

Scenario # 10: Scorched earth, Baby! How else can I litigate?

In re Kimball Wood:

$9,500,000

Take-aways

- Watch out for high stakes litigation where sanctions frequently arise (matters involving the stay and discharge injunction)
- The discovery rules are not mere guidelines
- Be aware of the defenses that don't work
- If sanctions are sought against you, don't double-down
- Don't try to represent yourself
- Pay attention to a judge's warning shot
- Curb the language
- Save the threat of sanctions for cases in which it is warranted
- If you do request sanctions, you better do it right
- Finally, remember that "zealous advocacy" has ethical and legal limits


Questions?

Thoughts on Zealous Advocacy: When Do Bankruptcy Lawyers Cross the Line?

By: Cynthia A. Norton
U.S. Bankruptcy Judge, W.D. MO
Presented to the ABI Paskay Bankruptcy Seminar[1]
February 2024

I. History of "Zealous Advocacy"

Experts believe that the notion that a lawyer must be a zealous advocate originated some 200 years ago with a British barrister, Henry Lord Brougham.[2]

Originally, views of a lawyer's duty derived from the medieval Catholic belief that knowledge is a gift from God and that such divine gifts should not be used to defend those who committed bad acts and that a lawyer who acted badly in the defense of a client was committing a sin. This medieval idea blended well with eighteenth century secular notions, as expressed in Blackstone's Commentaries, that a lawyer was a gentleman who "played fair" and "did the right thing," as determined by the beliefs and prejudices of the day.[3] But in defending Queen Caroline in 1820 on charges of adultery, Brougham threatened to expose the secret marriage of the Queen's husband, King George IV. The idea of attacking the King in defense of a client caused an uproar. Brougham defended himself with this extreme idea of what lengths an advocate should go to protect a client:

> An advocate by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, that client and none other. To save that client by all expedient means—to protect that client at all hazards and costs to all others, and among others to himself—is the highest and most unquestioned of his duties; and he must not regard the alarm—the suffering—the torment—the destruction—which he may bring upon any other. Nay, separating even the duties of a patriot from those of an advocate and casting them, if need be, to the wind, he must go on reckless of the consequences, if his fate should unhappily be to involve his country in confusion for his client's protection.

The idea of zealous advocacy thus found its way into the 1908 Canons of Professional Ethics promulgated by the ABA.[4] The ABA's 1969 Model Code of Professional Responsibility described the duty in Canon 7 as "A LAWYER SHOULD REPRESENT A CLIENT ZEALOUSLY

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[1] Originally presented to the ABI Midwestern Bankruptcy Institute, Kansas City, MO, in October 2023.
[2] Jennifer Anderson, *What does zealous advocacy mean in modern legal practice?,* INFOTRACK: LEGAL UP (Nov. 14, 2022), https://www.infotrack.com/blog/zealous-advocacy/.
[3] *Legal Ethics & Malpractice Reporter Vol. 1 No. 8*, JOSEPH HOLLANDER & CRAFT LLC: BLOG (July 31, 2020), https://josephhollander.com/news-blog/legal-ethics-malpractice-reporter-vol-1-no-8/.
[4] *Model Rules of Professional Conduct*, A.B.A. (1983), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/.

WITHIN THE BOUNDS OF THE LAW." Then, in 1983, the ABA substantially revised the Model Code and adopted the "Model Rules of Professional Conduct" or "MRPC." Most states have since adopted in whole or in part the ABA's MRPC. Experts have explained that the duty to act zealously was replaced by MRPC 1.3, the duty of diligence: "A lawyer shall act with reasonable diligence and promptness in representing a client," and that this was a compromise between the Blackstone notion of being gentlemenly, on the one hand, and the Brougham notion of protecting the client at all costs, on the other. Still, Comment 1 to MRPC 1.3 includes a reference to zeal, when it states:

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. ***A lawyer must also act*** with commitment and dedication to the interests of the client and ***with zeal in advocacy upon the client's behalf.*** A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

(emphasis added).[5] Some states, noting that "zeal" is often invoked as an excuse for unprofessional behavior, have now removed the concept of zeal.[6]

The Preamble to the ABA's MRPC uses the word "zealously" three times.[7] First in Preamble [2], in comparison to being an advisor, evaluator, third-party neutral or a citizen that, "[a]s advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." Second, in Preamble [8], that when an opposing party is well represented, a lawyer can be a "zealous advocate" on behalf of a client and at the same time assume that justice is being done. And third, in Preamble [9], in discussing when conflicts arise between a lawyer's duties to the client, her own interests and the legal system:

> In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. ***These principles include the lawyer's obligation zealously to protect and***

[5] Comment 1 to Rule 1.3 in the Kansas Rules of Professional Conduct and Rule 4-1.3 of the Missouri Rules of Professional Conduct are identical to the ABA Comment 1 to Rule 1.3.
[6] Jennifer Anderson, *What does zealous advocacy mean in modern legal practice?*, INFOTRACK: LEGAL UP (Nov. 14, 2022), https://www.infotrack.com/blog/zealous-advocacy/, citing to Ohio rules of professional conduct.
[7] *Model Rules of Professional Conduct: Preamble & Scope*, A.B.A. (1983), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/.

> ***pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.***

(emphasis added).[8]

Thus, in most states, a notion of a duty to be a zealous advocate within some bounds still exists.

II. How Have Courts Discussed "Zealous Advocacy"?

- ***Legal advocacy is an art; balance required*:** Legal advocacy is an art in which the unrelenting pursuit of truth and the most thorough self-control must be delicately balanced, and zealous advocacy on behalf of a client can never excuse contumacious or disrespectful conduct. *In re Brizinova*, 565 B.R. 488, 492 (Bankr. E.D.N.Y. 2017) (cites omitted) (declining to sanction defense lawyers at the request of the chapter 7 trustee; statements such as "extortionist," "threaten into further submission," "unexpected accretion," "frivolous," and "dig more," were strong, provocative and emotion-laden, but was not said in bad faith, also noting that such rhetorical embellishment generally does not enhance and may well detract from the quality of the argument).

- ***And may require counsel to walk on a gossamer thread***: At times, especially when facts are developing, advocacy on behalf of a client requires counsel to walk on gossamer thread. While the court has no desire to hamper zealous advocacy on behalf of a client, counsel must adhere to boundaries in representation. *In re Grimminger*, No. 12-60521, 2012 WL 5341381, at *4 (Bankr. N.D. Ohio Oct. 29, 2012) (denying debtor's objection to the bank's motion to vacate an order reducing its mortgage arrearage; several months before the bar date and before the bank had filed its secured proof of claim, the chapter 13 debtor filed a motion to establish a mortgage arrears claim of $3,129.07; the bank did not respond and the court granted the motion; when the bank later timely filed a secured claim showing an arrearage of more than $7,000, the debtor objected on the grounds of res judicata and the bank moved to vacate the debtor's order; the court was troubled by improper notice and service (debtor served the servicer, but not the bank who filed the foreclosure action), and debtor's motion to determine the arrears did not disclose the prepetition foreclosure; include any foreclosure fees or other charges; and did not disclose that debtor had estimated a much higher arrearage in the filed plan. "Between her plan and the motion to determine the arrearage, [d]ebtor maintained inconsistent positions. While the court cannot say these representations arise to "fraud," they were not wholly forthright." Finding no prejudice to the debtor, the court vacated the order).

- ***But zealous advocacy is not carte blanche***: An attorney's ethical obligation of zealous advocacy on behalf of his or her client does not amount to *carte blanche* to burden the federal courts by pursuing claims that are frivolous on the merits, or by pursuing nonfrivolous claims through the use of multiplicative litigation tactics that are harassing, dilatory, or otherwise "unreasonable and vexatious." *In re Gorges*, 590 B.R. 771, 789-90 (Bankr. E.D. Mich. 2018) (denying bank's request to sanction debtor's lawyer who filed a

[8] Preambles [2], [8], and [10] to the Kansas and Missouri Rules of Professional Conduct are identical to the ABA's.

chapter 13 to extend the time for debtors' to redeem their real estate before being evicted; there was no bad faith on the debtors' lawyer's part in filing the bankruptcy case for a proper bankruptcy purpose, notwithstanding that debtors apparently caused more than $250,000 in damages when they vacated the home after voluntarily dismissing the chapter 13 shortly after filing).

- ***Zealous advocacy does not displace lawyers' obligations as officers of the court*****:** *Azar v. Garza* ,138 S. Ct. 1790, 1793 (2018) (in a case involving whether a refugee minor in detention could obtain an abortion, the attorneys for the Department of Health & Human Services alleged that counsel for the minor made material misrepresentations and omissions designed to thwart the Supreme Court's review. "The Court takes allegations like those the Government makes here seriously, for ethical rules are necessary to the maintenance of a culture of civility and mutual trust within the legal profession. On the one hand, all attorneys must remain aware of the principle that zealous advocacy does not displace their obligations as officers of the court. Especially in fast-paced, emergency proceedings like those at issue here, it is critical that lawyers and courts alike be able to rely on one another's representations. On the other hand, lawyers also have ethical obligations to their clients and not all communication breakdowns constitute misconduct. The Court need not delve into the factual disputes raised by the parties in order to answer [whether the case was moot]").

- ***Courts use an objective standard of reasonableness to determine when zealous advocacy crosses the line into plain pettifoggery***: *In re Dernick*, No. 18-32417, No. 18-32494, 2020 WL 2617037, slip op. at *9, n 102 (Bankr. S.D. Tex. May 22, 2020), citing *United States v. Int'l Bhd. Of Teamsters*, 948 F.2d 1338, 1344 (2d Cir. 1991) (denying law firm's request to sanction chapter 11 debtors' lawyer who filed a motion to disqualify the law firm from representing a creditor due to alleged former representation of the debtors; although the court declined to grant the motion to disqualify, the disqualification motion was not objectively frivolous, given the interrelatedness of the debtors' companies and the timing of the law firm's representations, which, the court stated, would have given any competent attorney pause).

- ***And sanctions under 28 U.S.C. § 1927 for vexatious multiplication of pleadings should be construed narrowly to avoid deterring zealous advocacy; sanctions not appropriate where the issues raised are subject to reasonable dispute***: *Smith v. Bradley Pizza, Inc*., No. 17-CV-2032, 2018 WL 2538362, at *2 (D. Minn. June 4, 2018) (court declines to sanction counsel for pursuing one unsuccessful motion and unnecessary motion, stating: "The Eighth Circuit has cautioned that § 1927 should be construed narrowly to avoid deterring zealous advocacy by an attorney on behalf of her clients. *Lee v. L.B. Sales, Inc.*, 177 F.3d 714, 718 (8th Cir. 1999). As such, conduct is not sanctionable merely because a party raises an issue and does not prevail. Sanctions are not appropriate where the issues raised "are subject to reasonable dispute," citing *Misischia v. St. John's Mercy Health Sys.*, 457 F.3d 800, 806 (8th Cir. 2006); also 28 U.S.C. § 1927 implicates a higher level of culpability than Rule 11 sanctions).

- ***Or for conduct that may have been incompetent, negligent or perhaps insufficiently skeptical***: *In re Greater Middle Missionary Baptist Church*, 463 B.R. 24, 27 (Bankr. E.D. Mich. 2011) (court would not sanction counsel who filed a chapter 11 for a financially distressed church in imminent danger of losing its land to foreclosure following expiration of a consensually extended redemption period; counsel's conduct in accepting representations of church representatives and filing notices of lis pendens without a sufficient investigation to determine that church had no viable claims based on alleged defects in foreclosure process did not rise to level sufficient to warrant imposition of sanctions. The court stated: "One might argue, though the Court makes no findings in that regard, that those actions were the result of either incompetence or negligence, or, alternatively and possibly more accurately, a failing in the inherent duty of skepticism and objectivity that an attorney should bring to his relationship to his client (even a client that is a church) for the good of the client as well as the attorney. In any event, Debtor's Counsel's actions were no more than any of those, and, individually or *in toto,* were not actions that can be characterized or found to be the punishable aggressive tactics that so far exceeded zealous advocacy as to require or permit sanctions from this Court under [28 U.S.C. § 1927]").

- ***But the line can be "murky"***: *In re Calderon*, No. 21-14785, 2023 WL 2466555 (Bankr. S.D. Fla. Mar. 10, 2023) (Russin, J.) (The line between a lawyer's zealous advocacy and responsibilities under Rule 9011 can be "murky"; after the court denied the debtor's motion for lien avoidance, creditor moved for sanctions; court denied the motion, citing Fla. R. 1.3. "It cannot be said that every time an issue may have been decided by a state court and *Rooker-Feldman* or *Younger* Abstention is determined to apply, the motion raising the issue before the bankruptcy court violates FRBP 9011. *Rooker-Feldman* and *Younger* Abstention are complex legal doctrines that require analysis of another court's ruling and record which are not always clear. Often, bankruptcy counsel is different than state court counsel and determining precisely what occurred in state court can be challenging").

- ***And substantive law may impose some constraints on zealous advocacy***: *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA,* 130 S. Ct. 1605, 1622 (2010) (rejecting lawyer's argument that holding debt collector attorneys personally liable for FDCPA violations creates an irreconcilable conflict between an attorney's personal financial interest and her ethical obligation of zealous advocacy on behalf of a client, noting that, "[t]o the extent the FDCPA imposes some constraints on a lawyer's advocacy on behalf of a client, it is hardly unique in our law" (cites omitted)).

- ***Zealous advocacy does not include raising frivolous arguments***: *United States v. Brown*, No. 4:22-CR-0166, 2023 WL 2531868, slip op. at *1, n.1 (W.D. Mo. Mar. 15, 2023) (Kays, D.J.) (denying the criminal defendant's objections to the government motion in limine, noting that the argument is so meritless it is probably frivolous, because it is premised on two obvious mistakes in fact, and warning in a footnote that "The Court reminds defense counsel that zealous advocacy does not include raising frivolous arguments").

- ***Or acting in bad faith to pursue a personal agenda***: *In re Khan*, 488 B.R. 515 (Bankr. E.D.N.Y. 2013) (granting the trustee's motion for sanctions against attorney who, in

defending a fraudulent conveyance against the immigrant debtor's family members, filed counterclaims for alleged actual and punitive damages from the trustee's "abuse of process" and "constitutional tort violations," also seeking to enjoin the trustee from bringing similar complaints. The attorney later withdrew the counterclaims, but defended his actions on the grounds that minority immigrants are a very vulnerable class and that he as a member of the bar thought it was his utmost duty and moral obligation to represent them zealously. The court said that when an attorney's conduct crosses the line that divides creative and zealous advocacy from the assertion of claims that are plainly without merit to pursue a personal agenda, the question of bad faith must be addressed. The court granted sanctions of $15,000, noting that although the counterclaims may well have arisen from the lawyer's personal convictions concerning fairness and equity under the bankruptcy code, where there is no colorable basis to bring the claims, even the most laudable of motivations cannot provide a proper purpose or infuse merit into a groundless claim).

- ***Or personally denigrating the judge***: *In re New River Dry Dock, Inc.*, No. 06-13274, 2011 WL 4382023, slip op. at *7 (Bankr. S.D. Fla. Sept. 20, 2011) (court, sitting en banc, issued order to show cause to attorney why he should not be disciplined for unprofessional, disrespectful and inappropriate remarks about a bankruptcy judge in written responses, including, among other attacks that it was "sad when a man of your intellectual ability cannot get it right when your own record does not support your half-baked findings"; lawyer suspended for 60 days; that court notes that the attorney "offers no material justification for his diatribe. Indeed, there is no appropriate justification. If an attorney believes that a ruling is incorrect, he may seek reconsideration or file an appeal. If an attorney believes that a judge is unfairly prejudiced, he may seek the judge's recusal. If an attorney has concerns about a bankruptcy judge's behavior, he may file a judicial misconduct complaint with the Eleventh Circuit. There are many avenues for redress. However, a pleading containing a hostile, undignified and insulting tirade against a particular judge or the court in general is obviously not the way to redress an unfavorable ruling or a judge's alleged unfairness. A first year law student would know that. There is a distinction between zealous advocacy and judicial denigration. (citation omitted). The Responses crossed that line by a wide margin").

- ***And the duty of candor trumps or at least defines the boundaries of the duty of zealous advocacy***: *In re Varan*, No. 11-B-44072, 2014 WL 2881162 (Bankr. N.D. Ill. June 24, 2014) (debtor had filed three sets of amended schedules claiming he owed no interests in life insurance policies or businesses; the UST investigated and filed a complaint under § 727 to deny the debtor a discharge for the failure to disclose. During discovery, the debtor essentially admitted owning interests in those unscheduled assets. Attorneys nonetheless filed two more sets of amended schedules claiming no interests in those assets. The UST moved for sanctions for knowingly filing false schedules and the attorneys objected, arguing that the failure to disclose the assets in the amended schedules was harmless since the UST knew about the assets, and that their ethical duty to zealously defend their client in the adversary proceeding prevented them from filing accurate schedules, because of the adverse inference it would establish; held, that a lawyer's duty of candor must always prevail in any conflict with the duty of zealous advocacy; ordering disgorgement of fees

(which had also not been timely disclosed); sanctions in favor of the UST for attorney fees; and for the attorney to take remedial legal education in the form of an ethics course at an ABA accredited law school).

- ***Those boundaries recede even further when the attorney is pursuing his own interests in a fee application:*** *In re Zambrano*, No. 22-B-04462, 2022 WL 16646807, slip op. at *5 (Bankr. N.D. Ill. Nov. 3, 2022) (court finds debtor's attorney engaged in clear and consistent pattern or practice of violating § 526(a)(2) of the debt relief agency provisions in the Code, ordering disgorgement of $35,891.90 plus completion of an ethics course at an ABA accredited law school; attorney failed to disclose on locally mandated form for approval of chapter 13 "no look" fees that he was also deviating from the local rules by requiring his clients to execute a wage assignment. The court rejected the attorney's argument that because he attached a copy of the wage assignment and no one had ever objected before that he should not be sanctioned. "In a contest between counsel's duty of zealous advocacy and his ethical duty of candor, an attorney's 'ethical duty of candor before the bankruptcy court ... trumps (or at least defines the boundaries of) the duty of zealous advocacy' (citing *Varan*, *supra*). Those boundaries recede even further when the attorney, as in the case of a fee application, is pursuing his own interests rather than his client's").

- ***Attorneys must remain honest and forthright when confronted with damaging facts, i.e., don't "double-down"***: *In re Harmon*, No. 10-33789, 2011 WL 302859, at *14, n. 10 (Bankr. S.D. Tex. Jan. 26, 2011) (discovery dispute and motion to compel and for sanctions; the court stated that the defendant's response had "shocked and disturbed the court" because it essentially "doubled-down on its evasion and conjecture, in order to rationalize its own failures [to produce documents]." "The Court understands an attorney's duty of zealous advocacy. However, the duty of zealous advocacy is not without boundaries. The Court expects attorneys to remain honest and forthright when confronted with damaging facts. *See Hanner v. O'Farrell,* 142 F.3d 434 (6th Cir.1998) ("If a lawyer's view of zealous advocacy compels him to adopt tactics that he must know tread dangerously close to overstepping a boundary, he may ask for clarification."). An attorney treads close to exceeding those boundaries of zealous advocacy when he offers baseless . . . and far-fetched . . . theories in seeking to somehow rationalize a client's improper behavior").

- ***Continuing to litigate after you know your client's claims are spurious violates your duty to the court and is sanctionable; a lawyer may not use zealous advocacy to inflict his own bad luck on opponent***: *Wood v. Khan Hotels LLC*, No. 4:11-CV-3019, 2013 WL 1867056, at *1 (D. Neb. May 3, 2013) (awarding attorney fees of $8,655 to defense counsel under 28 U.S.C. § 1927 after dismissing plaintiff's complaint after a disastrous deposition showing plaintiff's claims were spurious; although giving the benefit of the doubt to plaintiff's counsel, the court states it had no doubt that after the plaintiff's deposition, the plaintiff's counsel continued to litigate with intentional or reckless disregard of his duty to the court, effectively admitted as much to opposing counsel in his attempt to settle the case. "The Court is not unsympathetic to the position plaintiff's counsel was in. Most litigators

have, at one time or another, taken a case that turns out not to have been as meritorious as it might have initially appeared. But bad breaks are inevitable, and a lawyer is not permitted to use "zealous advocacy" as an excuse to inflict his own bad luck on his opponent").

- ***Denying the obvious and contesting facts and issues without a reasonable basis is not zealous advocacy***: *Schweitzer v. Preferred Family Healthcare, Inc*., No. 6:19-CV-03240, 2021 WL 5496081, slip op. at *3 (W.D. Mo. Nov. 23, 2021) (Harpool, D.J.) (in denying cross motions for summary judgment, the court states: "The Court does not appreciate Defendant's refusal to admit documents that clearly speak for themselves. Zealous advocacy is consistent with quality legal representation. However, denying the obvious and contesting facts and issues without a reasonable basis is not zealous advocacy and is not a necessary or acceptable part of zealous advocacy").

- ***Zealous advocacy is also not a cloak to bill more***: *In re Kittery Point Partners*, LLC, No. 17-20316, 2018 WL 6433131, slip op. at *1 (Bankr. D. Me. Dec. 5, 2018) (court disallows $1,128 of debtor's counsel's time in filing a reply to the creditor's response to the debtor's objection to claim finding that the reply was not necessary under the local rules nor beneficial toward resolution of the objection. "Zealous advocacy should not be used as a cloak to transform an unnecessary task into a compensable billing opportunity").

- ***And when a court reduces fees, it isn't to curtail zealous advocacy but to encourage counsel to apply a cost/benefit analysis***: *In re Community Home Financial Services, Inc.*, No. 12-01703, 2017 WL 1753224, at *17 (Bankr. S.D. Miss. May 3, 2017) (court reduces trustee's attorney's fees for filing five motions to withdraw the reference, including a motion to withdraw reference of the whole bankruptcy cases; the court reduced the $60,000 in fee by half on the grounds that the probability of success at the time the trustee filed the withdrawal motions was such that the amount of fees requested were unreasonable, noting that by reducing the fees, the court did not intend to curtail zealous advocacy, but to encourage the application of cost/benefit analysis to that strategy consistent with Fifth Circuit standards requiring the fees to have been reasonable and necessary at the time they were incurred).

- ***And in connection with discovery disputes requires counsel to work cooperatively and to save their most zealous advocacy for issues necessary to resolve the merits***: *Jones v. City of St. Louis*, No. 4:21-CV-600, 2023 WL 2242143, slip op. at *2 (E.D. Mo. Feb. 27, 2023) (denying sanctions for failure to comply with the local rule requiring sincere efforts to resolve discovery disputes, the U.S. District Court judge states: "In the letter and spirit of Local Rule 3.04 and Federal Rule of Civil Procedure 26, the Court urges the parties and their counsel to work cooperatively and in good faith to tailor discovery to the needs of the case and to save their most zealous advocacy for those issues necessary to resolve the merits of the legal claims," warning that the court will "no longer entertain their continuous filings of contentious, confusing and frivolous motions without consequence").

- ***And cooperation in discovery does not compromise zealous advocacy***: *Nadeau v. Experian Information Solutions, Inc*., No. 20-CV-184, 2020 WL 7396588(D. Minn. Dec. 17, 2020) ("The Court notes that while it understands its fundamental role in addressing

discovery disputes, this particular set of grievances could have been resolved without involvement of the Court with a reasonably modest level of cooperation between the two parties. Such cooperation would not have compromised the level of zealous advocacy required in our adversarial system").

- ***The court expects and requires counsel to maintain professionalism and civility throughout the course of the litigation***: *Williams v. FCA US LLC*, No. 17-CV-00844, 2018 WL 9869534, at *2 (W.D. Mo. Mar. 13, 2018) (Whipple, J.) (deceased) (discovery dispute; motion for sanctions denied. "First, this Court expects and requires counsel to maintain professionalism and civility throughout the course of litigation. In this case, the parties' briefs contain unnecessary hyperbole and accusations. For example, "Plaintiffs' motion is frivolous and devoid of any good faith basis, whatsoever"; "Plaintiffs' bald assertion ... is ... a complete and utter fabrication"; "Plaintiffs trust the Court to properly assess ... the sincerity of FCA's righteous indignation"; and "FCA offers nothing else other than demonstrably false accusations" (record citations omitted). Professionalism and zealous advocacy are not mutually exclusive concepts. Moving forward, the parties shall present their arguments without needless exaggeration or accusations.")

- ***Although zealous advocacy is essential, vituperative rhetoric is too often substituted and detracts from the argument***: *A.O.A. v. Rennert*, No. 4:11-CV-44, 2017 WL 5478409, at *4 (E.D. Mo. Nov. 15, 2017) (discovery dispute in which the parties made repeated accusations of "gross" or "blatant" mischaracterizations, "outright" misrepresentations, falsehoods, and the like. Noting that such accusations served more to detract from the arguments than supporting a reasoned position, the court stated: "While "zealous advocacy is essential to the conscientious, vigorous representation of a client's interests," *United States v. Dowdy*, 960 F.2d 78, 81 (8th Cir. 1992), vituperative rhetoric is "too often substituted for logic and reason." *State v. Banks*, 215 S.W.3d 118, 122 (Mo. banc 2007)).

- ***And inflammatory language about an expert witness exceeds the bounds of zealous advocacy and will be subject to sanction in the future***: *Rockwood Retaining Walls, Inc. v. Patterson, Thuente, Skaar & Christensen, P.A.*, No. 09-2493, 2010 WL 2777273, at *3 (D. Minn. July 14, 2010) ("Moreover, the Court takes issue with the Law Firm's characterization of Mr. Perl's qualifications. In discussing Mr. Perl's testimony in their opening brief on the Motion to Dismiss, the Law Firm states: 'Common sense, not always something with which 'experts' are blessed, tells us that Perl is not conveying expert opinions but is experimenting with a new form of legal voodoo that permits him simply to massage the arguments in a lawsuit and declare with confidence the winners and losers. It is easier to envision him on a street corner in Minneapolis with a sandwich board over his shoulders than seated in a witness chair.' Such inflammatory language goes beyond the bounds of zealous advocacy and is utterly intolerable before this Court. Any similar behavior will be subject to sanction in the future").

- ***Although appreciating zealous advocacy, debtor's counsel's stay violation action bordered on frivolous when it was apparently prosecuted as a means to obtain attorney fees***: *In re Spearman*, No. 16-30772, 2017 WL 943918, at *7 (Bankr. W.D. Ky. Mar. 9, 2017) (debtor was a member of a credit union; the credit union had a policy to deny

electronic access to a member's accounts if the member caused the credit union a financial loss. After the debtor filed a chapter 7 bankruptcy owing debts to the credit union, the credit union invoked its policy such that debtor lost her ability to use her debit card but was able to access her account and withdraw funds by check or cash. Shortly thereafter, she moved her funds to another financial institution and did not reaffirm the debt. Debtor filed a motion seeking damages for an alleged violation of the stay and violations of the Kentucky Consumer Protection Act ("KCPA"), but did not allege or present any evidence of damages other than attorney fees. The court denied the debtor's motion for partial summary judgment and granted summary judgment in favor of the credit union. In its conclusion, the court expressed its displeasure: "Upon review of all the documents submitted, the Court must conclude that [the credit union] neither violated the § 362 automatic stay nor the KCPA. This was not a difficult decision for the Court. Indeed, the law and facts on this were not complex, complicated, or even disputed. While the Court can appreciate zealous advocacy of a client, this matter bordered on the frivolous. While CCU has not asked for attorney fees, and the Court is not going to award attorney fees, counsel for [the debtor] should recognize that actions of this nature are not well-taken, and could subject counsel to Fed. R. Bankr. P. 9011 sanctions, including attorney fees. True stay violation cases, cases wherein debtors are truly harmed by a creditor's actions, should absolutely be pursued on behalf of debtors, but those actions must include some damages element, and not merely be prosecuted as a means to incur fees").

- ***Duty of zealous advocacy doesn't excuse attorney from duty to comply with the law; urging one court to ignore another court's order is not zealous advocacy but mere foolishness***: *In re Sea Hawaii Rafting, LLC*, No. 14-01520, 2016 WL 1599804, at *4 (Bankr. D. Haw. Apr. 15, 2016), *vacated*, 2018 WL 11268134 (D. Haw. May 31, 2018) (trustee's motion for sanctions for violation of the stay for actions creditor's counsel took in admiralty law case in which counsel told the District Court it should ignore the orders of the bankruptcy court; creditor's counsel sanctioned $43,277.7. The court states: "Counsel for [the creditor] contend [they] simply fulfilled their duty to be zealous advocates for their client. But the duty of zealous advocacy does not excuse an attorney from the duty to comply with the law. Urging one court to ignore another court's order is not zealous advocacy but mere foolishness").

- ***Obstructionist discovery conduct is born of a warped view of zealous advocacy and has now become routine chicanery***: *Sec. Nat. Bank of Sioux City, IA v. Abbott Labs.*, 299 F.R.D. 595, 596-97 (N.D. Iowa 2014), *vacated*, 800 F.3d 936 (8th Cir. 2015) (imposing sanctions in the form of ordering counsel to write and produce a training video for deposition misconduct, including hundreds of unnecessary objections and interruptions during the examiner's questioning, most completely lacking merit and often influencing how the witnesses responded to questions; overuse of "form" objections, many of which stated no recognized basis for objection; repeated objections and interjections in ways that coached the witness to give a particular answer or to unnecessarily quibble with the examiner, plus excessive interruption of the depositions, frustrating and delaying the fair examination of witnesses. The Court stated: "Discovery—a process intended to facilitate the free flow of information between parties—is now too often mired in obstructionism. Today's 'litigators' are quick to dispute discovery requests, slow to produce information,

and all-too-eager to object at every stage of the process. They often object using boilerplate language containing every objection imaginable, despite the fact that courts have resoundingly disapproved of such boilerplate objections. Some litigators do this to grandstand for their client, to intentionally obstruct the flow of clearly discoverable information, to try and win a war of attrition, or to intimidate and harass the opposing party. Others do it simply because it's how they were taught. As my distinguished colleague and renowned expert on civil procedure Judge Paul Grimm of the District of Maryland has written: 'It would appear that there is something in the DNA of the American civil justice system that resists cooperation during discovery.' Whatever the reason, obstructionist discovery conduct is born of a warped view of zealous advocacy, often formed by insecurities and fear of the truth. This conduct fuels the astronomically costly litigation industry at the expense of 'the just, speedy, and inexpensive determination of every action and proceeding.' Fed. R. Civ. P. 1. It persists because most litigators and a few real trial lawyers—even very good ones, like the lawyers in this case—have come to accept it as part of the routine chicanery of federal discovery practice." The Eighth Circuit vacated on the grounds that the court's order failed to give particularized notice of the unusual nature of the sanctions).

III. Practical Takeaways

- ***Be aware of which types of cases/situations create a higher likelihood that the court or opposing parties may believe sanctions are warranted and tread more carefully to avoid a threat of sanctions in the first place***: Based on my anecdotal review of the cases, sanctions in bankruptcy cases are more frequently sought or imposed in high stakes, emotional and emergency situations. Examples include filing a bankruptcy case to impose a stay when there is ongoing state court litigation or collection efforts with no time to thoroughly investigate the facts; filing a motion seeking damages for stay and discharge injunction violations, which typically involve creditors and their counsel unfamiliar with bankruptcy and who believe they did nothing wrong; and motions to disqualify opposing counsel or attacking their fees, because such attacks, no matter how well-intended, are always taken personally. And don't forget discovery disputes, given that most bankruptcy attorneys treat the discovery rules as mere guidelines and not the rules with teeth that they really are; most discovery disputes are resolvable if the parties try in good faith to cooperate; and judges of all stripes hate discovery disputes as a complete waste of time and resources and tend to want to punish both sides.

- ***If you are threatened with sanctions, be aware of the defenses that don't work:*** Over and over, when threatened with sanctions, lawyers inevitably raise one if not all three of these defenses: (1) "I was only being a zealous advocate as is my ethical obligation to my client"; (2) "It is my First Amendment right to do or say "[fill in the blank for whatever obnoxious or outrageous and professional language or conduct you can imagine]"; and (3) "You, Mr. or Mrs. Bankruptcy Judge, have no right, power, authority or jurisdiction to sanction me!" None of these defenses work, as the above cases and the cases in the addendum show. Instead, focus forthrightly on whether your actions were reasonable and whether you have

a defense. Note, however, that you do have a due process right to notice of what conduct constitutes a violation of applicable rules and what potential punishments you are facing. *See In re Roman Catholic Church of Archdiocese of New Orleans*, — F.Supp.3d— (E.D. La. 2023). The failure of a court to give you due process notice before it punishes you may be grounds for reversal.

- ***Don't double-down***: Rather than admitting the mistake, sincerely apologizing for it, and offering to make it right, most attorneys "double-down," by denying the bad conduct notwithstanding that it is often clear for all to see that, yes, you did the bad thing the other side or the court is accusing you of. Doubling down will only make it worse. *See, e.g.*, Hon. Cynthia A. Norton & Nancy B. Rapoport, *Doubling Down on Dumb: Lessons from Mata v. Avianca Inc.*, ABI J. 24 (Aug. 2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4528686 (reprinted with ABI permission).

- ***A corollary to not doubling down is to learn the first rule of holes: if you are in one, stop digging***. if you learn that your claim or position is frivolous or not supported by law or fact, then you need to have a heart-to-heart with your client and withdraw or dismiss it. Continuing to litigate after you know your client's cause of action or position is meritless *will* subject you to sanctions.

- ***People who represent themselves have fools for a client.*** You cannot be objective when you are the subject of a court's order to show cause why sanctions should not be imposed or when a motion for sanctions has been filed against you. Consult a trusted friend with practical and wise judgment to get candid advice.

- ***Judges will usually give you a warning shot across the bow; pay attention***. Exhibit 1: *In re Spearman*, No. 16-30772, 2017 WL 943918, at *7 (Bankr. W.D. Ky. Mar. 9, 2017).

- ***Save sanctions motions for a situation where it is truly warranted***. Just because you won and the other side lost, it doesn't mean you are entitled to sanctions. You will lose all credibility with the judge if you are like the boy crying wolf requesting sanctions all the time. Remember that for Rule 11 sanctions, there must be proof of an objectively unreasonable factual or legal investigation or improper motive. For sanctions for vexatious multiplication under 28 U.S.C. § 1927, there must be bad faith or other culpable conduct, such as pursuing claims that are frivolous on the merits, or by pursuing nonfrivolous claims through the use of multiplicative litigation tactics that are harassing, dilatory, or otherwise unreasonable and vexatious.

- ***Curb your language.*** Judges don't appreciate overly broad use of adjectives and adjectives, such as the other side did such-and-such thing "blatantly," "frivolously" or "outrageously," just as they don't like personal attacks on the opposing party or counsel or calling people names, such as "Extortionist!" As the numerous cases in this outline show, using such

vituperative and extreme language may not only be sanctionable in and of itself, but it is also not effective advocacy and actually detracts from your argument. If you tell the story directly and straightforwardly, the court will reach its own conclusion about whether the actions of the opposing party were outrageous or not.

- ***People in glass houses shouldn't throw stones.*** If you are going to file a motion for sanctions, make sure you comply with the safe harbor requirements in Rule 11 to the letter. Make sure you understand the legal basis upon which you are seeking sanctions (e.g., Rule 9011? discovery rules? § 105? Contempt powers? 28 U.S.C. § 1927? Inherent authority? Other equitable powers?) and make sure you understand the requirements in your circuit for what you need to do to prove a violation under the authority you are proceeding under. Doing it wrong may result in a counter-motion for sanctions.

- ***Finally, remember that "zealous advocacy" has ethical and legal limits.*** All lawyers have a number of legal and procedural weapons in their war chest that they can deploy in any given situation for any given client at any given time in any give case. Remember, Rule 1.3 does not require us to pull out a howitzer to destroy an opponent for a matter that deserves only a fly swatter. Many of the cases in which lawyers get carried away (and punished) for excessive zeal are those in which they did not choose their legal or procedural weapon wisely.

Conclusion

A zealous and ethical advocate does not fall short of the line, nor go over the line, but presses just up to and against the line. In doing so, an advocate may get bruised, particularly because determining where that line is can be difficult. With hope, this outline may help advocates avoid being bloodied for crossing over the line.

Addendum: "Zeal" Case Summaries[9]

BEHAVIOR

1. In addition to debtor's counsel being ordered to pay a creditor's attorneys' fees in the amount of $12,785.57, debtor's counsel must also disgorge $5,000 in fees paid by the debtor in connection with the bankruptcy case and the adversary proceeding, and was barred from filing bankruptcy cases for one year. An attorney has professional responsibilities, which include responding to court orders, and if one fails to do so, they will face court sanctions. *In re Gerstner*, 648 B.R. 746 (Bankr. N.D. Ga. 2022)

Creditor filed a nondischargeability complaint against the debtor. After months of no activity in the case, the court held a status conference where neither the debtor nor debtor's counsel appeared. Five days before the status conference, the creditor filed a motion to compel discovery because debtor's counsel had not produced any documents and had not responded to several follow-up communications. There being no opposition to the motion to compel, the court granted it. Twenty days later, the creditor filed a motion for sanctions for lack of responses to discovery requests. The court entered an order to show cause and granting in part the motion for sanctions which required the debtor and debtor's counsel to appear at a hearing. Debtor's counsel did not appear. However, the debtor, who did appear, testified to being unaware of being noticed for deposition, was unaware that debtor's counsel did not respond to the discovery requests, and was unaware of the motion to compel or the court's order to compel. The debtor further testified that his counsel had told him "[e]verything would be OK, and that the Debtor did not need to appear in court." Based on that testimony, the court ordered debtor's counsel to pay the creditor's attorneys' fees incurred in connection with the motion to compel and motion for sanctions and entered a separate order resolving the motions against the debtor. The court also entered a second show cause order to address whether debtor's counsel should receive additional sanctions. At this second hearing, debtor's counsel confirmed most of the allegations and explained his lack of responses and other failings were because he "froze in the face of mounting mistakes and chose to hide his head in the sand instead of confronting the problem." The court held that debtor's counsel willfully failed to comply with court orders and grossly violated his professional responsibilities. The court required debtor's counsel to not only pay the creditor's attorneys' fees, but also pay back all fees paid by the debtor in connection with the bankruptcy case and adversary proceeding, and to attend additional continuing legal education above the required hours of the states. Lastly, debtor's counsel was barred from filing within the bankruptcy court for one year.

2. Mortgage creditor was entitled to have order reducing mortgage arrearage claim set aside, and there are boundaries that counsel must adhere to when advocating for a client's interest. *In re Grimminger*, No. 12-60521, 2012 WL 5341381 (Bankr. N.D. Ohio Oct. 29, 2012)

Bank moved to vacate an order reducing its mortgage arrearage claim under Rule 9024. In determining whether to set aside an order based on excusable neglect, courts consider whether the opposing party would be prejudiced, whether the proponent had a meritorious

[9] Prepared by Erica Garrett and Jacorius Williams, Law Clerks to the Hon. Cynthia A. Norton.

claim or defense, and whether the proponent's culpable conduct led to the default. The court found that the order reducing the bank's arrearage claim could not stand, and that the debtor could not demonstrate any real prejudice that would result from vacating the order reducing the bank's mortgage arrearage claim. The court mentioned that while it has no desire to hamper zealous advocacy on behalf of a client, counsel must adhere to boundaries in representation. Debtor's motion failed to fully apprise the court of what was at stake, and any prejudice from vacating the order would be supplanted by the benefits in protecting due process and the integrity of the bankruptcy system, the court said.

3. An award of sanctions against counsel and his law firm in the amount of $15,000 was warranted. *In re Khan*, 488 B.R. 515 (Bankr. E.D.N.Y. 2013), *aff'd sub nom. Dahiya v. Kramer*, No. 13-CV-3079 DLI, 2014 WL 1278131 (E.D.N.Y. Mar. 27, 2014), *aff'd sub nom. In re Khan*, 593 F. App'x 83 (2d Cir. 2015)

After chapter 7 trustee brought an adversary proceeding against the debtor's son, seeking to recover an alleged fraudulent transfer arising from the sale of real property that was owned jointly by the debtor, her son, and a third party, the son asserted counterclaims against the trustee for abuse of process and "constitutional torts," seeking, inter alia, punitive damages and a permanent injunction barring the trustee from bringing actions against the debtor's family members without first showing "probable cause" for the allegations and claims. The trustee filed a motion for sanctions against the son's counsel, arguing that he brought the counterclaims in bad faith and for the purpose of harassment and delay. The son withdrew the counterclaims. The bankruptcy court held that it has authority to issue sanctions against an attorney who multiplies proceedings unreasonably and vexatiously; the son's counsel acted in bad faith by bringing the counterclaims, which lacked a colorable basis, as required to impose sanctions under 28 U.S.C. § 1927 and pursuant to the court's inherent authority; and awarded sanctions against counsel and his law firm in the amount of $15,000. The court noted that personal convictions concerning fairness and equity under the Bankruptcy Code is no substitute for having a colorable basis to bring claims against the trustee. In determining the amount of sanctions, the court stated that the relevant considerations included compensating the trustee for the excess fees and costs associated with the counterclaims and the motion for sanctions.

4. Defendants awarded $91,252.13 in monetary sanctions against pro se plaintiff for abusive litigation practices. *In re Khan*, No. 14-75498-REG, 2017 WL 4838747 (Bankr. E.D.N.Y. Oct. 24, 2017)

Defendant in an adversary proceeding filed a motion to impose monetary against a pro se plaintiff for abusive litigation practices. Section 105(a) provides the court with authority to sanction abusive litigation practices. And, while the so-called "American Rule" states that a litigant is responsible for his or her own attorneys' fees and costs, the rule has an exception for when a party has acted in bad faith. The court found that the pro se plaintiff's actions in connection with the adversary proceeding and the bankruptcy case were without colorable basis, brought in bad faith, and motivated by improper purposes such as harassment. Among other things, the pro se plaintiff sent emails to both the defendant's counsel and the trustee's counsel making it clear that the intent behind the litigation tactics

was to harass. The court found that the pro se plaintiff's behavior exceeded the permissible bounds of zealous advocacy, and that monetary sanctions were warranted. The court granted the trustee's request for sanctions in the amount of $30,307.50 for attorney fees, plus $196.42 in expenses. The court also awarded defendant's counsel's request for monetary sanctions totaling $60,944.63 for fees and expenses incurred by result of the pro se plaintiff's frivolous action in the bankruptcy.

5. Debtors' Counsel and Special Counsel to the debtors were required to each disgorge to the estate the sum of $2,500 based on deficiencies in performance. *In re Lee*, 495 B.R. 107 (Bankr. D. Mass. 2013)

Both debtors, bankruptcy counsel, and special counsel representing the debtors in connection with a personal injury claim failed to perform their duties to properly represent the debtors in several respects and failed to maintain the integrity and transparency of the bankruptcy process. Section 329 provides that a court may order the return to the estate of a fee paid to an attorney for the debtor to the extent compensation exceeded the reasonable value of services. After representing the debtors in the personal injury case, special counsel failed to timely file an application for compensation in accordance with Rule 2016 and state ethics rules and failed to obtain court authority for his disbursements. Special counsel's actions undermined the goals of transparency and full disclosure required to maintain the public confidence in, and the integrity of, the bankruptcy system. Debtors' counsel had an affirmative duty to conduct a reasonable inquiry into the facts set forth in the debtors' schedules and statement of financial affairs, but he neglected to list the personal injury claim on schedules B and C at the commencement of the case. Also, debtors' counsel failed to disclose the amount of the personal injury award once it was obtained, and failed to amend the claim of exemption on schedule C. The court could not find that either counsel engaged in bad faith or vexatious conduct that would warrant sanctions. However, the court granted the trustee's motion for review of fees of debtors' counsel and special counsel, and required each attorney to disgorge to the estate the sum of $2,500.

6. Sanctions were warranted when creditor's counsel failed to inform the debtor or the court of her client's death, and continued to litigate the matter despite her client being deceased. *In re Pagan*, No. 14-08824 (ESL), 2017 WL 405611 (Bankr. D.P.R. Jan. 30, 2017)

Debtor sought sanctions against a creditor and her counsel for filing a supplemented motion to dismiss under §§ 707(a), 707(b)(3)(A), and 349. The debtor alleged that the motion to dismiss was meant to aggravate the debtor and to cause him to incur unwarranted expenses and delay in closing his bankruptcy case and obtaining his discharge. Rule 9011 prohibits presentation of a document for an improper purpose and lists harassment, delay or needless increase in litigation as examples of improper purposes. This court found that sanctions pursuant to Rule 9011 were not warranted because the motion was not filed for an improper purpose. However, creditor's counsel could be sanctioned under 28 U.S.C. § 1927, where the court found that creditor's counsel's actions added up to a reckless breach of her obligations as an officer of the court, in part for failing to advise anyone that her client had passed away. The court ordered creditor's counsel to pay the debtor's excess costs,

expenses, and attorney fees incurred after the passing of the client (in an amount to be determined).

7. Sanctions were not warranted where there was a lack of cumulative behavior by the debtor's attorney. *In re Rodriguez Cossio*, No. 16-05295 (EAG), 2019 WL 1423082 (Bankr. D.P.R. Mar. 28, 2019)

The debtor filed a motion requesting to set aside the order granting the chapter 7 trustee's objection to her claimed exemption. Debtor's counsel argued that the court erred in granting the trustee's objection to exemption because the objection was untimely filed pursuant to Rule 4003(b). Debtor's counsel also asserted "excusable neglect" or "extraordinary circumstances" because her failure to timely oppose the trustee's objection was due to an "unintended oversight by prior counsel, for which the debtor should not be held accountable." However, the trustee opposed the debtor's motion, and assert that the objection was filed timely pursuant to general orders issued by the Clerk of the Bankruptcy Court in September 2017 extending all periods set by statutes of limitations due to the passage of Hurricanes Irma and Maria in Puerto Rico. Debtor's counsel admittedly did not consider and frankly forgot about the general orders extending all periods. The trustee requested the court to issue an order to show cause against the debtor as to why sanctions should not be imposed pursuant to § 1927 for the filing of an unreasonable and vexatious motion. The court stated that the record did not reflect cumulative behavior by the debtor's attorney that was sanctionable. While the motion to set aside failed to acknowledge the general orders issued by the Bankruptcy Court extending all periods set by statutes of limitation because of Hurricanes Irma and Maria, debtor's counsel later admitted that she honestly forgot about the general orders. The debtor's motion to set aside the judgment was denied.

8. Plaintiff and Plaintiff's counsel were sanctioned $4,000 under Rule 9011 for asset sale that could not be set aside on due process grounds based on alleged lack of notice. *In re Sun Prop. Consultants, Inc.,* No. 8-16-72267-LAS, 2021 WL 3375831 (Bankr. E.D. N.Y. Aug. 2, 2021)

Chapter 7 trustee conveyed property to real estate company in a court approved sale. The permitted exceptions under the sale did not contain any reference to a lease held by potential conciliating interest in the real estate. A plaintiff – who alleged that he had an interest in the real estate that was sold – filed a complaint for breach of a lease and interference with enjoyment of the leasehold premises. Plaintiff moved to amend the complaint and submitted three affidavits in support. The purchaser served the plaintiff with a sanctions motion, and later moved the court to sanction the plaintiff and plaintiff's counsel. The court granted the sanctions motion in part and denied it in part, denying the motion seeking to impose sanctions under Rule 9011 with respect to each person's affidavit that was submitted was denied. The court granted, however, the sanctions motion as to the plaintiff and his counsel under Rule 9011: plaintiff's counsel was sanctioned $1,500 and the plaintiff was sanctioned $2,500, based on multiple factual discrepancies that arose as the plaintiff litigated the adversary complaint, which resulted in the court finding that the complaint was brought for the purpose of frustrating the rights of the purchaser.

9. An attorney who seeks to add more causes of action at an unknown future date, after three amended complaints already filed, threatens to cross the line past "zealous advocacy." *In re Bates*, No. 16-11052, 2017 WL 6403503 (Bankr. W.D.N.Y. Dec. 14, 2017)

Plaintiff's counsel stated on the record an intent to seek and add more causes of action at an unknown time once discovery had developed. The court said that this tactic threatened to cross the line past zealous advocacy, reasoning that the statement acted as a threat to place the defendants in fear of new allegations that should have already been raised. If the plaintiff's opposition to the motions in front of the court sought or impliedly sought further leave to amend the complaints, the court said it would deny such request with prejudice.

10. Pursuant to 28 U.S.C. § 1927, attorney was sanctioned $7,500 for continuously delaying proceedings by falsely representing his clients' willingness to continue with litigation, even after the clients had all chosen not to proceed. *In re Cortellesso,* No. 09-1059, 2012 WL 768153 (Bankr. D.R.I. March 8, 2012)

Debtor moved to dismiss the plaintiffs' pending adversary proceedings for failure to prosecute their claims and for sanctions. 28 U.S.C. § 1927 states that if an attorney multiplies the proceedings in any case unreasonably, he may be required to personally satisfy the excess cost, expenses, and attorneys' fees reasonably incurred because of such conduct. After the court disposed of all counts under § 727, it held a status conference on the § 523 matters. At a status hearing, the plaintiffs' attorney presented a new discovery plan and asserted the need for an additional 90 days for discovery. After missing several deadlines, plaintiffs' attorney responded by explaining that some of the plaintiffs involved in the § 523 matters did not wish to continue. Months later, the plaintiffs' attorney finally announced that none of the plaintiffs were willing to proceed. The debtor filed motions for sanctions claiming that the plaintiffs' attorney unreasonably and vexatiously multiplied proceedings. Despite the plaintiffs backing out of the litigation due to a lack of funding, the plaintiffs' attorney persisted in delaying the case by representing the § 523 matters were on track for hearing. The court sanctioned plaintiff's counsel in the amount of $7,500 with the hope and expectation of deterring counsel from repeating this conduct.

11. Counsel was not awarded prevailing party attorney's fees where counsel's billing records were inadequately documented. *In re Akins*, 640 B.R. 687 (Bankr. E.D. Cal. 2022)

Judgment creditor brought a nondischargeability proceeding against the debtor. After judgment was entered in favor of debtor, the debtor filed a motion seeking prevailing party fees in the amount of $275,500 based on the judgment creditor's claims being not substantially justified, constituting an abuse of the judicial process. However, debtor's counsel did not provide the necessary billing records as part of the motion. The court held that the judgment debt at issue, which arose from the now-deceased debtor's commercial business operation, was not a consumer debt within meaning of the Bankruptcy Code authorizing award of fees and costs to debtor if creditor brings unsuccessful dischargeability complaint concerning consumer debt. The court also declined to award debtor attorney's fees pursuant to § 105 and the court's inherent power. The court noted

that debtor's counsel had not presented the court with the necessary evidence for the court to make an informed, intelligent, proper award of attorney fees and costs. Debtor's counsel had incorrectly listed billing costs, and had no explanation as to why the requested attorney's fees of $275,000.00 were not itemized. The court noted that in its search for conduct which assaults the integrity of the court and constitutes an abuse of the judicial process, excluding billing statements from a Motion for Prevailing Party Attorney's Fees, and not itemizing billing, would be "near the top of the list."

12. $7,140.55 in sanctions were warranted against debtor's counsel for pressing arguments that had been previously rejected without accounting for the effect of those rejections. *In re Pearson*, No. BR 19-27718, 2023 WL 1824206 (Bankr. D. Utah Feb. 8, 2023)

Debtor borrowed money to buy a vehicle and gave the creditor a lien to secure the loan. After the debtor defaulted on the loan, the creditor obtained a default judgment against the debtor for the deficiency and sought to collect. Even though the issue of the vehicle's ownership was litigated in favor of the creditor in another proceeding, the debtor still believed she owned the vehicle and filed bankruptcy with the hopes of retaining the vehicle. The debtor objected to the creditor's proof of claim and was gearing up for more litigation regarding the vehicle. The creditor moved for sanctions against debtor's counsel, and the court conducted an evidentiary hearing on the motion for sanctions. After reviewing the evidence and the record, the court granted the creditor's motion, noting that there were ways for debtor's counsel to argue on behalf of the debtor without crossing the line from zealous advocacy to sanctionable conduct. The court stated that the main concern was that debtor's counsel omitted relevant facts and continued to press arguments that were previously rejected, without accounting for the effect of those rejections. Therefore, the court imposed a monetary sanction against debtor's counsel requiring him to pay the creditor $7,140.55.

13. A debtor who is forthcoming and represented by zealous counsel, when trying to save her homestead, does not always violate Rule 9011 when the Rooker-Feldman and Younger abstention doctrines apply to homestead exemptions, as they are complex legal doctrines that must be analyzed. *In re Calderon*, No. 21-14785, 2023 WL 2466555 (Bankr. S.D. Fla. March 10, 2023)

Creditor moved for sanctions against the debtor, arguing that the debtor's lien avoidance motion violated Rule 9011 because the *Rooker-Feldman* and *Younger* abstention doctrines prevent the debtor from relitigating state court rulings. The court held that the debtor's filing of the lien voidance motion does not rise to the level of sanctionable conduct under Rule 11 or § 105. The court reasoned that the line between a lawyer's zealous advocacy and their duties under Rule 9011 is not clear, and it cannot be said that Rule 9011 is always violated when the *Rooker-Feldman* and *Younger* abstention doctrines apply. The state court stated that the lien attached to the home prior to the homestead claim, but it did not explain how it reached that conclusion. The court stated that a motion for sanctions under Rule 9011 must discuss with specificity the legal basis of the argument or why the debtor cannot seek relief in the bankruptcy court.

LANGUAGE

14. The response to the court's show cause order related to statements made by an attorney must address the truth behind the statements made and the specific basis for such belief. *Henderson v. School Dist. Of Springfield*, No. 6:21-cv-03219-MDH, 2023 WL 3620743 (W.D. Mo. May 24, 2023) (Harpool, J.)

An attorney released the following statement to the media following an adverse order entered by the court in connection with a case involving race-based training in schools: "This is an effort by a lone agenda-driven federal judge to deny concerned teachers and parents the right to seek redress in court and to protect so-called 'anti-racist' training in Missouri's public schools." The court ordered the attorney to show cause as to why her statement did not violate Missouri's Ethics Rules related to untrue statements or statements made with reckless disregard for the truth. Prior to responding to the court's show cause order, the attorney apologized via letter stating that, as she carries out her professional duty to engage in zealous advocacy and to express concerns with court rulings, she would not again use such language. In responding to the court's show cause order, the attorney requested the court to disregard the Missouri Supreme Court's interpretation of Missouri's Ethics Rules because it conflicts with both recent Missouri Supreme Court and U.S. Supreme Court cases. The court disagreed with the attorney's understanding of such recent cases, stating that nothing in the recent Missouri Supreme Court case can reasonably lead to the conclusion that the Missouri Supreme Court's objective standard for violations of Rule 4-8.2 has been overruled. The court then ordered the attorney to file a supplementary response explain the truth behind her statements and the specific basis for her belief.

15. Where counsel attempts to make an argument to the jury which the law would not allow them to make in their tenders of evidence, if objected to at the time and allowed to pass unrebuked, it is grounds for a new trial. *Gibson v. Zeibig*, 24 Mo. App. 65 (1887) (Thompson, J.)

A Missouri trial court overruled the plaintiffs' objection to the defendant's statement to the jury in which the defendant attempted to appeal to local prejudice by stating that the matter amounted to a little difference between St. Louis and Chicago, and that the jury would find that "we of St. Louis rather got the best of Chicago." On appeal, the court held that the defendant's counsel indulged in unwarranted remarks, and because the trial judge failed to rebuke the impropriety in the presence of the jury notwithstanding the plaintiffs' objection, the judgment had to be reversed and remanded. The court also stated that counsel should not feel themselves "trammeled" in the forcible and zealous advocacy of their client's cause. But, the court said, there is a clear line between matters which pertain to the case on trial and matters which are wholly extrinsic; and where counsel have attempted to make a case in their argument to the jury which the law would not allow them to make in their tenders of evidence, our courts have always held that such conduct, if objected to at the time and allowed to pass unrebuked, is ground for a new trial.

16. Bankruptcy counsel's intemperate statements, while offensive to trustee, did not warrant imposition of sanctions. *In re Ng*, 2018 WL 3956608 (Bankr. E.D. N.Y. Aug. 14, 2018); *In re Ng*, 584 B.R. 463 (Bankr. E.D. N.Y. 2018)

Chapter 7 trustee moved for imposition of sanctions against debtor's attorney for five provocative statements that the attorney made in moving to dismiss adversary complaint the trustee had filed in different case. Among other things, the trustee asserted that the statements violated a stipulation approved in the instant adversary proceeding pursuant to which the attorney had agreed to practice in accordance with the court's civility standards. Sanctions are unwarranted under 28 U.S.C. § 1927 where statements do not multiply the proceedings in any case unreasonably and vexatiously. The court opined that a reasonable reader would ignore such superfluous language, focusing instead on any substantive legal arguments asserted. The court cited a Second Circuit case which had said in an unrelated case: "though the reference to proctology was offensive and distinctly lacking in grace and civility, it is, regrettably, reflective of a general decline in the decorum level of even polite public discourse," and "although likening an attorney to a member of the animal kingdom may well be opprobrious, such colorful tropes are not necessarily injudicious discourse." Citing *Revson v. Cinque & Cinque P.C.,* 221 F.3d 71, 78 (2d Cir. 2000). The court declined to find the attorney in contempt or award sanctions under 11 U.S.C. § 105(a), 28 U.S.C. § 1927, or the court's inherent power. The court ended by stating that its ruling should not be interpreted as an endorsement of the practice of utilizing the type of ad hominem language which had so offended the trustee, and that this language detracted from any legal argument the attorney was attempting to make, had no persuasive value, reflected negatively on the attorney, and wholly failed to achieve its presumed objective to portray its object in a negative light.

17. Attorneys' strong and provocative language in dismissal motion did not warrant sanctions. *In re Brizinova,* 565 B.R. 488 (Bankr. E.D. N.Y. 2017)

Trustee moved for sanctions against debtors' counsel for provocative statements he made in moving to dismiss an adversary proceeding filed by the trustee, arguing that debtor's counsel violated local rules regarding disclosing confidential mediation communication and state ethics rules concerning impermissible and sanctionable assertions of opinion. The court denied the motion for contempt and sanctions without prejudice, noting that "advocacy is an art in which the unrelenting pursuit of truth and the most thorough self-control must be delicately balanced," and "zealous advocacy on behalf of a client can never excuse contumacious or disrespectful conduct." However, while the language debtor's counsel employed was "strong," (such as using the words "extortionist, "threaten into further submission, "and "dig more"), it did not cross the line that separates permissible zealous advocacy from impermissible and sanctionable opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of the accused. Therefore, the trustee not only failed to show any violation of local rules concerning disclosing confidential mediation communications, but also failed to show that

the statements were impermissible and sanctionable assertions of opinion that violate state ethics rules.

18. Attorney was ordered to show cause why she should not be sanctioned for unreasonably and vexatiously multiplying proceedings; Court declined to issue sanctions but issued a very strong warning about future behavior. *Rittinger v. Healthy All. Ins. Co.,* No. 4:15-CV-1548 CAS, 2016 WL 492717 (E.D. Mo. Feb. 9, 2016) (Shaw, J.); *Rittinger v. Healthy All. Ins. Co.,* 2016 WL 827960 (E.D. Mo. Mar 2016)

This matter came before the court following plaintiff's voluntary dismissal without prejudice of her ERISA claims. The defendant alleged that the plaintiff had engaged in the use of hostile rhetoric, abusive litigation tactics, and offensive language during the course of the litigation, which he had previously been cautioned about. The defendant sought sanctions against the plaintiff in the form of a dismissal with prejudice or payment of defendants' attorneys' fees. Sanctions are proper under 28 U.S.C. § 1927 and Missouri's ethics rules when an attorney acts with intentional or reckless disregard of the attorney's duties to the court. The court found that: plaintiff's filing of her motion to remand unreasonably and vexatiously multiplied proceedings; plaintiff's motion to dismiss was frivolous and presented for the purpose of multiplying proceedings; and plaintiff's accusatory and abusive language in her objection ran afoul of the ethics rules. The court also ordered the plaintiff to show cause in writing why she should not be sanctioned for unreasonably and vexatiously multiplying the proceeding under Missouri Supreme Court Rule 4-3.5(d). In subsequent proceedings, plaintiff's counsel sought the presiding judge's recusal, in essence because of unsubstantiated accusations against the judge's law clerks. According to the court, counsel's accusations in this regard were "false, offensive, and border[ed] on the delusional." Counsel offered no factual support for his "stunning attack on the integrity of the Court and the Court's staff," the court said. Moreover, counsel had "conducted himself in a thoroughly indecorous and improper manner, unbecoming a member of the bar" and his repeated and escalating attacks on opposing counsel, the court, and its staff "wholly failed in this case to comply with an attorney's duty to remain respectful while engaging in zealous advocacy." The court ultimately accepted counsel's apology for his behavior, and declined to issue sanctions, stating that counsel "should consider this Order as a wake up call, which he would do well to heed."

19. After nondisclosure of a conflict in interest regarding the sale of a marina, court ordered disgorgement of the full remaining $490,000 of the paid commission. *In re New River Dry Dock, Inc.,* No. 06-13274-BKC-JKO, 2011 WL 4382023 (Bankr. S.D. Fla. Sept. 20, 2011), *aff'd sub nom. In re Gleason*, No. 11-62406-CIV, 2012 WL 463924 (S.D. Fla. Feb. 13, 2012), *aff'd*, 492 F. App'x 86 (11th Cir. 2012)

The bankruptcy court for the Southern District of Florida, en banc, was faced with the question of whether a seasoned bankruptcy attorney should be sanctioned for his unprofessional and disrespectful tone and content of a pleading he had filed with the court. A creditor moved for order directing disgorgement of compensation paid to real estate broker which had been employed by estate to sell a marina, based on the broker's failure to disclose a prior relationship with purchaser. Under Rule 2014, the application to employ

should have been accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest. The court held that had continuing subject matter jurisdiction after plan confirmation, which permitted its review of compensation paid to the broker; the court had personal jurisdiction over the parties; the creditor had standing to seek disgorgement; and disclosure of compensation paid to the broker was warranted. The court stated that it would not have approved the professional employment because of the clear adverse interest to the bankruptcy estate. The nondisclosures amounted to a fraud on the court and on the debtor's estate by professionals who owed fiduciary duties to the estate. The court ordered disgorgement of the full remaining $490,000 of paid commission, but declined to award prejudgment interest and fees.

FILING

20. The mere finding that an attorney failed to undertake a reasonable inquiry into the basis for a claim does not automatically imply that the proceedings were intentionally or unreasonably multiplied; no sanctions warranted. *In re Greater Middle Missionary Baptist Church,* 463 B.R. 24 (Bankr. E.D. Mich. 2011)

Debtor's counsel either did not, or was unable to, fully investigate the situation, and in particular, the public records and the recorded chain of documents involved. Creditor moved for imposition of sanctions against debtor's counsel on an unreasonable and vexatious multiplication theory. 28 U.S.C. § 1927 provides that an attorney who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to personally satisfy the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct. The court held that debtor's counsel's conduct did not rise to a level sufficient to warrant imposition of sanctions. Counsel accepted the representations of the debtor-church's representatives and filed notices of lis pendens without conducting sufficient investigation to determine that the church had no viable claims based on alleged defects in foreclosure process. The court stated that the mere finding that an attorney failed to undertake a reasonable inquiry into the basis for a claim does not automatically imply that the proceedings were intentionally or unreasonably multiplied. The court held that debtor's counsel's actions were not ones that could be characterized as the punishable type of aggressive tactics that so far exceeded zealous advocacy as to require or permit sanctions.

21. Sanctions were not warranted under Rule 9011 where court found no improper purpose in filings. *In re Dernick,* No. 18-32417, 2020 WL 2617037 (Bankr. S.D. Tex. May 22, 2020)

The court entered a show cause order as to why debtors' counsel should not be sanctioned under Rule 9011(b) for failure to present any evidence to support counsel's motion to disqualify creditor's counsel for former client representation of the debtors. Sanctions are warranted under Rule 9011 where counsel presents a motion for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. The court found credible debtors' counsel's testimony that his review of the record raised

reasonable concerns about creditor's counsel's scope of representations with respect to the debtors and, therefore, debtors' motion was not presented for an improper purpose under Rule 9011(b)(1).

22. Numerous inconsistencies between information disclosed can warrant the imposition of sanctions under Rule 9011. *In re Parikh*, 508 B.R. 572 (Bankr. E.D.N.Y. 2014)

Creditor filed motion for sanctions against debtor, debtor's counsel and the law firm for which counsel worked, as well as the debtor's spouse. Rule 9011(b)(3) provides that counsel's signature on a bankruptcy petition is a certification that after an inquiry reasonable under the circumstances, 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. The court held that numerous inconsistencies between information disclosed in the debtor's chapter 7 case and that disclosed in recently filed chapter 13 petition warranted the imposition of Rule 9011 sanctions against debtor's counsel for lack of reasonable pre-filing investigation. However, the creditor was not entitled to award of sanctions against debtor's counsel under an unreasonable and vexatious multiplication theory. The creditor also argued that sanctions were appropriate because the debtor filed the petition in bad faith, engaged in discovery misconduct, filed frivolous motions, and lied at his 341 meeting. Also, he alleged that the debtor's spouse funded his case and assisted the debtor every step of the way. A non-party may only be sanctioned pursuant to the court's inherent power if they violate a specific court order or act in bad faith, have a substantial interest in the litigation, and play a substantial role in the litigation. The court declined to exercise its discretion to shift costs or impose monetary sanctions against debtor personally; and the debtor's spouse could not be sanctioned in exercise of bankruptcy court's inherent authority, absent evidence that she had violated specific order of bankruptcy court. Therefore, the court granted the motion for sanctions against debtor's counsel pursuant to Rule 9011(b)(3), but denied the remaining relief sought.

23. The ethical duty to zealously represent a client does not circumvent counsel's duty to file accurate schedules, because attorneys also have a duty of candor to the court with respect to satisfying the disclosure requirements in the debtor's bankruptcy case; disgorgement of fees and completion of professional responsibility course ordered. *In re Varan*, No. 11 B 44072, 2014 WL 2881162 (Bankr. N.D. Ill. June 24, 2014)

The UST filed a motion against attorneys seeking sanctions for their failure to file a materially accurate schedule B on behalf of the debtor, and timely file a fee disclosure statement required under § 329(a) and Rule 2016(b). The court found that sanctions against counsel were warranted because they violated the duty to disclose assets, accurately disclose, and also violated their ethical duties. The attorneys argued that their ethical duties to zealously represent their client in the UST's adversary proceeding prevented them from filing accurate schedules. The court disagreed, citing the duty of candor to the court with respect to satisfying the disclosure requirements in the debtor's bankruptcy case. The court ordered disgorgement of all fees received in the bankruptcy case and the related adversary proceeding, reimbursement to the UST for attorney fees and costs relating to this motion

for sanctions, and completion of a professional responsibility course at an ABA-approved law school within one year of this ruling.

24. Based on the entire record and the unsettled state of the law regarding the parameters of the unique circumstances doctrine, the court declined to overturn the bankruptcy court's denial of a sanctions motion. *In re Radakovich*, No. ADV 12-04117, 2014 WL 4676009 (B.A.P. 9th Cir. Sept. 19, 2014)

Debtor appealed from the bankruptcy court's order denying his motion for Rule 9011 sanctions against creditors and their counsel. Rule 9011(b)(1) provides for an award of sanctions against an attorney or a party who files pleadings or papers that are interposed for any improper purpose. The debtor argued that the bankruptcy court's determination was erroneous and that the creditor's position was nothing more than a variation of the oft-rejected attempts by litigants to assert excusable neglect as a basis for relief from the Rule 4004(a) and Rule 4007(c) filing deadlines. Affirming the bankruptcy court, the Ninth Circuit BAP held in light of the unsettled state of the law regarding the unique circumstances doctrine, the bankruptcy court did not err when it concluded that the creditor's papers were not frivolous. At that time, there was no case directly on point—no Ninth Circuit precedent determining whether an eleventh-hour denial of access to the bankruptcy court's ECF system resulting from the routine operation of the system's password security features constituted exceptional or unique circumstances for purposes of seeking relief from an expired deadline under Rule 4004(a).

25. An attorney must do more than exert influence over the content of a filed petition to have his conduct fall within the subject exception to the safe harbor provision under Rule 9011; bankruptcy court erred in awarding sanctions. *In re Blasingame*, 709 F. App'x 363 (6th Cir. 2018)

Debtors were referred by "Counsel 1" to engage another attorney to handle their bankruptcy case. On a creditor's motion for sanctions, the bankruptcy court ordered Counsel 1 to disgorge any fees paid or funds transferred to him by debtors, pay $20,000 to the trustee, and complete fifteen hours of continuing legal education training, pursuant to Rule 9011. Additionally, Counsel 1 was ordered to pay the creditor and the trustee an additional amount in fees and expenses pursuant to 28 U.S.C. § 1927, which was later set at a total of almost $75,000. Counsel 1 appealed the bankruptcy court's order. The Sixth Circuit BAP vacated the order imposing sanctions, stating that bankruptcy court erred in imposing sanctions because the creditor failed to comply with the safe harbor provision. Affirming the Sixth Circuit BAP, the Sixth Circuit Court of Appeals held the mere fact that Counsel 1 allegedly exerted influence over the content of the filed petition did not bring his conduct within the subject exception to the safe harbor provision. Therefore, Counsel 1 did not vexatiously and unreasonably multiply the proceedings, and attorney's conduct did not fall within the exception to Rule 9011's safe harbor provision for the filing of a petition. The BAP found that the underlying record was insufficient to support the bankruptcy court's finding that Counsel 1's conduct was frivolous, or that the filing of these responsive motions unreasonably or vexatiously multiplied the proceedings, particularly where debtors' counsel claimed full responsibility for filing the defective

schedules that had initiated the discharge proceedings, and the bankruptcy court found that at least some of those proceedings most likely would have ensued with or without Counsel 1's involvement in the case.

26. Sanctions were not warranted where debtor's counsel did not sign and file the bankruptcy petition, or any other paper in the bankruptcy case, for any improper purpose under Rule 9011(b); but debtor himself was sanctioned by default. *In re Gorges*, 590 B.R. 771 (Bankr. E.D. Mich. 2018)

Creditor sought an order sanctioning debtor's counsel for filing the bankruptcy case in bad faith and for an improper purpose, seeking sanctions of $177,621.51. Among other things, the creditor alleged it had foreclosed on its mortgage and, after the redemption period expired without redemption, sought to gain possession of the home. But the debtor thwarted that effort by taking various actions and continuing to live in the home. The creditor was not awarded any sanctionable relief, however, because of noncompliance with the 21-day safe harbor provision of Rule 9011(c)(1)(A). The court held that sanctions were not warranted against debtor's attorney because he did not sign and file the bankruptcy petition or any other paper in the bankruptcy case for any improper purpose or otherwise in violation of Rule 9011(b). The court sanctioned debtor, by default, in the amount of $78,000, but determined that sanctions were not warranted against debtor's counsel.

27. Court issued a criminal referral for attorney who attempted to bribe another attorney during settlement discussions. *In re Butler*, No. 19-30007, 2019 WL 2618069 (Bankr. S.D. Tex. June 26, 2019)

An attorney and his law firm entered into a "referral agreement" whereby he and his firm were responsible for the preparation and filing of the bankruptcy petitions, while the particular attorney was paid a flat fee to make court appearances. Pursuant to this agreement, the attorney filed bankruptcy petitions for three individuals. After failed negotiations between the parties about monetary damages, the court sought to determine whether it was mandatory that the attorney be reported, inasmuch as the attorney made varying representations to the court about his referral agreement, and was not forthright regarding how the petitions were filed or by whom they were filed. Due to the court's reasonable belief that the attorney violated the law, the court found that it had a mandatory duty to report the attorney for the apparent violation. The attorney claimed that his zealous advocacy for his client drove him to make those statements, and there was no intent to defraud the court, but merely to gain the most favorable outcome for his client. However, a person's good faith belief in the lawfulness of his conduct is not a defense to bankruptcy fraud. The court stated that it would issue a criminal referral to the local U.S. Attorney and to the FBI. The court also referred the matter to the local U.S. District Court and to the state bar with a recommendation that disciplinary proceedings be commenced.

DISCHARGE VIOLATION

28. Ninth Circuit BAP affirms award of $70,000 in attorney fees as a sanction against counsel for making reckless and frivolous arguments to pressure the opposing party to

release her claims. *In re Crystal Cathedral Ministries*, 2021 WL 2182975 (B.A.P. 9th Cir. May 28, 2021)

As part of a years-long dispute between debtor Crystal Cathedral Ministries and its founding member's daughter, Carol Milner, the parties entered into a settlement agreement concerning the copyright and physical assets of a play Ms. Milner created while working for CCM. Among other things, the settlement agreement divided the play's physical assets between the two parties, which CCM agreed to safely store for Ms. Milner. The parties also agreed to Ms. Milner receiving a housing allowance from CCM, copyright protections, and other things. CCM later filed chapter 11. Ms. Milner filed proofs of claim relating parts of the agreement, but not as to the part where CCM was storing her share of the play's assets. Post-confirmation, CCM then brought a state court lawsuit against Ms. Milner, seeking relief from the obligation to continue storing the play's physical assets, to which Ms. Milner filed counterclaims. CCM filed a motion for contempt against Ms. Milner and her counsel for asserting the counterclaims in violation of the discharge injunction. Ms. Milner then moved for sanctions against CCM and its counsel, arguing the court should sanction them both for their bad faith, pursuant to its inherent powers, on the following grounds:

- Asserting that the Settlement Agreement was an executory contract that was rejected during the bankruptcy case, even though CCM had considered whether to reject it but took no action;
- Filing the Contempt Motion to pressure Ms. Milner to sign a release, as evidenced by CCM's attorney's e-mails;
- Misrepresenting a California state court case in the reply brief to the Contempt Motion;
- Submitting a false declaration as to the availability of CCM board members to offer testimony;
- Failing to subpoena its trial witness or bring her to the hearing so that she could not be questioned as to her allegedly false declaration;
- Failing to turn over documents prior to the hearing; and
- Presenting false and misleading legal arguments at the hearing.

In a lengthy opinion, the bankruptcy court held that despite the fact Ms. Milner had not complied with Rule 9011 in seeking sanctions under that rule, the court had the inherent authority to sanction for bad faith conduct inasmuch as his misstatements of law and fact were both frivolous and reckless. The court awarded Ms. Milner approximately $70,000 in attorney fees and costs.

The BAP affirmed, reaffirming that the bankruptcy courts have inherent authority, aside from Rule 9011, to award sanctions for bad faith conduct, citing *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). The BAP also held that the court did not abuse its discretion in sanctioning counsel for $70,000, holding that: the attorney's disregard to the "return to the fray" doctrine was frivolous and reckless; his filing the contempt motion was done for the improper purpose of pressuring Ms. Milner to release her claims; the attorney had adequate due process; and the bankruptcy court did not err in calculating the damage award.

29. District Court affirms $200,000+ in compensatory and punitive damages for violation of the discharge injunction as passing the Supreme Court's *Taggart* test. *Renfro v. Grogan* (*In re Renfro*), 629 B.R. 83 (Bankr. N.D. Okla. 2021), *vacated by In re Renfro*, 2022 WL 18911602 (N.D. Okla. Dec. 16, 2022) (vacated due to settlement).

A creditor sued the debtor prepetition in state court alleging breach of contract and unjust enrichment with respect to loans made for the debtor's purchase of an ophthalmology practice from the creditor. While the state court case was pending, the debtor filed chapter 7 and obtained a discharge. Six weeks after the discharge was entered, a law firm filed, on behalf of the creditor, an amended petition in state court that essentially restated the claims against the debtor for repayment of the loans. The "amended" part of the petition alleged that the debtor filed her bankruptcy and then caused her company, which was a co-obligor on the loan, to transfer substantial assets from its bank accounts to herself with the intent to hinder, delay, and defraud the creditor in violation of Oklahoma's Uniform Fraudulent Transfers Act. The debtor filed a complaint against the creditor and the creditor's lawyers for violating the discharge injunction, alleging that the UFTA claim was simply a "ruse to continue litigation" against her to collect the discharged debt. The creditor then dismissed the prepetition breach of contract and unjust enrichment claims against the debtor, but proceeded with a jury trial on the UFTA claim. The jury found in the creditor's favor and awarded judgment of $89,500. The debtor appealed that judgment, and while that appeal was pending, the bankruptcy court found the creditor and her firm in contempt of the discharge injunction and entered judgment against them, jointly and severally, in the amounts of $104,867 in compensatory damages and $100,000 in punitive damages under § 524(a)(2) and the court's inherent power to sanction. In addition, the court declared the state court UFTA judgment void under § 524(a)(1).

A few weeks later, the Supreme Court decided ***Taggart v. Lorenzen*, 139 S.Ct. 1796 (2019),** which set a new standard for holding a creditor in civil contempt for violating the discharge order. This caused the district court to remand the case to the bankruptcy court for reconsideration in light of *Taggart*. (In *Taggart*, the Supreme Court adopted an objective standard that allows civil contempt sanctions to be imposed "when there is no objectively reasonable basis for concluding the creditor's conduct might be lawful under the discharge order.") According to the bankruptcy court, however, a creditor's subjective intent is still relevant in determining whether the creditor acted in bad faith. Under applicable Tenth Circuit precedent, sanctions can be imposed "if it were determined, on a factually sufficient record, that the effect of the state litigation was nevertheless to harass and coerce [the debtors] into paying discharged debts." *Citing Paul v. Iglehart* (*In re Paul*), 534 F.3d 1303 (10th Cir. 2008). The bankruptcy court found that no reasonable person or lawyer could conclude that the creditor's amended state court petition asserted a claim against the debtor's business alone and, therefore, "from an objective viewpoint," the amended petition on its face reflected a continuation of a prepetition action seeking to impose personal liability on [the debtor] for discharged debt."

30. In awarding damages for discharge violation, the court would consider whether debtor's attorney had an opportunity to, and did, mitigate, damages. *In re Craytor,* 650 B.R. 470 (Bankr. D. N.J. 2023)

Debtor moved to reopen his bankruptcy case, alleging that the estate of a deceased creditor violated the discharge injunction when it sought a state court order recognizing and enforcing settlement between the debtor and the estate for debt. The estate of the deceased creditor claimed ignorance of bankruptcy laws. The court found that the estate violated discharge injunction by attempting to enforce settlement agreement; the violation was not objectively reasonable allowing for civil contempt; and a lack of understanding of bankruptcy law was insufficient to avoid sanction. However, the court would consider whether the debtor's attorney had an opportunity to, and did, mitigate, damages, in addition to requirement for sanctions to be limited to minimum necessary to prevent repetition.

31. Where an attorney files a motion that a reasonable attorney would find to have no legal merit is justification for sanctions under Rule 9011(b)(2). ***In re Schmelcher,*** **No. 11-61607, 2015 WL 639076 (Bankr. N.D.N.Y. Feb. 15, 2015)**

The county filed a motion for sanctions against debtor's counsel for his continued pursuit of a motion to hold the county's finance department in contempt for violating the discharge injunction in the debtor's case. The county pursued an in rem action against the debtor to collect on late property taxes. Debtor's counsel's motion to hold the county in contempt was ultimately denied, as it was based on § 524(a)(2), which the court said was inapplicable under the circumstances. As to the county's motion for sanctions against debtor's counsel, the county argued that counsel's contempt motion was filed for an impermissible purpose in violation of 28 U.S.C. § 1927 and Rule 9011. Under § 1927, the court must find clear evidence that the offending party's claims were meritless and that such claims were brought in bad faith. Debtor's counsel's claim lacked merit, the court held, but it was not brought in bad faith. The court denied relief under § 1927 because finding bad faith in this case would be a "leap." Rule 9011(b)(1) requires a showing of an improper purpose. The court held that the county provided no evidence of any improper purpose in bringing the contempt motion, and therefore, the court had no basis to grant relief. The county's last argument is based on Rule 9011(b)(2), which requires a finding that no reasonable attorney would have concluded their claims were warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law. The court granted sanctions (to be determined in a separate order) against debtor's counsel, holding that no reasonable attorney would have filed the motion, and reasoning that debtor's counsel fell below the objective standard of reasonableness by filing such a motion when the claim was related to an in rem action that did not apply to the discharge injunction.

AUTOMATIC STAY

32. Bankruptcy court awards $10,000 in sanctions against attorney, plus $4,000 against a decedent's estate's "special representative" for violating Rule 9011 by filing bankruptcy cases for decedents' estates he should have known were ineligible to file. ***In re Taplin Estate,*** **641 B.R. 236 (Bankr. E.D. Cal. 2022)**

Ernest Taplin died intestate. His son – the heir – who was in prison – gave his mother a power of attorney to handle the inheritance issues on his behalf. The mother hired an experienced bankruptcy attorney to get permission from the state probate court to appoint her as "special administrator" for the Taplin estate, the purpose of which was to file a

chapter 11 to prevent foreclosure on Taplin's home. On the same date the probate court entered the order appointing the mother, counsel filed a chapter 11 petition identifying the decedent's estate as a corporation. Because the court determined a decedent's estate is not a "person" eligible to be a debtor under the Bankruptcy Code, the court ordered the mother and her counsel to show cause why filing the petition didn't violate Rule 9011(b)**.** They responded that the state court order authorized the filing and alleged the "corporate" filing was an error, but then they amended the petition to identify the decedent's estate as a small business debtor, even though the estate was not engaged in business. At a hearing, the attorney admitted he had not inquired about, and could not offer any theory, as to whether a decedent's estate was eligible to be a debtor. The bankruptcy court dismissed the case, but left open the Rule 9011 question. The court held that under § 109(a) and § 101(15), it was clear that the decedent's estate did not qualify. "There being no authority for a decedent's estate to be a debtor under any chapter of the Bankruptcy Code, and the state probate court having no authority to modify the Bankruptcy Code, it is plain that the filing of this bankruptcy case lacked merit," the court said. The bankruptcy court found that the petition was filed for the improper purpose of delaying the foreclosure sale of the decedent's home and was filed without conducting a reasonable inquiry into the decedent estate's eligibility to be a debtor.

Counsel added to the problem by filing the amended petition and advocating his untenable position in state court, the judge said. As sanctions under Rules 9011(b)(21) and (b)(2), and the court's own initiative, the bankruptcy court ordered the attorney to disgorge the $4,000 retainer he received, sanctioned him $2,000 for his initial disregard of Rule 9011, plus $2,000 for advocating an untenable position, and, noting that counsel had filed other similar improper cases, $2,000 to deter others similarly situated, for a total of $10,000. The mother was sanctioned $2,000 for filing the petition for an improper purpose and $2,000 as an example to others. "[T]he nonsense needs to stop," the court said.

33. Restricting electronic access to account did not violate the automatic stay; no sanctions awarded, despite the fact that the debtor's position "bordered on the frivolous." ***Spearman v. Commonwealth Credit Union*** **(*In re Spearman*) 2017 WL 943918 (Bankr. W.D. Ky. March 9, 2013)**

At the time the debtor filed chapter 7, she was a member of a credit union, which had a policy to deny electronic banking privileges to members "who cause the credit union to suffer a loss." The debtor had previously filed for bankruptcy protection and reaffirmed her debt to the credit union which, apparently, prevented her privileges being denied at that time. Attempting to avoid interruption of access to her account due to the more recent filing, the debtor expressed her desire to reaffirm "all my accounts" at the credit union, but the credit union did not respond. Shortly thereafter, the debtor's attempt to use her credit union debt card failed, which the union told her was the result of her bankruptcy filing. But the union did not tell her she could regain her electronic privileges by reaffirming her debt. Debtor attempted to make other transactions on her account, but having lost her electronic banking privileges for 13 days, the debtor filed a complaint against the credit union asserting that its actions violated the automatic stay. The bankruptcy court granted the credit union's motion for summary judgment, holding that the "vast majority of cases"

have held that restricting electronic privileges, such as what took place in this case, does not constitute a violation of the automatic stay. And, even if the case law was not overwhelmingly in the credit union's favor, the court could not find that it violated the stay because, under the complete record of the case, denying electronic access did not equate to an attempt to collect a debt; rather, the policy's intent was to prevent members from overdrawing their account. Further, the policy was not restricted to debtors in bankruptcy, but applicable to all members who caused a loss to the credit union. The court added that even if the credit union's action violated the stay - which it didn't - the debtor did not show she suffered any damages. In its conclusion, the court noted that while it appreciated zealous advocacy, "the prosecution of this matter bordered on the frivolous." True stay violation cases – i.e., cases where debtors are truly harmed by a creditor's actions – should absolutely be pursued on behalf of debtors, the court said, "but those actions must include some damages element, and not merely be prosecuted as a means to incur fees," the court said. Note that a New York district court distinguished *Spearman*, holding that under the facts of the New York case, the bank had "exercise[d] control over property of the estate which is prohibited by [11 U.S.C. § 362(a)(3)]." ***In re DiPietro*, 2019 WL 457601 (S.D. N.Y. Feb. 5, 2019) (not reported).**

ZEALOUSNESS/ USING LITIGATION AS A WEAPON

34. Ninth Circuit BAP holds: (1) postpetition prosecution of a fraudulent transfer claim against nondebtor parties violated the automatic stay; (2) a bankruptcy court may not deny all § 362(k) sanctions merely because the violation of the automatic stay was "technical," and (3) the bankruptcy court may find that, in the circumstances of a particular case, a reasonable attorney fee under § 362(k) is zero." *In re Koeberer*, 632 B.R. 680 (B.A.P. 9th Cir 2021)

Chapter 7 debtors and their son owned a corporation. A bank had made a $2.75 million loan to the corporation which was personally guaranteed by the debtors. In mid-2019, the company defaulted on the loan and, at the same time, the debtors created an irrevocable trust and transferred their residence, plus $125,000 to the trust. A relative was named as trustee of the trust, and the debtors' two adult children were named as beneficiaries. The bank filed a lawsuit in state court which included a claim against the debtors and the trustee-relative for fraudulent conveyance under California law. After the debtors filed chapter 7, the bank filed a notice of trial in the state court which appeared to be indiscriminately directed to all parties and causes of action in the case, including the fraudulent transfer claim against the debtors. The BAP held this notice violated the automatic stay. Although the violation was merely "technical," the BAP said the bankruptcy court had erred with it said such technical violations are undeserving of sanctions under § 362(k), which says the court "shall" award sanctions to "any individual injured" by "**any** willful violation of [the automatic stay]." "While the moving party must show "injury," and the court may consider the severity of the violation when deciding the amount of sanctions, there is no category of violations so minor that it automatically negates the mandatory language of § 362(k)," the BAP said. While it was possible that the debtors' "injury" did not warrant significant damages, and perhaps would result in zero damages, the bankruptcy court erred in failing to determine the reasonableness of the requested award.

35. The Fifth Circuit blames high-end wedding photographer's attorney for bringing "groundless" lawsuit against the photographer's competitors; awards sanctions of $40,000. *Matter of Champion Printing & Copying, L.L.C.*, 2023 WL 179851 (5th Cir. Jan. 13, 2023) (not reported)

A high-end wedding photographer and his company hired an attorney to bring suit in Texas state court against two other wedding photographers, claiming that the defendant-photographers had conspired to block him from taking photos at weddings and tortiously interfered with his business. The court granted summary judgment in favor of the defendants. Shortly thereafter, the defendants filed a motion for sanctions against the plaintiffs and against the attorney and his law firm. The state court granted the motion for sanctions, but only as to the photographer's company, Champion, holding that it knew or should have known it was groundless to assert that the defendant-photographers controlled the worldwide high-end wedding industry, as the plaintiffs had pled. Champion appealed to the Texas court of appeals, which affirmed, concluding that Champion had made groundless assertions and brought the lawsuit for improper purposes. Champion filed chapter 7 after the Texas Supreme Court denied its petition for review. The defendant-photographers filed a claim for $41,518.75 in the bankruptcy case. The chapter 7 trustee then filed suit in the bankruptcy court on behalf of Champion against the attorney and his firm who had filed the groundless lawsuit. The bankruptcy court found that the trustee's expert failed to prove malpractice based on standard of care. The district court agreed. The Fifth Circuit sharply disagreed, suggesting that "a cursory inquiry into Texas Law" should have made clear to the attorney that the antitrust claim would not pass muster. In accordance with state law, the attorney should have anticipated that sanctions could stem from his filing of a clearly frivolous antitrust suit, the Fifth Circuit said. Because the attorney satisfied the cause in fact and foreseeability elements of for malpractice, he also was the proximate cause for Champion's sanctions. The Fifth Circuit reversed and remanded on the question of what damages the trustee should be awarded. ***See also*, Emily Sawicki, *5th Circ. Blames Atty for Photographer's "Groundless" Suit*, Law360 (Jan. 17, 2023), found at www.law360.com/articles**

36. Not disclosing the true reasons for taking a position in court can result in negative consequences. *In re Heaven's Landing, LLC*, 649 B.R. 812 (Bankr. N.D. Ga. 2023)

The court described this case as "the rare situation where a debtor proposes to pay all of its creditors in cash in full on the effective date of the plan," which in this case was 36 days after the confirmation hearing. In other words, the court said, "[t]his type of result is usually every bankruptcy judge's dream." And, the case had "the even more rare situation" where a creditor who was being paid in cash in full on the effective date objected. The plan had proposed that, upon paying that secured creditor's claim, the debtor would be subrogated to the secured creditor's lien position on certain real property. The secured creditor objected on the ground that it did not want the debtor to be subrogated to its paid-off lien rights. After concluding that the debtor's proposed treatment was permissible under state law, the court commented that the secured creditor never articulated a satisfactory

explanation to why it objected to prompt payment in full, which led the court to question the creditor's motives: "Why else would [the secured creditor] be objecting to getting paid in full in cash in a few weeks? *It is obvious that the reason it is objecting is because it wants the value of Debtor's property . . . for itself to the detriment of the Debtor.*" (Emphasis added.) The court confirmed the plan.

37. Seventh Circuit affirms bankruptcy court's $9.5 million in sanctions for violating a plan injunction. *In re Kimball Hill Inc.*, 61 F.4th 529 (7th Cir. 2023)

Debtor was a residential construction company which had entered several land development agreements in the early 2000s with Chicago-area suburbs. Fidelity and Deposit Company of Maryland issued surety bonds to the debtor securing its performance under the development agreements. In turn, Fidelity required the debtor to indemnify it for its losses. After the 2008 financial crisis, the debtor defaulted and filed chapter 11. The bankruptcy court confirmed the debtor's liquidation plan, which released all claims against it which had been held by creditors that voted in favor of the plan, including Fidelity, and prohibited those entities from seeking repayment. A year later, a third party, "TRG," purchased the debtor's development interests free and clear of any claims. Later, the municipalities that had development agreements with the debtor sued Fidelity in state court to collect on the surety bonds, with the bankruptcy court's permission, and prevailed in many cases. In response, Fidelity added TRG to the lawsuits to enforce its prepetition indemnification agreement with the debtor. In July 2016, TRG moved the bankruptcy court to order Fidelity to dismiss it from the state court suits and sanction Fidelity for an intentional violation of the confirmation order. The Bankruptcy Court sanctioned Fidelity $9.5 million, which included costs TRG incurred for defending itself in the state court suits. The Seventh Circuit affirmed, rejecting Fidelity's contention that the bankruptcy court had mistakenly applied ***Taggart v. Lorenzen*, 139 S.Ct. 1795 (2019),** for imposing sanctions and determining contempt of bankruptcy plan confirmation orders by incorrectly shifting the burden of proof from TRG to itself. Further, the panel agreed with the bankruptcy court that there was no "'fair ground of doubt' that Fidelity's actions amounted to a flagrant violation of the agreed-to terms of [the] plan confirmation order." Rather, "Fidelity ignored the confirmation order, which, by its terms, extinguished any rights to recover those liabilities outside of the bankruptcy proceedings," the panel said, concluding that the bankruptcy court's sanction determination was not in error.

ZEALOUS ADVOCACY / CONFLICT OF INTEREST

38. Attorney suspended for three years for blatant misconduct in client's bankruptcy case, including trying to infect the trustee's attorney with COVID. *Layng v. Barclay* (*In re Mennona*), Adv. Pro. No. 22-1139 TBM, 2023 WL 149957 (Bankr. D. Colo. Jan 10, 2023)

Chapter 7 debtors hired attorney Devon M. Barclay and his wholly-owned law firm, Devon Barclay PC, to represent them in bankruptcy. According to the court, Barclay commenced the debtors' bankruptcy case by forging the debtors' signatures on the petition, statement of financial affairs, and schedules. He also filed a "knowingly false" application for the debtors to pay the bankruptcy filing fee in installments and submitted an incorrect schedule A/B. After the trustee started to investigate the debtors' assets and financial condition, Barclay "engaged in an egregious pattern of further misbehavior trying to dismiss the

debtors' bankruptcy case" by repeatedly lying at the meeting of creditors and attempting to manipulate the filing fee system to have the case dismissed. He also "ignored informal and formal discovery efforts initiated by the Chapter 7 Trustee, thus causing his clients to be sanctioned by the court," the court said, concluding that Barclay failed to communicate with the debtors and provide competent legal services. "To top it all off," the court said, "*Mr. Barclay advised his clients to try to infect the Chapter 7 Trustee's legal counsel with 'COVID or some highly infectious disease.*" (Emphasis added.) "What Mr. Barclay and DBPC did was an affront to the administration of justice and highly detrimental to the debtors," the court said. The U.S. Trustee asked the bankruptcy court to sanction the defendants for violations of Bankruptcy Rules 1008 and 9011, as well as Bankruptcy Code §§ 526(a) and 528 and rules of professional responsibility. The defendants withdrew their answer, which the court said was deficient, and defaulted. The defendants did not attend the trial. Consequently, all of the factual allegations asserted by the UST were deemed admitted by the court. The court found that the defendants' "blatant misconduct" demanded severe sanctions. The court suspended the defendants from the practice of law in the bankruptcy court for three years, and ordered copies of the court's ruling be provided to state and local disciplinary authorities.

39. Trustee's bringing fraudulent transfer action against the debtor's adult child for the value of room and board in the family home reflected a total misunderstanding of the law and a "disturbing" lack of judgment on the trustee's part. *In re Martino*, 652 B.R. 416 (Bankr. E.D. N.Y. 2023)

A father filed a chapter 7 case listing a home that he and his nondebtor wife owned as tenants by the entireties. The couple's son had turned 21 about three years before the father filed bankruptcy but, as is common these days, the son continued living in his childhood bedroom at the home. After the father filed bankruptcy, the trustee sued the son, alleging he had received constructively fraudulent transfers under § 548 and New York law. The trustee sought about $35,000 for the son's room and board and his use of a car. The bankruptcy court dismissed the car-related claims because the evidence showed that although the father bought the car in his name because his son lacked credit, the son had paid for the car and its insurance. In rejecting the claim for room and board, the court said there was no evidence about the value of the room the son occupied, nor was there evidence that the father incurred extra expenses due to the son living there. In addition, the parents had not received any unjust enrichment by allowing their son to remain in the family home "instead of kicking him out on the street." In dismissing the trustee's claims, the court said that the case demonstrated "a failure to understand what is required to prove the necessary elements of the claims alleged. Equally disturbing is the lack of judgment exercised by this Trustee." Further, debtors "should not be fearful that utilizing the rights Congress has given them may come at the cost of subjecting their children or other members of their family to ill-conceived actions by an overly aggressive trustee." The court did not award any monetary sanctions, however.

40. $400,000 in sanctions upheld for violation of confidentiality order. *In re Roman Cath. Church of Archdiocese of New Orleans*, No. CV 22-4101, 2023 WL 4105655 (E.D. La. June 21, 2023) (appeal pending)

Attorney for creditor's committee was found to have knowingly and willfully violated a protective order involving numerous lawsuits brought against a church alleging sexual abuse by priests or lay persons. The bankruptcy court issued a show cause order setting a hearing for the attorney to explain why he should not be sanctioned for violating the protective order. The bankruptcy court ordered sanctions in the amount of $400,000 for violating the protective order. On appeal, the attorney argued that he was deprived of due process, that his prior appeal divested the bankruptcy court of jurisdiction to further consider imposing sanctions for his violation of the protective order, and that the $400,000 sanction is excessive, amounting to the imposition of criminal contempt, because there was no evidence that he violated the protective order willfully or in bad faith. Affirming the bankruptcy court, the district court found that the attorney enjoyed more than enough due process for the bankruptcy court to impose sanctions. The bankruptcy court did not impose sanctions immediately; instead, the show-cause order was issued to afford the attorney specific notice of the contempt hearing and an opportunity to be heard. Also, jurisdiction was not divested because the show cause order was not a final and appealable order, but instead was merely a non-final, unappealable, interlocutory order. Lastly, the sanctions imposed by the bankruptcy court were reasonable, fully supported by the record, and justified under the circumstances.

The court stated that the attorney's argument mischaracterized the intent and effect of the show cause order, which did not impose any sanction. The timeline of events demonstrated that the bankruptcy court employed a process in addressing the attorney's violation of the protective order. First, the bankruptcy court ordered the trustee to undertake an independent investigation and issue a report. The Trustee's Report stated that the attorney admitted to disseminating to third parties information that he learned through his receipt of protected material as the attorney to individual committee members. Upon reviewing the Trustee's Report and the appended exhibits, the bankruptcy court correctly determined, for purposes of enforcing its protective order, that the attorney had knowingly and willfully violated the order and effectively admitted to doing so. Recognizing that the bankruptcy court had a duty to protect the integrity of the bankruptcy process and to enforce its own orders, the bankruptcy court employed § 105(a) of the Bankruptcy Code to fashion an appropriate remedy.

The court noted that an experienced attorney knew he was bound by a protective order and made the deliberate choice to violate it and, in doing so, *failed to honor the privacy choices of certain sexual abuse victims he did not know but whose interests he professes to zealously advocate*. The court would not condone an officer of the court's deliberate decision to violate a court order, no matter how noble the motivations, so there is no reservation in upholding the bankruptcy court's finding that the attorney's conduct was contemptuous, wasteful, and warranted the imposition of sanctions.

41. Judgment creditor's conduct in unsuccessful nondischargeability proceeding did not warrant imposition of sanctions. *In re Akins*, 640 B.R. 721 (Bankr. E.D. Cal. 2022)

Following an entry of judgment in favor of the debtor in judgment creditor's nondischargeability proceeding, the court declined to order sanctions against judgment

creditor pursuant to its inherent power. The debtor complained of the judgment creditor's shortcomings and devious tactics. However, the debtor engaged in similar conduct and many of debtor's litigation expenses were a result of the debtor's intentional litigation strategy in, such as choosing not to utilize available rights and remedies to address parties' discovery disputes. Despite that the judgment creditors may have been unprepared, engaged in gamesmanship, and acted questionably in some respects, the conduct did not rise to the level of bad faith.

42. Sanctions were warranted against chapter 13 debtors' counsel in the amount of $5,000 for making a false declaration that debtors had completed the plan. *In re Frantz,* 648 B.R. 91 (Bankr. C.D. Cal. 2023), reconsideration denied, No. 6:15-BK-19432-MH, 2023 WL 4055905 (Bankr. C.D. Cal. June 16, 2023)

After dismissal of chapter 13 case based on the debtors' uncured default in direct mortgage maintenance payments to creditor, the court issued a show cause order as to why debtors' counsel should not be sanctioned for a statement in the declaration that the debtors had completed plan. Debtors' counsel was aware of the trustee's motion to dismiss the case based on debtors' default in direct mortgage maintenance payments to creditors. The payments due under the plan and the plan could not be completed until all plan payments were made. After multiple hearings and opportunities to file pleadings, counsel never raised arguments as to good faith belief that the debtors had completed their plan. Instead, debtor's counsel filed a declaration knowing that the debtors had not completed all their plan payments. The court held that sanctions were warranted pursuant to Rule 9011, the court's inherent power, and the local rule on willful, bad faith conduct. The court awarded sanctions in the amount of $5,000, which was based on flat no-look fee for chapter 13 debtor's counsel. Debtors' counsel's advocacy in the matter crossed the line from zealous to overzealous to, ultimately, unethical, and thus the court felt compelled to issue an order to prevent similar behavior in the future, or at least make clear that the behavior would not go unaddressed.

43. No sanctions were warranted where debtor sought to remove trustee for protecting the interest of creditors. *Matter of Ash,* No. 20-11068, 2022 WL 73768 (Bankr. N.D. Ind. Jan. 6, 2022)

Chapter 7 debtor previously filed a motion to convert from chapter 7 to chapter 13, which the chapter 7 trustee opposed. At the hearing on the motion, rather than trying the issue on the trustee's objections, the debtor withdrew the motion. As the debtor approached the discharge date, the UST objected to the debtor's discharge - acting on information provided by the trustee. The debtor blamed the trustee for the UST opposing her discharge and claimed that the trustee improperly induced her to withdraw the motion to convert. Based on the concept that the trustee's actions had caused injury to the debtor's interests by forcing her to have to defend her right to a discharge, the debtor requested that the trustee be removed and filed an adversary proceeding seeking damages from the trustee. The court denied the adversary and the debtor's motion to remove the trustee. In turn, the trustee filed a motion for sanctions arguing that the debtor's submissions were frivolous and vexatious.

The court did not sanction the debtor pursuant to Rule 9011 for suing the trustee or seeking her removal. The court stated that there is a fine line between the zealous representation of one's client and unreasonably vexatious litigation, and that line has not been stepped over.

44. $187,000 in sanctions were warranted against attorney who brought a "wasteful, extraordinarily overbroad and dangerous lawsuit." *O'Rourke v. Dominion Voting Sys., Inc.*, No. 21-1442, 2022 WL 17588344 (10th Cir. Dec. 13, 2022) (appeal pending)

The plaintiffs sought to pursue a civil-rights class action alleging that the defendants violated the constitutional rights of every person registered to vote in the November 2020 Presidential Election. The plaintiffs sought a declaratory judgment, a permanent injunction enjoining the defendants from continuing to burden the rights of plaintiffs and all similarly situated registered voters, and nominal damages of $1,000 per registered voter. The amount total was approximately $160 billion. The defendants incurred costs in preparing and arguing motions, but the plaintiffs voluntarily dismissed the lawsuit. The district court ordered the plaintiffs to pay the defendants a total of $186,922.50 as sanctions under the court's inherent powers for work done by the defendants. On appeal, the plaintiffs agreed that the district court properly employed the lodestar method, accepted the defendants' representations as to the hours expended and the reasonableness of the hourly rates. However, the plaintiffs' contention rested on the believe that requiring them to pay such an amount in attorney fees is excessive and unreasonable. Affirming the district court, the Tenth Circuit Court of Appeals agreed that the award of sanctions under the court's inherent powers and § 1927 were warranted. The court mentioned that the district court did not award the full amount claimed by some of the defendants, and the plaintiffs failed to convince the court that the award was excessive and unreasonable. Moreover, the sanctions were perfectly reasonable because the plaintiffs' claims were made vexatiously, wantonly, or for oppressive reasons – which is bad faith.

45. No sanctions were warranted under Rule 9011 against creditor's counsel for local counsel's factually and legally frivolous arguments. *In re LeGrand,* 638 B.R. 151 (Bankr. E.D. Cal. 2022)

Chapter 7 debtor brought a proceeding to recover damages for alleged willful violation of automatic stay by local collections counsel, and judgment creditor – nationwide servicer of defaulted credit accounts. The parties conceded to the automatic stay violations and sought to determine whether the judgment creditor may avoid "represented party" liability for Rule 9011(b) violations committed by its local collections attorney. Local collections counsel failed to respond to debtor's counsel, failed to notify the judgment creditor of the debtor's demands, and failed to terminate postpetition wage garnishments. To avoid liability under Rule 9011(b) the represented party must establish, implement, and police an effective program of supervision of local counsel. The court held that local collections counsel made factually and legally frivolous claims in the proceeding over judgment creditor's alleged willful violation of automatic stay in judgment debtor's bankruptcy case, but judgment creditor would not be sanctioned for local collections counsel's arguments. However, the court stated it would be issuing an opinion finding that counsel made the factually and legally frivolous arguments. The court noted that the judgment creditor is in

the line of fire due to the nature of the judgment creditor's collection business that relies on local counsel to implement legal process, which logically invites an inference that the judgment creditor sufficiently participates in litigation so as not be at the mercy of local counsel. However, that which is suggested by logic needs to be confirmed by facts, and the judgment creditor had a system in place designed to minimize the risk that local counsel may trigger in navigating through the bankruptcy process.

46. Assignees of judgment debt violated discharge injunction in debtors' chapter 13 case by attempting to collect on nonexistent judgment lien. *In re Skaggs,* 644 B.R. 149 (Bankr. W.D. Va. 2022)

After reopening the bankruptcy case, the debtors sought an order of contempt against assignees of judgment debt for violating a discharge order by attempting to collect on a debt. The defendants argued that no violation of the discharge injunction occurred because they did not attempt to collect from the debtor, claiming that they were only attempting to enforce *in rem* rights based on the judgment lien they erroneously believed existed. The parties cross-moved for summary judgment. The court held that the defendants violated the discharge injunction by attempting to collect on a nonexistent judgment lien, because the defendants had no objectively reasonable basis on which to believe the judgment survived the bankruptcy discharge order or that their collection activity was otherwise lawful, the defendants may be held in contempt of the discharge order. However, neither punitive damages nor damages were appropriate as a sanction for civil contempt of discharge order. The court may consider the defendants' good faith when determining the appropriate remedial sanction. Debtors' summary judgment motion was granted, and the defendants' summary judgment motion was denied.

47. Attorney for chapter 13 debtor in serial cases was sanctioned in the amount of $8,000 for violating Rule 9011 by proposing unfeasible plan modifications. *In re Kelly*, 649 B.R. 448 (Bankr. W.D. Pa. 2023)

After the court ordered the UST to investigate an attorney's conduct in four of the debtor's five chapter 13 cases in six years, all of which were dismissed, the court commenced proceeding to determine whether the attorney violated Rule 9011. The debtor agreed to increase his monthly payment obligation to amount required to pay all claims over the remaining plan term. The resulting payment obligations were more than three-times the debtor's scheduled monthly net income, with shortfall to be covered by obtaining market-rate rent for rental properties. The debtor's signature was missing from the petition. The court found that the attorney failed to appropriately weigh all known facts, including the debtor's history of performance, in assessing whether the debtor could feasibly fund a plan in that manner. The court held that the attorney violated Rule 9011 by misrepresenting that he had the debtor's signature on the petition when he did not; by filling knowingly inaccurate schedules; by proposing patently unconfirmable plans and unfeasible plan modifications; by filing serial cases for improper purpose. The court found that it was appropriate to sanction the attorney via public censure, monetary sanctions in the amount of $8,000, and disgorgement of fees.

48. Attorney for the debtors in multiple chapter 13 cases lacked candor in her escrow-related representations to the court. *In re Reyes*, 651 B.R. 99 (Bankr. S.D. N.Y. 2023)

Debtors' attorney in multiple cases altered standard form chapter 13 plans, so that the debtors' postpetition mortgage payments were being held in escrow by the attorney, rather than being made through the trustee or directly to the secured creditors. The debtors' plans stated that the attorney would serve as escrow agent or that postpetition mortgage payments were to otherwise be set aside, and in debtors' schedules J that such payments were to be ongoing expenses. Funds were not escrowed in six cases and there were shortfalls in escrowed funds in another four cases. The attorney delayed in providing information and knowingly made inaccurate representations, when questioned. The court held that the attorney's conduct violated state ethics rules governing attorney escrow accounts, the attorney lacked candor in her representations to the court. The court found that it was appropriate to refer the attorney to the Committee on Grievances. The court stated that transparency as to the financial affairs of the debtor is essential to the appropriate functioning of the bankruptcy system.

49. Defendants' catch-all affirmative defense in adversary proceeding seeking to avoid and recover transfers would be stricken as insufficient. *In re Bal Harbour Quarzo, LLC*, 640 B.R. 597 (Bankr. S.D. Fla. 2022)

Liquidating trustee appointed pursuant to chapter 11 debtor's confirmed plan filed an adversary complaint seeking to avoid and recover alleged fraudulent transfers relating to a failed real estate development project. The trustee asserted claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty. The defendants opposed the action and listed a catch-all affirmative defense stated that the defendants assert all defenses available under federal law and under any applicable state law. The court held that the defendants' catch-all affirmative defense would be stricken as insufficient and redundant of the other affirmative defenses. The court reasoned that the affirmative defense did more than just seek to reserve the defendants' rights, it also purported to assert all defenses available under federal law and under any applicable state law, which is where the defense goes too far.

50. Failure to disclose riding lawnmower on schedules resulted from lack of candor by debtor rather than failure to investigate by debtor's counsel. *In re Roedl*, 634 B.R. 777 (Bankr. S.D. Ill. 2021)

Chapter 7 trustee filed motion seeking to review fees of debtor's counsel, asserting that fees charged exceeded reasonable value of services and fees should be disgorged or sanctions for failure to conduct proper investigation into financial affairs of the debtor. The court found that debtor's counsel's conduct did not warrant disgorgement of fees or sanctions. The court reasoned that regardless of whether a search of the public database would have disclosed debtor's ownership of the mower, counsel spent considerable time preparing the debtor's bankruptcy and discussing the debtor's property with him, and counsel specifically asked the debtor whether he owned a riding lawn mower. The debtor's response to counsel was no, and the debtor did not disclose his ownership of the mower on

client asset information worksheet. The court noted that debtors' counsel must be cognizant that a reasonable investigation is harder to achieve when debtor's counsel delays in filing their clients' case.

51. Special circumstances existed foreclosing an award of attorney fees to chapter 7 debtor after prevailing on fraud-based nondischargeability claims; bankruptcy court's award reversed. *Aboud & Aboud PC v. Cary*, No. CV-21-00240-TUC-RCC, 2022 WL 17261415 (D. Ariz. Nov. 29, 2022)

Divorce attorney filed adversary complaint against chapter 7 debtor-former client seeking to determine nondischargeability of debt for legal services incurred prepetition by debtor in post-divorce decree enforcement proceedings against her former spouse. The bankruptcy court found for the debtor and determined that the divorce attorney's claims were not substantially justified, awarding attorney's fees to the debtor in the amount of $30,332.50. The divorce attorney appealed. The district court affirmed in part and reversed in part, holding that the statutory presumption of nondischargeability of consumer debts incurred for luxury goods or services did not apply to debt for legal services; the debt did not fall within discharge exception for debts for willful and malicious injury; the divorce stipulation that debtor entered with former spouse after hiring new counsel in post-divorce decree enforcement proceedings was not relevant to the divorce attorney's claim to except debt for legal services under fraud discharge exception; there was no evidence that debtor entered settlement agreement with the divorce attorney a few weeks prior to filing bankruptcy with intent to deceive the divorce attorney; and that special circumstances existed foreclosing award of attorney fees to debtor after prevailing on fraud-based nondischargeability claims. The court reasoned that the Bankruptcy Code's goal of curbing abusive practices by institutional creditors in allowing such awards would not be furthered by requiring the divorce attorney to pay attorney's fees to debtor in the amount of $30,332.50. Moreover, the complaint was not limited to claims under § 523(a)(2), but also alleged an exemption under § 523(a)(6).

52. Debtor's counsel was sanctioned $100 for noticing parties late and filing a motion to shorten time late. *In re Taylor*, No. 2:22-BK-14195-NB, 2022 WL 4076001 (Bankr. C.D. Cal. Sept. 2, 2022)

Debtor's counsel waited over three weeks after the commencement of the case to file a motion for imposition of the automatic stay. In turn, debtor's counsel's conduct created an emergency requiring the expense of an order setting hearing on shortened notice application, an overnight delivery to several parties in interest, and an attorney to attend the hearing in case anyone objected at the hearing. The self-created emergency imposed unnecessary burdens on all parties in interest, including the court. The court ordered debtor's counsel to pay all costs associated with conducting the hearing on shortened notice to consider imposition of the automatic stay. Furthermore, debtor's counsel failed to comply with the terms of the OST because it failed to show expedited service on several creditors. The court stated that counsel should be prepared to address at the hearing what remedy is appropriate for his failure to comply with the OST's requirements for expedited service on secured creditors. The tentative ruling is to impose a sanction of $100.

53. Debtor's counsel was sanctioned in the amount of $10,000 for not conducting a reasonable investigation into the complaint's allegation prior to filing the complaint, and $3,000 sanctions for frivolous arguments made on appeal by debtor's counsel were warranted. *In re Defeo,* 632 B.R. 44 (Bankr. D.S.C. 2021), *aff'd*, 644 B.R. 323 (Bankr. D. S.C. 2022)

Debtor-Plaintiff filed an adversary complaint seeking an injunction of defendant's collection attempts, as well as actual and punitive damages. Defendant's counsel requested that the debtor withdraw the complaint and advised that if the complaint was not withdrawn within 21 days, a motion for sanctions would be filed with the court. After being served with the motion for sanctions, debtor's counsel did not withdraw the complaint. Defendant moved for sanctions against the debtor and debtor's counsel asserting that counsel violated Rule 9011(b) by failing to investigate or make an inquiry that was reasonable under the circumstances before filing the complaint. The court held the defendant demonstrated that debtor's counsel failed to make reasonable pre-filing inquiry to support allegations in the complaint, and that reasonable attorney fees in the amount of $10,000 was appropriate sanction, in addition to an order striking disputed allegations from the complaint for purposes of trial. The complaint alleged that defendant engaged in overly aggressive, devious, deceptive, manipulative, oppressive, abusive, and illegal collection activity. It further alleged that the defendant's mailing of invoices was done with the express intent to annoy, threaten, cause harm, abuse, intimidate or harass. The court noted that the position went "beyond aggressive advocacy or hyperbole" — rather, it was: frankly disingenuous." The court granted the defendant's motion for sanctions in the amount of $10,000.

On appeal, the district court agreed with the bankruptcy court's analysis of why the debtor's verification of the pleading failed to satisfy the attorney's professional duties of candor to the court under Rule 9011. On appeal, the creditor filed another motion for sanctions against debtor's counsel for a frivolous appeal. The debtor mischaracterized and misrepresented several aspects of the underlying record, failed to substantively address, or make any showing of error, regarding the Bankruptcy Court's key findings, and continued to disingenuously characterize the single, mildly worded invoice as "harassment." The district court held that sanctions for the frivolous arguments made on appeal by debtor's counsel were warranted in the amount of $3,000.

54. Debtor sought $17,500.45 in attorney fees, but an award of $2,515.45 was warranted due to the debtor's failure to make genuine efforts to mitigate damages. *In re Defeo,* 635 B.R. 253 (Bankr. D. S.C. 2022)

Chapter 13 debtor filed an adversary complaint against a creditor that had been inadvertently omitted from the debtor's initial schedules, because the creditor sent postpetition invoices for medical debt to the debtor. The creditor claimed that the second invoice was sent due to computer or clerical error. The debtor sought actual damages for the creditor's alleged violation in the amount of $17,500.45 in attorney fees. The court held that the creditor willfully violated the stay despite the assertion that the second invoice was sent due to computer or clerical error. Although, the debtor sought $17,500.45 in attorney fees, an award in the amount of $2,515.45 was warranted. Despite debtor's counsel's

billing rates being reasonable, time and labor billed appeared overstated, as some services related to counsel's compliance with the Bankruptcy Code's disclosure requirements. The complaint did not involve novel or complex issues, but involved de minimis harm and asserted basic claim of type typically resolved without court intervention, and debtor's counsel failed to make genuine efforts to mitigate damages. Due to the creditor's immediate cessation of collection efforts once notified that the complaint had been filed and early efforts to settle the matter, and the fact that the creditor had to engage in costly discovery to obtain counsel's time sheets, such that counsel's fees after the date that the debtor rejected the settlement offer were excessive and unnecessary.

Addendum: Florida Rules of Professional Conduct and "Zeal" Case Summaries[1]

Florida's Rules of Professional Conduct

Florida has adopted the ABA Model Rules of Professional Conduct, with some variations, including modifications related to zeal.[2]

Rule 1.3, on "Diligence," is the same as the Model Rule: "A lawyer shall act with reasonable diligence and promptness in representing a client." Florida also retained the following part of Comment 1 to Rule 1.3:

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer ***must also act*** with commitment and dedication to the interests of the client and ***with zeal in advocacy upon the client's behalf***. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See rule 4-1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.[3]

Florida did make some modifications to the references to zeal in the Model Rules' preamble, however.[4] Preamble [2] of the Florida rules retains the reference to zeal: "As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."[5] But Florida did modify the reference to zeal in Preamble [8] by replacing the second sentence with "Zealous advocacy is not inconsistent with justice."[6] And, finally, Florida modified Preamble [9] by removing the reference to zeal altogether:

> In the practice of law, conflicting responsibilities are often encountered. Difficult ethical problems may arise from a conflict between a lawyer's responsibility to a client and the lawyer's own sense of personal honor, including obligations to society and the legal profession. The Rules of Professional Conduct often prescribe

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[1] Prepared by Erica Garrett, Law Clerk to the Hon. Cynthia A. Norton.
[2] FL ST BAR Ch. 4.
[3] FL ST BAR Rule 4-1.3 (emphasis added).
[4] *Model Rules of Professional Conduct: Preamble & Scope*, A.B.A. (1983), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/.
[5] FL ST BAR Preamble.
[6] FL ST BAR Preamble. The Model Rule states: "Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done."

terms for resolving these conflicts. Within the framework of these rules, however, many difficult issues of professional discretion can arise. These issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules. ***These principles include the lawyer's obligation to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system***.[7]

"Zeal" Case Summaries

1. Eleventh Circuit affirmed bankruptcy court's order assessing $370,000 in sanctions against attorney and barred the attorney from practicing before it for five years. *In re Evergreen Sec., Ltd.*, 570 F.3d 1257 (11th Cir. 2009)

This opinion involved a voluntary Ponzi scheme bankruptcy, which then spun-off involuntary bankruptcies against the principal actors in the scheme. All of the cases were being heard by the same bankruptcy judge. After the petitioning creditor in the involuntaries made its prima facie case, the putative debtors filed a motion seeking the bankruptcy judge's recusal, disqualification of the judge, disclosure of all ex-parte communication, and revocation of all prior orders in the initial case. The debtors' attorneys also filed writs of mandamus in the district court, asking that it order the bankruptcy judge recuse, which the district court denied. The bankruptcy court then denied the motion for his recusal and issued an order to show cause why sanctions should be imposed. After an evidentiary hearing, the court imposed monetary sanctions of $371,517.69 against the debtors' primary attorney and barred him from practicing before the bankruptcy court for the Middle District of Florida for five years. Affirming, the Eleventh Circuit addressed each of the attorney's many asserted bases for recusal, the primary one being that someone had filed a judicial complaint against the bankruptcy judge in connection with an ex parte ruling in an unrelated case, in which some of the same attorneys had been involved. The Eleventh Circuit rejected that argument, saying the mere filing of a judicial complaint is not enough to merit disqualification in other cases, in part because someone could judge-shop by filing such a complaint. If the complaint had turned into a formal investigation, that might warrant recusal, but there was no indication that this one had. And, although ex parte hearings and rulings should be rare, the particular circumstances of the case in which the judge ruled ex parte warranted it. After addressing a myriad of other allegations, the Eleventh Circuit affirmed the court's award of both the monetary sanctions and the suspension under § 105(a) and the court's inherent authority. Ultimately, the Eleventh Circuit said the attorney's "relentless pursuit" of the recusal motion, even after the

[7] FL ST BAR Preamble (emphasis added). The highlighted sentence appears in the Model Rules as follows: These principles include the lawyer's obligation ***zealously*** to protect and pursue a client's legitimate interests, within the bounds of the law, maintaining a professional, courteous and civil attitude toward all persons involved in the legal system." (Emphasis added).

evidentiary hearing revealed no factual support for the attorney's contentions, and the attorney's other egregious behavior in the case, went beyond the bounds of zealous representation. And, because the attorney was "a non-bankruptcy (by his admission), New York lawyer who appeared *pro hac vice* before the Bankruptcy Court in the Middle District of Florida," the five year suspension in that court was not too severe. Finally, the monetary sanctions imposed by the bankruptcy court were based upon the attorneys' fees incurred by the appellees and were fully supported in the record.

2. "We must never permit a cloak of purported zealous advocacy to conceal unethical behavior." Attorney who made frivolous arguments and impugned judges in an appeal was referred to the Florida Bar for appropriate disciplinary proceedings and sanctioned $35,000 for opposing parties' attorney fees. *Azran Miami 2, LLC v. US Bank Trust, N.A.*, 343 So.3d 673 (Fla. Dist. Ct. App. 2022)

In four separate appeals, which the court addressed together, the Florida appellate court issued orders to show cause why sanctions should not be imposed for failing to comply with the Florida Rules of Appellate Procedure and "with the professional norms governing appeals" which conduct included, among many other things: making frivolous legal arguments; impugning the integrity of the court and opposing counsel without any relevance to the legal matter at issue; making citations to the record that did not support the facts for which they were cited; filing voluminous documents outside and unrelated to the record; citing to vacated orders as precedent; making arguments in bad faith; and disparaging the judges of the court. Among other things, the attorney said the court was depriving his clients of their rights; that it was injuring the integrity of the judicial process and engaging in "gross misconduct"; that it was violating his African American and Jewish clients' rights; and that the court needed to "search its soul." Noting that it had imposed sanctions on the same attorney for similar misconduct in the past, the court rejected the attorney's argument that his conduct was borne of some righteous intent. Quoting a Florida Supreme Court case, the court said: "We must not permit a cloak of purported zealous advocacy to conceal unethical behavior. . . . Zealous advocacy cannot be translated to mean win at all costs, and although the line may be difficult to establish, standards of good taste and professionalism must be maintained while we support and defend the role of counsel in proper advocacy." The court then referred the matters to the Florida Bar for appropriate disciplinary proceedings and awarded the opposing parties up to $35,000 in attorney fees. *See also Bank of New York Mellon v. Bontoux*, 355 So.3d 965 (Fla. Dist. Ct. App. 2022) (this same attorney sanctioned under Florida Rule of Appellate Procedure 9.410(a) for recklessly impugning and disparaging the judges involved in his cases: "Insults or disparaging comments by lawyers to courts in court filings cannot be justified as zealous advocacy because they risk alienating the very judges the lawyer was hired to persuade.").

3. An attorney must be capable of seeing the forest for the trees in providing zealous advocacy: Attorney suspended for three years for submitting altered photographs at a deposition. *Florida Bar v. Schwartz*, 334 So.3d 298 (Fla. 2022)

A criminal defense attorney created and submitted as deposition exhibits two police lineup photos. In one of the photos, the attorney altered his client's picture by replacing his face with that of a person who witnesses other than the victim had identified the perpetrator and, in the other, he modified the defendant's hairstyle. The photos retained the victim's identification of the defendant, including both her circle around what had been the defendant's picture, and her and the police officer's signatures. Rejecting a referee's recommendation that the attorney be suspended for ninety days, the Florida Supreme Court suspended the attorney for three years for violating Florida's Bar Rules 4-8.4 (misconduct), saying "we reiterate that the requirement to provide zealous representation, as contemplated under our ethical rules, . . . does not excuse engaging in misconduct, irrespective of one's intent to benefit the client." Based on this instance and prior transgressions, the court commented that the attorney "has been an overzealous advocate incapable of seeing the forest for the trees."

4. Although sanctions were not on the table in this case, the court made a shot across the bow: Zealous advocacy does not include misquoting case law to support your position. *Fries v. Anderson*, 359 So. 3d 343, 348-49 (Fla. Dist. Ct. App. 2023)

The plaintiffs, initially pro se, filed a small claims lawsuit against their landlord. Their petition, which was on a form supplied by the court, asked for "court costs." The form did not contain a specific request for attorney fees (presumably because it was small claims). Their lease, which they did not attach to the petition, defined court costs to include attorney fees. Counsel later entered an appearance and represented the plaintiffs in court. When they prevailed, they sought attorney fees. The trial court awarded the fees. On appeal, the landlord argued the award was contrary to Florida law which requires that requests for attorney fees be specifically pled. The court of appeals reversed. Seeking reconsideration of the appellate decision, the plaintiffs *quoted* a binding case for the proposition that "costs" include attorney fees. Despite "scouring" the cited case, however, the court could not find the quoted language, and indeed, interpreted the case to hold the opposite of what counsel had purported. Nor had the court's research unearthed any other Florida case containing such language. The court said that counsel's "misrepresentation of the holding of [the cited case] exceeds the bounds of zealous advocacy. It is the practice of this court to read the cases cited in briefs and motions." Most courts do. No one had raised the issue of sanctions at that point, so the case should be read as a cautionary warning.

5. "Words matter and words have definitions." In a cautionary opinion, counsel's inflammatory language in arguing that the court "punished a little girl with a birth defect" by not ruling in her favor went beyond zealous advocacy. *Huggins v. Siegel*, 336 So.3d 58 (Fla. Dist. Ct. App. 2021).

The plaintiffs filed a lawsuit against their landlord, alleging that their daughter was born with birth defects resulting from mold infestation in the home where they were living while the mother was pregnant. The trial court granted a motion to exclude the plaintiffs' expert's testimony as being untimely disclosed, as well as under *Daubert*. The trial court then granted the landlord's motion for summary judgment, ruling that without the plaintiff's expert testimony, there was no genuine issue of material fact on the issue of causation. The appellate court affirmed on the merits. On a second motion for rehearing, plaintiffs' counsel stated the following, regarding the exclusion of the expert witness: "The panel, as with the trial court, *effectively punished A.R.H. for being a little girl with a legitimate birth defect* only because her injuries are in an area of medicine and science not yet fully developed." (Emphasis added by the court). He also accused the courts of "stealing" the girl's jury trial right. In a cautionary ruling, the court said counsel's language was "improper and inflammatory." "Words matter and words have definitions," the court said. Citing the Oxford English Dictionary's definition of "punish," the court held counsel crossed the line of zealous advocacy which, the court said, must be tempered with respect, courtesy, and decorum. Furthermore, counsel's attempt to diminish the accusation against the courts with the word "effectively" did not fix the violation.

7. Counsel must take the amount at stake into consideration in accruing litigation costs. Zealous advocacy does not include turning a small claim in to all-out war. Magistrate judge recommends plaintiff's counsel be sanctioned $30,265.33 in defendant's attorney fees. *Olguin v. Florida's Ultimate Heavy Hauling*, Case No. 17-61756-CIV-COOKE/GOODMAN, 2019 WL 3426539 (S.D. Fla. June 5, 2019)

According to the magistrate court in this Report and Recommendation to the district court, "this lawsuit (which quickly morphed from an extremely small claim worthy of a telephone call into a full-fledged litigation war) should never have been a lawsuit in the first place. But once filed, this lawsuit should have been quickly and inexpensively resolved. It wasn't." It was a case involving a claim of less than $1,000 under the Fair Labor Standards Act, which resulted in a settlement of $783. But the case had "mushroomed into a full-scale, pedal-to-the-metal litigation war and an epic battle over attorney's fees." As a consequence of this "avoidable war," the plaintiff sought $36,000 in fees from the defendants, and the defendants sought $60,000 of fees from the plaintiffs. And, the court said, those amounts had already increased significantly by the time of the decision as a result of multiple supplemental motions and briefing involving the mutual requests for fees.

In partially granting the defendants' request, the court said that plaintiff's counsel (1) did not determine before trial that a statutory exemption applied; (2) did not ask defendants about the applicability of the exemption before filing suit; (3) did not make a pre-filing demand; (4) continued to litigate after receiving evidence establishing the exemption; (5) declined to accept defendants' tender of wages made less than two months after the lawsuit was filed (by claiming that a receptionist at his law firm was not authorized to accept an envelope containing the tender); and (6) later demanded a general release as a condition for settlement even though defendants and their insurer have claims against plaintiff for property damage. The plaintiff also served written discovery consisting of 73 requests for production and separate sets of interrogatories and requests for admission to each of the three defendants. He also filed a motion for summary judgment and prolonged settlement discussions. According to the court, the plaintiff's attorney "appeared to be far-more interested in generating attorney's fees for himself than in resolving a modest claim for his client's benefit." For that reason, among others, the court recommended that the plaintiff's statutory prevailing-party attorney fees be denied, and recommended that the plaintiff pay a portion of the defendant's attorney fees under 28 U.S.C. § 1927[8] and the court's inherent authority for bad faith litigation, even though the plaintiff was the prevailing party under the statute. The magistrate judge recommended sanctions in the amount of $30,265.33, based on a lodestar approach. The district court adopted the Report and Recommendation. *Olguin v. Florida's Ultimate Heavy Hauling*, Case No. 17-61756-CIV-COOKE/GOODMAN, 2019 WL 5290856 (S.D. Fla. July 23, 2019) (unpublished).

7. The Southern District of Florida Bankruptcy Court, en banc, suspended counsel based on a tirade he made toward the bankruptcy judge presiding over a case and engaging on ex parte communications. It also referred the attorney to the state bar. *In re New River Dry Dock, Inc.*, No. 06-13274-BKC-JKO, 2011 WL 4382023 (Bankr. S.D. Fla. Sept. 20, 2011), *aff'd sub nom. In re Gleason*, No. 11-62406-CIV, 2012 WL 463924 (S.D. Fla. Feb. 13, 2012), *aff'd*, 492 F. App'x 86 (11th Cir. 2012)

The bankruptcy court for the Southern District of Florida, en banc, was faced with the question of whether a seasoned bankruptcy attorney should be sanctioned for his unprofessional and disrespectful tone and content in a pleading he had filed with the court. The case involved an order directing disgorgement of compensation paid to a broker which had been employed by estate, based on the broker's failure to disclose a prior relationship with purchaser. The bankruptcy court found there had been a clear fraud on the court in the disclosure for employment, and ordered disgorgement of $490,000 of the commission. This resulted in the attorney filing pleadings with the court in which he personally attacked the bankruptcy judge with several snarky comments and criticizing the judge with such

[8] Title 28 U.S.C. § 1927 provides that an attorney admitted to conduct cases in any court of the United States "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

language as "It is sad when a man of your intellectual ability cannot get it right when your own record does not support your half-baked filings." And, instead of withdrawing the offensive pleading and apologizing to the court, the attorney filed a supplemental response with the "extraordinary offer" to participate in an ex parte communication with the judge. The attorney also inappropriately delivered a bottle of wine to the judge's chambers with a note reading: "Dear Judge Olson, A Donnybrook ends when someone buys the first drink. May we resolve our issues privately?" The bankruptcy court en banc issued an order to show cause to the attorney as to whether he should be sanctioned. The court concluded that the attorney's tirade against the judge crossed the line (by a wide margin) between zealous advocacy and judicial denigration, "something a first year law student would know." The court suspended the attorney from practice in the bankruptcy court for 60 days and referred him to the Florida bar.

8. Merely losing a weak case does not cross the bounds of zealous advocacy. No sanctions warranted. *Pennington v. CGH Techs., Inc.*, No. 6:19-CV-2056-PGB-EJK, 2022 WL 18772229 (M.D. Fla. Nov. 16, 2022).

Title 28 U.S.C. § 1927 provides that an attorney admitted to conduct cases in any court of the United States "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." Under this provision, an attorney multiplies the proceedings "unreasonably and vexatiously" when the attorney engages in conduct "so egregious that it is tantamount to bad faith." The court also has the inherent power to sanction. This case involved a lawsuit under the Fair Labor Standards Act, and included a counterclaim against the plaintiff for fraud. A jury awarded $60,000 in favor of the plaintiff on his FLSA, and awarded $140,000 in favor of the defendant, finding that the plaintiff had committed fraud in connection with his employment. The plaintiff asked for attorney fees as the prevailing party under the FLSA, which the court denied. The defendant sought attorney fees under 28 U.S.C. § 1927. To warrant sanctions under that provision, the court said, it is well-settled that "[s]omething more than a lack of merit or negligent conduct" is required to find an attorney acted in bad faith. Rather, an attorney acts in bad faith when he "knowingly or recklessly pursues a frivolous claim." "Needless to say," the court said, "the standard for sanctions under § 1927 is high." In this case, the defendant here sought attorney fees from the plaintiff's attorney *personally* under § 1927. That, the court said, was far more demanding as it calls for courts to dissect lawyers' conduct in hindsight. Since the plaintiff's attorney did not realize until after a jury verdict that his client had engaged in fraud, no sanctions were warranted. "In speculating *after trial* that Plaintiff's fraud was evident early in the proceedings, the Court did not—and does not—intend to retroactively inflict consequences of its well-informed opinion on Plaintiff *counsel's* every move." "[C]ourts are expected to be "mindful that [they] should not punish

counsel under § 1927 merely for zealous advocacy or for being on the losing side of a case."

Faculty

Hon. Cynthia A. Norton is a U.S. Bankruptcy Judge for the Western District of Missouri in Kansas City. Prior to her appointment on Feb. 1, 2013, she was a founding partner of Grimes & Rebein, LC in Lenexa, Kan., where she focused on consumer and business bankruptcy, creditors' rights, commercial workouts and related fields. She also clerked for Hon. John E. Rees of the Kansas Court of Appeals and Hon. James A. Pusateri of the U.S. Bankruptcy Court in Topeka, Kan., and was previously an associate with Stinson, Mag & Fizzell, an associate and then partner with Lewis, Rice & Fingers, and Of Counsel with Levy & Craig, and established her own law firm in 1995. She has published an annual column reviewing Eighth Circuit bankruptcy cases of interest for *Norton's Bankruptcy Law Advisor* and has authored numerous articles, book chapters and seminar papers on bankruptcy-related topics, is a Fellow in the American College of Bankruptcy and a member of various bankruptcy organizations. She also is the recipient of the Michael R. Roser Excellence in Bankruptcy Award and the Robert L. Gernon Award for Outstanding Contribution to CLE, as well as the NCBJ Excellence in Education Award. Judge Norton received her B.A. in French and art history Phi Beta Kappa and *summa cum laude* from Kansas University in 1981, and her J.D. from the Kansas University Law School in 1984, where she was associate editor of its law review.