AMERICAN BANKRUPTCY INSTITUTE

2022 Annual Spring Meeting

Whoops! Ethics Issues Ripped from the Headlines: Recent Attorney Faux Pas

Hosted by the American Board of Certification

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

Hon. Peter G. Cary
U.S. Bankruptcy Court (D. Me.); Bangor

Hon. Elizabeth L. Gunn
U.S. Bankruptcy Court (D. D.C.); Washington

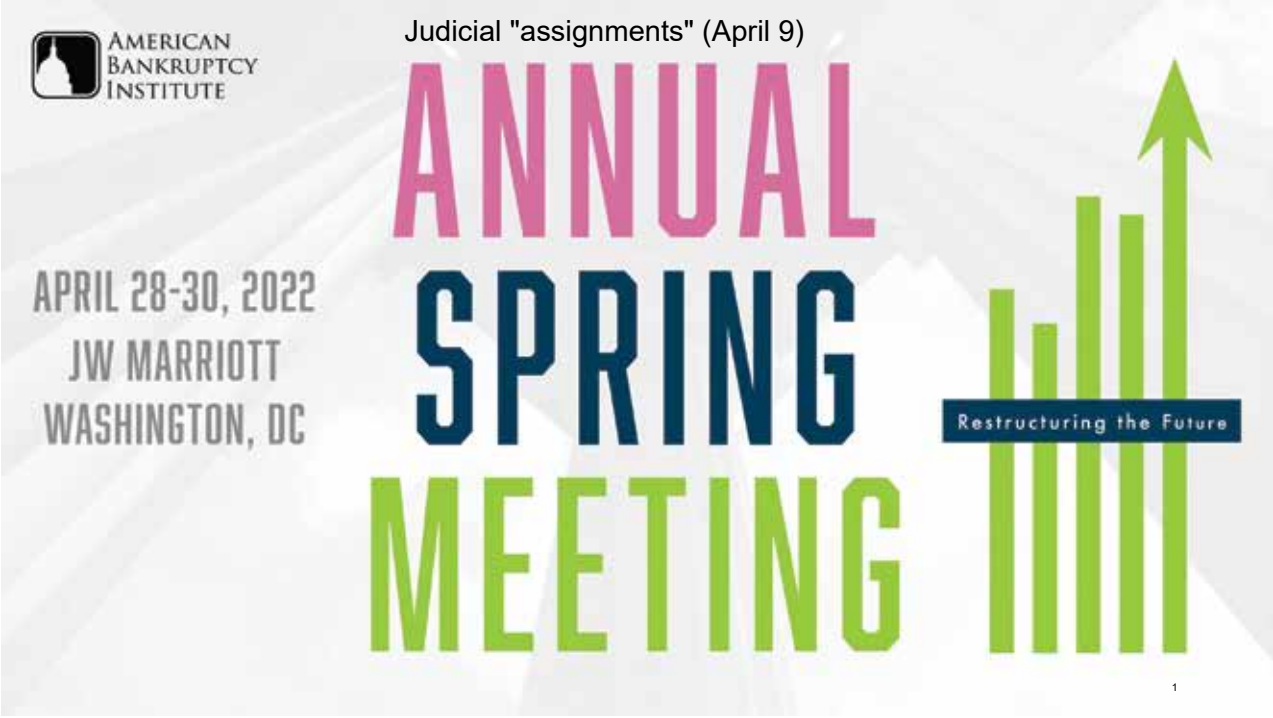
Hon. Gregory R. Schaaf
U.S. Bankruptcy Court (E.D. Ky.); Lexington

Hon. Mary F. Walrath
U.S. Bankruptcy Court (D. Del.); Wilmington

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

CONCURRENT SESSION

2022



Whoops! Ripped from the Headlines: A Panel of American Board Certified Judges Consider Attorneys' Faux Pas and other Ethical and Practice Concerns

April 30, 2022, 3:45 p.m. to 4:45 p.m. Eastern Daylight Time
American Bankruptcy Institute, Annual Spring Meeting, Washington, D.C.

Sponsored by The American Board of Certification (abcworld.org)

V 18

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Let's clear something up, first thing

https://www.wordhippo.com/what-is/the-plural-of/faux_pas.html:

The plural form of faux pas is also ***faux pas***.

3

Judges, please introduce yourselves

Hon. Peter G. Cary
Chief Judge, U.S. Bankruptcy Court (D. Maine); Bangor, Maine

Hon. Elizabeth L. Gunn
U.S. Bankruptcy Court (D. D.C.); Washington **(sworn in via Zoom -- in her living room)**

Hon. Gregory R. Schaaf
Chief Judge, U.S. Bankruptcy Court (E.D. Ky.); Lexington

Hon. Mary F. Walrath
U.S. Bankruptcy Court (D. Del.); Wilmington

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

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Donna Parkinson, Commentator
Parkinson Phinney
Sacramento
President, The American Board of Certification
Certified Specialist in Business Bankruptcy Law

J. Scott Bovitz, Impresario
Bovitz & Spitzer
Los Angeles
Former Chair, The American Board of Certification
Certified Specialist in Business Bankruptcy Law

Wesley H. Avery, Moderator
Chapter 7 Bankruptcy Trustee
Law Offices of Wesley H. Avery, APC
Pasadena
State Bar Liaison, The American Board of Certification
Certified Specialist in Business Bankruptcy Law

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Cary

Discussion: the role of legal specialization

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

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

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

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11 U.S.C. § 329

Gunn

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

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

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

(2) the entity that made such payment.

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Competence and diligence in representation

Gunn

8

Bankruptcy judges don't preside over 341(a) examinations, but they may have learned that the first meeting of creditors does not always go *smoothly*

Gunn

9

Clamping down on a busy (or lazy) lawyer

Schaaf

10

In re Cargill, 20-12261-7, 2021 WL 2069936, at *1 (Bankr. W.D. Wis. May 21, 2021) Schaaf

On September 1, 2020, Michael Benham Cargill ("Cargill" or "Debtor"), represented by Jacobson, filed a voluntary chapter 7. Cargill paid Jacobson $2,000.00 for the filing fee and attorney's fees. There was a written fee agreement that provided for the $2,000.00 as an advance payment. It included no disclosure of an hourly rate.

On October 13, the first meeting of creditors ("341 meeting") was held. The chapter 7 trustee ("Trustee") informed Cargill and Jacobson that the following documents had not been provided as required:

- Debtor's identification confirmation form
- lien confirmation documents
- bank statements, and
- tax returns.

These items were to have been provided before the 341 meeting.

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In re Cargill, 20-12261-7, 2021 WL 2069936, at *1 (Bankr. W.D. Wis. May 21, 2021) Schaaf

The 341 meeting was adjourned for about three weeks to allow Debtor to provide the missing documents. Since the documents were not provided in that period, the 341 meeting was continued for another three weeks. At this third meeting, the bank statements and lien confirmation documents were still missing. Jacobson told the Trustee the bank statements were sent earlier that day and lien confirmation documents would be forthcoming.

While some portion of the bank statements were submitted by Jacobson, they were incomplete. Extending courtesy to Cargill and Jacobson, the Trustee once again adjourned the 341 meeting to December 14.

On December 11, the Trustee informed Jacobson that the bank statements that had been provided were not complete, and based on the limited bank statements provided "the Debtor's schedules failed to disclose and exempt the entirety of the funds in his bank account."

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In re Cargill, 20-12261-7, 2021 WL 2069936, at *1 (Bankr. W.D. Wis. May 21, 2021) Schaaf

Yet again, the 341 meeting was adjourned—this time to December 28 to allow amended schedules to be filed and for Cargill to provide complete bank statements. Neither Cargill nor Jacobson appeared nor were the required documents provided.

On February 3, 2021, the Trustee filed an Order to Show Cause as to why the case should not be dismissed for the failure to provide bank statements, file amended schedules, and appear at the December 28 section 341 meeting.

On February 24, Cargill was ordered to provide all outstanding documents by March 8 and to appear at a continued 341 meeting on March 15 or the case would be dismissed.

Cargill filed amended schedules. On March 2 – 140 days after the initial 341 meeting and only after a Court order – complete bank statements were provided. The Trustee concluded the 341 meeting and filed a no asset report. Cargill received his discharge on April 1.

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In re Cargill, 20-12261-7, 2021 WL 2069936, at *2 (Bankr. W.D. Wis. May 21, 2021) Schaaf

About a month later, the UST filed a motion to examine fees. The motion requested that the Court:

- Find that Richard B. Jacobson & Associates, LLC, has failed to comply with §329 of the Bankruptcy Code;
- Find that the fees paid to Jacobson are unreasonable pursuant to §329;
- Order that Jacobson return or waive $800.00 of fees; and
- Order that all fee agreements between Jacobson and Cargill are void and cancel the agreements.

Responding, Jacobson conceded he was informed several times of the deficiencies, that he had ample opportunity to determine whether the bank statements provided were complete, and to object if they were, but he did not do so. He says he wrote to Cargill about the required documents and he sent the Trustee what he received.

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In re Cargill, 20-12261-7, 2021 WL 2069936, at *3 (Bankr. W.D. Wis. May 21, 2021) Schaaf

The issue before the Court is payment and reasonableness of professional fees paid to Jacobson. This falls within the parameters of "matters concerning the administration of the estate." 28 U.S.C. §157(b)(2)(A). The issue before the Court implicates 11 U.S.C. §§329-330 and Fed. R. Bankr. P. 2017. ...

If compensation to debtor's counsel "exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment." 11 U.S.C. § 329(b). Factors considered in determining "reasonableness" are listed in 11 U.S.C. § 330(a)(3). ...

15

In re Cargill, 20-12261-7, 2021 WL 2069936, at *4-5 (Bankr. W.D. Wis. May 21, 2021) Schaaf

As Jacobson argues, performance by competent attorneys is encouraged and benefits the administration of bankruptcy cases. Unfortunately, his performance did not benefit either Cargill or the administration of the case. It would have been a simple matter for Jacobson to review the bank statements provided in November. An experienced attorney would have concluded that providing the first page was insufficient and could have followed up to obtain the complete statements. ...

The hourly rate listed in Jacobson's submission is similar to rates charged by similarly situated attorneys in this District. Rate alone is not determinative. Services were not performed competently or within a reasonable time period. Obtaining and providing bank records prior to the section 341 meeting is a routine matter that is important but not complex. A delay of 140 days jeopardized a discharge for Cargill and caused the Trustee and the Court to expend unnecessary time and resources to address Jacobson's inaction or lack of attention to matters. While based on statements of Jacobson there were services on top of those described in the time records that were submitted, there is no evidence of those services or their reasonableness in the record.

16

A few words about "orders to show cause"

Walrath

What is the purpose of an order to show cause?

What does a judge do if an attorney fails to appear at a hearing on an order to show cause?

If the attorney appears at an OSC, what is the judge looking for?

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In re Symka, Inc., 518 B.R. 888, 889-890 (Bankr. D. Colo. 2014)

Walrath

The Court frequently issues orders to show cause. Typically, these are intended to prompt compliance with Court orders or Court procedures.

It is a different matter where a private litigant seeks the Court's entry of an order to show cause for purposes that are unrelated to enforcement of Court rules or orders. In effect, such a litigant seeks the Court's endorsement of relief against another private party, on an *ex parte* basis, before the merits of that relief have been subjected to due process. Such orders create an appearance of impropriety. They create the appearance that the Court has evaluated allegations made by the applicant—without an opportunity for input from the other party—and adopts the applicant's position that a basis exists to require the target of the order to appear and explain himself to the Court.

At least partially for the above reasons, a motion for an order to show cause is not a form of pleading that is recognized by the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 7. ...

The Court does not suggest that a motion for an **order** to **show cause** is *per se* impermissible. But, because the entry of an **order** to **show cause** is an official act of the Court, it is most appropriately used to compel compliance with Court orders or procedures.

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Debt relief agency

Wanslee

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

> A "debt relief agency" is "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration." 11 U.S.C.A. § 101(12A). However, the Bankruptcy Code specifically excludes five general groups from the definition of "debt relief agency." … Notably, the lynchpin of a "debt relief agency" requires that the bankruptcy assistance be provided to an "assisted person." The Bankruptcy Code defines "assisted person" as "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $226,850 [effective April 1, 2022] 11 U.S.C.§ 101(3). …
>
> Attorneys that provide assistance to "assisted persons" constitute "debt relief agencies." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 130 S. Ct. 1324, 176 L. Ed. 2d 79 (2010); *see also Hersh v. U.S. ex rel. Mukasey*, 553 F.3d 743, 750 (5th Cir. 2008) ("[U]nder the plain language of 11 U.S.C. § 101(12A), attorneys qualify as 'debt relief agencies.'"); *In re Brown*, 505 B.R. 716, 723 (Bankr. W.D. Va. 2014) ("an attorney representing a consumer debtor who qualifies as an 'assisted person' is a 'debt relief agency.'").

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11 U.S.C. §526

Wanslee

(a) A debt relief agency shall not—

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

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

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

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11 U.S.C. § 526 (cont.)

Wanslee

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

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

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

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

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

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11 U.S.C. § 526 (cont.)

Wanslee

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

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

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

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

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

(A) enjoin the violation of such section; or

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

22

Debtors' transactions with attorneys

Cary

House and Senate Reports (Reform Act of 1978)

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

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Federal Rule of Bankruptcy Procedure 2016(b)

Cary

(b) Disclosure of Compensation Paid or Promised to Attorney for Debtor.

> Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 14 days after the order for relief, or at another time as the court may direct, the statement required by §329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity.
>
> The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required.
>
> A supplemental statement shall be filed and transmitted to the United States trustee within 14 days after any payment or agreement not previously disclosed.

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Federal Rule of Bankruptcy Procedure 2017

Gunn

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

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

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"National law firm" practice issues

Walrath

Ease of finding clients through the internet.

Client comfort with communicating with professionals on the internet.

Disclosure of compensation.

Supervision of non-attorney staff.

Misrepresentation to clients.

26

In re Ward, CV 20-03176-HB, 2021 WL 1940743, at *1 (Bankr. D.S.C. May 13, 2021) Walrath

Babbs is an attorney licensed in Florida. He is the sole shareholder of the Firm, located in Florida and Virginia. Babbs and the Firm are each a "debt relief agency" as defined in 11 U.S.C. § 101(12A). The Firm recruits attorneys licensed in various states to assist with the filing and management of cases. An email solicitation to attorneys in South Carolina makes clear the Firm sought an arrangement whereby the Firm would perform most, if not all, prepetition work and local counsel would do a minimal amount, including appearing for the meeting of creditors and any other court appearances. ...

In December 2019, the Firm and an attorney licensed in South Carolina and admitted to practice in this Court ("SC Counsel") entered a "Counsel Agreement" whereby the Firm agreed to retain the SC Counsel as a "part-time independent contractor" to serve as "local counsel" for the Firm's clients in bankruptcy and other debt relief matters. The agreement states the Firm is "lead counsel as between them, and the client to have originated with and be primarily a client of [the Firm]." SC Counsel proffered that he is not an employee of the Firm, later stipulated that he also is not a partner or member of the Firm ...

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In re Ward, CV 20-03176-HB, 2021 WL 1940743, at *1-2 (Bankr. D.S.C. May 13, 2021) Walrath

James Ward, Teresa Ward, and Darrell Smith (collectively, the "Clients") are "assisted persons" as defined by §101(3). The Clients found the Firm after conducting an internet search for bankruptcy lawyers. …

Clients communicated with and received assistance and advice from numerous individuals at the Firm in Virginia who are not lawyers. From April through July 2020, no attorney was involved in the prepetition legal services provided to Clients by the Firm, including advising Clients if they should file for bankruptcy relief and which chapter would be most appropriate, reviewing and discussing the retainer agreements, conducting financial interviews, requesting and reviewing Client documents, preparing and reviewing the petitions, schedules, and statements, and sending the same to the Clients for review, and answering any of the Clients' questions.

The Firm misrepresented to the Clients that these actions were supervised by an attorney. That person would be Jeff Sherman, employed by the Firm as "in-house counsel." However, in pretrial filings Babbs and the Firm stipulated to facts as follows: Sherman is not an attorney (stipulated multiple times); the "in-house counsel" who reviewed and approved Smith's bankruptcy documents is not an attorney; the only attorney who reviewed Smith's bankruptcy documents was SC Counsel; and the Wards' financial interview was conducted by the Firm's non-attorney personnel.

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In re Ward, CV 20-03176-HB, 2021 WL 1940743, at *2 (Bankr. D.S.C. May 13, 2021) Walrath

No attorney reviewed the Wards' bankruptcy documents until after they were already reviewed and signed by the Wards. An attorney first reviewed Smith's bankruptcy documents the day before they were filed. Neither the Firm, Babbs, nor SC Counsel were able to produce copies of the Clients' signed bankruptcy documents. The Clients retained the Firm in April 2020 and June 2020, and the Wards paid the Firm's fee by May 2020 and Smith by June 2020. However, their cases were not filed for several months thereafter. The Clients repeatedly contacted the Firm seeking status updates, asking who their attorney would be, and requesting their cases be filed. There was no adequate explanation for the prolonged delays. ...

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In re Ward, CV 20-03176-HB, 2021 WL 1940743, at *3 (Bankr. D.S.C. May 13, 2021) Walrath

The "Disclosure of Compensation of Attorney for Debtor" (Official Form B 2030) pursuant to 11 U.S.C. §329 and Fed. R. Bankr. P. 2016 ("Disclosures") filed with the Clients' petitions are signed by Babbs on behalf of the Firm. ... The Disclosures indicate the Firm is not sharing fees with anyone who is not a member or associate of the law firm. However, other Disclosures filed simultaneously therewith show SC Counsel received $440.00 from the Firm in each case. The Firm has represented debtors in other cases filed in this Court. ...

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In re Ward, CV 20-03176-HB, 2021 WL 1940743, at *5 (Bankr. D.S.C. May 13, 2021) Walrath

The Disclosures and written retainer agreements between the Clients and only the Firm included work the Firm was incapable of doing without SC Counsel and did not disclose payment of SC Counsel or the need for those services. Therefore, such Disclosures and agreements contain untrue and misleading terms and do not explain clearly and conspicuously the services to be provided or the fees for such services. The Disclosures and agreements provided for prepetition legal services, including advising the Clients and preparing bankruptcy documents, which were performed by unsupervised or improperly supervised non-attorney personnel. The terms of the agreements gave Clients the false impression that a properly licensed attorney would represent them throughout their cases.

31

In re Ward, CV 20-03176-HB, 2021 WL 1940743, at *5 (Bankr. D.S.C. May 13, 2021) Walrath

The evidence shows the Firm violated § 526(a)(2), failed to satisfy its obligations under § 528(a), failed to adequately disclose compensation as required by § 329(a), and the compensation received was unreasonable under § 329(b). Further, the acts do not appear to be isolated or accidental, but rather intentional or at least extremely negligent. They arise from a for-profit business model and are present in numerous cases before this Court. Pursuant to §§329(a) and (b) and 526(c)(1) and (c)(2)(A), the retainer agreements between the Firm and the Clients must be voided and all fees returned. The Court also finds that a further civil penalty and injunction are appropriate under §§105(a) and 526(c)(5) to remedy these violations and ensure future compliance with applicable rules and statutes. ...

... pursuant to 11 U.S.C. §§105(a) and 526(c)(5), Sam Babbs III and the Babbs Law Firm, LLC are enjoined from appearing in or assisting with any potential or existing bankruptcy case in the District of South Carolina until further order of the Court after adequately demonstrating that their practices comply with all applicable authorities.

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UpRight Law

Wanslee

https://www.justice.gov/opa/pr/national-consumer-bankruptcy-law-firm-agrees-pay-more-300000-relief-consumers-and-six-year (March 10, 2021)

> The Department of Justice's U.S. Trustee Program (USTP) has entered into a settlement with national consumer bankruptcy law firm Deighan Law LLC, previously known as Law Solutions Chicago and doing business as UpRight Law (UpRight). … UpRight has paid or will pay more than $300,000 in monetary relief and will be barred from representing bankruptcy clients in Montana for six years. … the USTP alleged that UpRight engaged in misconduct and misrepresentations impacting hundreds of Montana consumers … In one case, UpRight substantially delayed filing its client's bankruptcy case for almost a year after it misrepresented that it had a local attorney who was licensed in Montana available to file the case. UpRight's delay resulted in a creditor garnishing more than $6,000 of the debtor's wages.

33

L. Sols. of Chicago LLC v. Corbett, 971 F.3d 1299, 1304 (11th Cir. 2020)

Wanslee

> Bankruptcy is a creation of statute, and those who practice bankruptcy law must comply with its myriad statutory provisions and implementing rules. "Debt relief agencies" that represent "assisted persons," as those terms are defined in the Bankruptcy Code, have additional obligations under the statute. Law Solutions of Chicago LLC and UpRight Law LLC (jointly, "The UpRight Law Firm"), and an attorney with that firm, Mariellen Morrison (collectively, "UpRight"), qualify as debt relief agencies that represent assisted persons.
>
> By order dated April 19, 2018, the Bankruptcy Court for the Northern District of Alabama found that UpRight had violated several applicable provisions and rules, and it imposed sanctions against them. UpRight appealed the sanctions order to the District Court, which affirmed, and they now appeal to us. After review and oral argument, we also affirm.

34

L. Sols. of Chicago LLC v. Corbett, 971 F.3d 1299, 1305 (11th Cir. 2020) Wanslee

An attorney representing a debtor is required by § 329(a) and Rule 2016(b) to file (and to amend or supplement as necessary) a disclosure with the court that sets the amount of compensation that she has been paid or will be paid ("Attorney Disclosure" or "2016 Disclosure"). If the attorney qualifies as a debt relief agency, § 528(a) requires that she provide her clients with a written contract that "clearly and conspicuously" explains the services that will be provided to the client for the agreed upon charge ("Retention Agreement"). If these documents are materially inaccurate, the attorney may have potentially violated several statutory provisions and rules.

35

L. Sols. of Chicago LLC v. Corbett, 971 F.3d 1299, 1306 (11th Cir. 2020) Wanslee

Lastly, and most notably for this case, §526(a)(2) provides that:

> (a) A debt relief agency shall not—
>
> * * *
>
> (2) make any statement ... in a document filed in a case or proceeding under this title, that is untrue or misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue or misleading[.]

If a debt relief agency is found to have intentionally violated this provision, or was "engaged in a clear and consistent pattern or practice of violating [it]," §526(c)(5) authorizes the Bankruptcy Court to enjoin the violation and impose an appropriate civil penalty against the offender.

In sum, if a debt relief agency files an Attorney Disclosure that is without evidentiary support, incorrect, untrue, and/or misleading, the Bankruptcy Court could potentially impose civil sanctions under Rule 9011; its statutory contempt authority in § 105; its inherent contempt authority; or §707 and §526.

36

L. Sols. of Chicago LLC v. Corbett, 971 F.3d 1299, 1305–1306 (11th Cir. 2020)

Wanslee

Similarly, and even more expansively, § 707(b)(4)(C)-(D) provides that an attorney's signature on a pleading, petition, or motion is certification that she has investigated the circumstances giving rise to that document and determined that it is well grounded in fact and warranted by existing law, and that it contains correct information. If an attorney violates this provision, she can be sanctioned under the Bankruptcy Court's inherent contempt power or its statutory civil contempt power in § 105(a), which provides, in relevant part, that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

37

L. Sols. of Chicago LLC v. Corbett, 971 F.3d 1299, 1306-1307 (11th Cir. 2020)

Wanslee

The UpRight Law Firm is a large legal operation with its principal office in Chicago, Illinois. It is an amalgamation of hundreds of attorneys and various law firms that cooperate to provide legal services, including bankruptcy representation, to clients in all 50 states. The firm solicits clients through the internet and refers them to "partners" who practice in the specific locality where the clients reside. The Bankruptcy Court found—and it doesn't appear to be in dispute—that the local attorneys affiliated with The UpRight Law Firm have very little, if any, input into how the firm's business is conducted; they appear to be "partners" in name only. ...

On April 5, 2016, J. Thomas Corbett, the Bankruptcy Administrator ("BA") for the Northern District of Alabama, brought two adversary proceedings ... asserted multiple claims, the most significant of which concerned UpRight's purported involvement in a car repossession scheme (known as the "Sperro/Fenner repo scam") that was utilized to pay the attorney and filing fees in the two cases.

38

L. Sols. of Chicago LLC v. Corbett, 971 F.3d 1299, 1307 (11th Cir. 2020) Wanslee

The "Sperro/Fenner repo scam" isn't directly relevant to this appeal, so we don't need to discuss it in great detail. Stated briefly, the alleged scheme was as follows: When a potential client contacted The UpRight Law Firm, he would be asked if he owned an encumbered vehicle that he intended to surrender to the secured creditor. If the client said yes, he was referred to Sperro LLC or Fenner & Associates LLC—companies controlled by a business associate of the firm—and they would take possession of the vehicle and pay the attorney and filing fees for the client's bankruptcy case.

Sperro/Fenner would then tow the vehicle to another state; notify the secured creditor that its collateral was in storage at their facility; and give the creditor just a few days to pay large fees for loading, towing, and storing expenses. If the creditor refused to pay, the vehicle was sold at auction. This scheme not only harmed the secured creditors, of course, but it exposed the debtors to potential civil and criminal liability, in addition to subjecting them to claims by the creditors for nondischargeability of debts and jeopardizing their discharge and financial "fresh start" under the Bankruptcy Code.

39

L. Sols. of Chicago LLC v. Corbett, 971 F.3d 1299, 1315 (11th Cir. 2020) Wanslee

Throughout the course of its opinion and order, the Bankruptcy Court made a number of negative comments about The UpRight Law Firm and what the court perceived to be its ethically-questionable business model. It referred to the firm as a "bankruptcy mill" and "high-volume, monolithic ... internet cartel" that used "marketing strategies ... often at the expense of their clients." It said that UpRight was after "profits," not "public service," and that its argument to the contrary was "absurd."

40

L. Sols. of Chicago LLC v. Corbett, 971 F.3d 1299, 1320 (11th Cir. 2020) Wanslee

UpRight clearly violated §526, and the Bankruptcy Court—which had the opportunity to the see the UpRight witnesses at the evidentiary hearing firsthand, observe their demeanor, and assess their credibility—found them to be "arrogant" and "indifferent" and their defenses "incredulous" and "absurd." The Bankruptcy Court felt that the previous sanctions failed to get UpRight's attention; and although there were only six Post-Settlement Cases filed, it found there would have been no difference in their conduct had there been one hundred cases instead of six. Viewed in totality, the evidence supports a finding of a "clear and consistent pattern or practice." 11 U.S.C. §526(c)(5). ...

Ultimately, while we may not have employed certain of the language that the Bankruptcy Court used—and while we might have imposed different sanctions ourselves—we agree that serious sanctions were appropriate.

41

11 U.S.C. §707(b)(4)(A)

Wanslee

(A) The court, on its own initiative or on the motion of a party in interest, in accordance with the procedures described in rule 9011 of the Federal Rules of Bankruptcy Procedure, may order the attorney for the debtor to reimburse the trustee for all reasonable costs in prosecuting a motion filed under section 707(b), including reasonable attorneys' fees, if—

(i) a trustee files a motion for dismissal or conversion under this subsection; and

(ii) the court

(I) grants such motion; and

(II) finds that the action of the attorney for the debtor in filing a case under this chapter violated rule 9011 of the Federal Rules of Bankruptcy Procedure.

42

11 U.S.C. §707(b)(4)(B)

Wanslee

(B) If the court finds that the attorney for the debtor violated rule 9011 of the Federal Rules of Bankruptcy Procedure, the court, on its own initiative or on the motion of a party in interest, in accordance with such procedures, may order—

(i) the assessment of an appropriate civil penalty against the attorney for the debtor; and

(ii) the payment of such civil penalty to the trustee, the United States trustee (or the bankruptcy administrator, if any).

43

11 U.S.C. §707(b)(4)(C)

Gunn

(C) The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has—

(i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and

(ii) determined that the petition, pleading, or written motion—
(I) is well grounded in fact; and
(II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).

44

11 U.S.C. §707(b)(4)(D)

Gunn

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

45

Federal Rule of Bankruptcy Procedure 9011

Gunn

10-9011 Collier on Bankruptcy ¶ 9011.04

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

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

46

Federal Rule of Bankruptcy Procedure 9011 (b) Gunn

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

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

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

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

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

47

Federal Rule of Bankruptcy Procedure 9011 (c) Gunn

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

48

Discussion: no knowledge

Schaaf

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

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

How much inquiry is enough?

Can the attorney rely on the intake questionnaire?

What independent research and investigation is required in the $1,500.00 flat fee case?

49

In re Dozier, AP 20-3006, 2021 WL 5991749, at *1 (Bankr. D.S.D. Dec. 15, 2021)

Schaaf

Warren Boyd Dozier ("Debtor") sought bankruptcy relief because he had medical bills in excess of $1,000,000.00. In late March 2015, Debtor hired Aloysius Arendt ("Attorney Arendt") to be his bankruptcy attorney. ...

On April 5, 2015, Debtor's mother, Joyce Dozier, died. Her will named Debtor as her sole heir.

On April 6, 2015, Bonnie London spoke to Attorney Arendt by telephone to ask whether Joyce Dozier's death would impact Debtor's bankruptcy. Attorney Arendt advised her it would not ...

On May 21, 2015, Debtor filed his chapter 7 petition, schedules, and statements. In signing the petition, Debtor declared, under penalty of perjury, that the information provided in the petition was true and correct. Because Debtor's debts were primarily consumer debts and 11 U.S.C. §707(b)(4)(D) applied, in signing the petition Attorney Arendt certified he had no knowledge after an inquiry that the information in the schedules was incorrect. ...

50

In re Dozier, AP 20-3006, 2021 WL 5991749, at *1 (Bankr. D.S.D. Dec. 15, 2021) Schaaf

At question 20 on his schedule of assets, Debtor did not disclose his mother had died earlier and he was her sole heir. On his schedule of monthly expenses, at question 24, which asked Debtor if he expected any increase or decrease in expenses within the following year, Debtor implied his mother was still living when he stated he "resides in his mother's house in Pierre, SD, is fully disabled and pay's [sic] her rent and helps with the utilities as set forth on the Schedule J; in addition, he drives her 2001 Dodge Ram 1500 PU, pays for the insurance, gas and upkeep on the same."

Attorney Arendt has acknowledged Debtor's answer was not responsive to the question; Attorney Arendt stated he just put on the form the answer Debtor gave him.

51

In re Dozier, AP 20-3006, 2021 WL 5991749, at *1 (Bankr. D.S.D. Dec. 15, 2021) Schaaf

Debtor and Attorney Arendt attended Debtor's meeting of creditors conducted by the case trustee, Forrest C. Allred, on July 1, 2015. During the meeting, Debtor affirmed under oath the truthfulness, accuracy, and completeness of his schedules and indicated no changes to them were needed. Debtor also testified he was not a beneficiary under any probate proceeding.

52

In re Dozier, AP 20-3006, 2021 WL 5991749, at *2 (Bankr. D.S.D. Dec. 15, 2021) Schaaf

Attorney Arendt never advised Trustee Allred that Debtor–and later Debtor's decedent's estate–inherited Joyce Dozier's assets. Attorney Arendt said he did not do so because he did not have a fiduciary obligation to the bankruptcy court. ...

Trustee Allred next commenced this adversary proceeding against Attorney Arendt. In his amended complaint, Trustee Allred seeks both damages from Attorney Arendt and sanctions against Attorney Arendt regarding Debtor's and Attorney Arendt's failure to disclose in Debtor's chapter 7 bankruptcy case Debtor's interest in the Joyce Dozier estate.

53

In re Dozier, AP 20-3006, 2021 WL 5991749, at *4 (Bankr. D.S.D. Dec. 15, 2021) Schaaf

Attorney Arendt does not dispute: Debtor's interest in the Joyce Dozier estate became property of Debtor's bankruptcy estate when Debtor filed his chapter 7 petition; Debtor did not initially schedule his interest in the Joyce Dozier estate or later amend his schedules to add this interest as an asset; neither Debtor nor Attorney Arendt disclosed Debtor's interest in the Joyce Dozier estate to Trustee Allred at the meeting of creditors or at any time thereafter, including when Attorney Arendt assisted Debtor in administering the Joyce Dozier estate; and Attorney Arendt did not take any steps to ensure the assets of the Joyce Dozier estate were not transferred to others, to the exclusion of Debtor's bankruptcy estate. Attorney Arendt also does not dispute Trustee Allred relied on Debtor's schedules and Debtor's meeting of creditors testimony and closed Debtor's bankruptcy case without administering any assets, resulting in a yet undetermined injury to the bankruptcy estate and its creditors. Thus, of the elements of fraud cited by the parties, two remain at issue: Did Attorney Arendt make a fraudulent statement–or remain silent when he had a duty to disclose–and, if so, whether Attorney Arendt spoke–or remained silent–with an intent to deceive and for the purpose of inducing Trustee Allred to act upon it.

54

In re Dozier, AP 20-3006, 2021 WL 5991749, at *4-5 (Bankr. D.S.D. Dec. 15, 2021)

Schaaf

What the undisputed record does not show–and thus what first precludes summary judgment in Trustee Allred's favor–is Attorney Arendt had a duty *to Trustee Allred* to ensure the accuracy of Debtor's schedules or the truthfulness of Debtor's testimony at the meeting of creditors or to advise Trustee Allred directly of Debtor's interest in the Joyce Dozier estate. Trustee Allred has not specifically identified that duty, originating either in statute, an applicable standard of professional conduct, or common law. ...

Trustee Allred will also need to establish Attorney Arendt intended to deceive him. Though Trustee Allred believes the present record is sufficient to determine Attorney Arendt's intent, it is not.

55

In re Dozier, AP 20-3006, 2021 WL 5991749, at *5 (Bankr. D.S.D. Dec. 15, 2021)

Schaaf

Trustee Allred alleges Attorney Arendt made numerous false representations of fact or omissions in the bankruptcy filings he prepared and filed for Debtor, these representations and omissions were material and Attorney Arendt knew they were false or should have known they were false, and Attorney Arendt's actions were a fraud on the Court, subjecting Attorney Arendt to civil contempt under 11 U.S.C. § 105 and the Court's inherent contempt power. ...

The trustee's allegations regarding Attorney Arendt's preparation and filing of Debtor's schedules, remaining silent at the meeting of creditors, and remaining silent when he knew the Joyce Dozier estate held assets for Debtor's bankruptcy estate do not, as a matter of law, meet the definition of a fraud on the Court.

56

Joint and several liability of debtor and attorney for FRBP 9011 sanctions

Gunn

57

In re Perez, 627 B.R. 702, 703 (Bankr. S.D. Fla. 2021)

Gunn

... the law firm of Marrero, Chamizo, Marcer Law, LP (the "MCM Firm") should be jointly and severally responsible for the attorney fees and costs incurred by the Creditor in connection with this bankruptcy case. ...

The case was filed by the Debtor, Lorenzo Perez, Jr., on February 6, 2020 ... Creditor was the record title owner of property subject of the bankruptcy proceeding ... the Court entered its Order Granting Motion to Dismiss with Prejudice, A [sic] for Prospective Stay Relief and for Sanctions and Setting Hearing on Order to Show Cause ... finding the case was filed in bad faith solely to avoid eviction from Property, dismissing the case with prejudice for one year, granting two years of "*in rem*" stay relief, and reserving jurisdiction to determine whether the Creditor "is entitled to attorney fees and other costs pursuant to Fed. R. Bankr. P. 9011." ...

The sole issue remaining is whether the MCM Firm should be held jointly and severally liable for the sanctions.

58

In re Perez, 627 B.R. 702, 704 (Bankr. S.D. Fla. 2021)

Gunn

While it is clear that the Debtor violated Rule 9011(b)(1), it is also clear that the MCM Firm violated Rule 9011(b)(2).

Because the MCM Firm's litigation tactics, including the filing of the appeal of the Dismissal Order and waiting to the last minute to stipulate to facts for a scheduled evidentiary hearing, and the Debtor's non-litigation delays, including refusing access to the property both before and after title passed, worked in tandem, both the Debtor and the MCM Firm are responsible for the filing of the bad faith petition and the costs associated with the Motion to Dismiss and the subsequent events. Therefore, it is ORDERED that the MCM Firm and the Debtor are jointly and severally liable for the sanctions ...

59

In re Schemelia, 607 B.R. 455, 457-458 (Bankr. D.N.J. 2019)

Cary

South Jersey Federal Credit Union ("Creditor"), by its counsel, Robert Malloy has brought a motion for sanctions (the "Motion") against Debtor's Counsel, Mark Ford, alleging violations of Federal Rule of Bankruptcy Procedure 9011, as well as asking this Court to impose sanctions pursuant to its inherent authority under section 105 of Title 11 of the United States Code (the "Bankruptcy Code") and under 28 U.S.C. § 1927, for filing a voluntary petition under Chapter 13 of the Bankruptcy Code in bad faith and containing knowingly false statements. For the reasons stated herein, the Motion is granted. ...

... the Property had been sold by auction at a Sheriff's sale and the Sheriff's deed was conveyed to Creditor more than a month prior to the Petition Date. ... In response to Court questions, Mr. Ford admitted that he was aware that title had transferred prior to the Petition Date. ...

60

In re Schemelia, 607 B.R. 455, 459–460 (Bankr. D.N.J. 2019) Cary

If the Court determines that the Petition has been filed for an improper purpose, sanctions are still not appropriate unless the Court determines that Mr. Ford had failed to conduct a reasonable inquiry prior to filing the Petition. Fed. R. Bankr. P. 9011(b). As far as what constitutes a reasonable inquiry, "[t]he Third Circuit has defined reasonableness as 'an objective knowledge or belief at the time of the filing of a challenged paper that the claim was well-grounded in law and fact.' " In re Antonelli, 2012 WL 280722, at *11 (Bankr. D.N.J. Jan. 30, 2012) (quoting In re Taylor, 655 F.3d 274, 284 (3d Cir.2011)), The duty of reasonable inquiry is determined objectively.

61

In re Schemelia, 607 B.R. 455, 460 (Bankr. D.N.J. 2019) Cary

... pursuant to Rule 9011(c), no safe harbor letter need be sent if a party seeks sanctions for the filing of a petition. In re Antonelli, 2012 WL 280722, at *8 (Bankr. D.N.J. Jan. 30, 2012) (citing Fed. R. Bankr. P. 9011 Advisory Committee Note (1997) ("The 'safe harbor' provision contained in subdivision (c)(1)(A) ... does not apply if the challenged paper is a petition.")).

62

In re Schemelia, 607 B.R. 455, 460–461 (Bankr. D.N.J. 2019) Cary

A review of all of the facts and circumstances of this case leads this Court to conclude that the Petition was indeed filed for an improper purpose. First, the Petition was filed to delay eviction after a Writ of Possession had been issued under the guise of attempting to save ownership of the Property. This was improper because both Mr. Ford and the Debtor were aware that title had transferred to the Creditor and the Debtor was effectively a tenant at sufferance with only a possessory interest. Additionally, the Petition lists only $2,000 of unsecured debt, all of which could have been discharged through a Chapter 7.

The Petition and the Plan also indicate that the case was filed for an improper purpose or without legal or factual support. The Plan proposed only a nominal monthly payment which would not have been sufficient to pay the amounts owed on the mortgage even if the mortgage could somehow have been reinstated.

Moreover, Schedule A incorrectly lists the Debtor as the owner of the Property, despite the fact that title had been transferred and the redemption period lapsed.

63

Discussion: lawyer fibbing and irresponsibility Walrath

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

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

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

Why are some attorneys prone to fudging the truth?

Do you refer liars to the State Bar?

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

64

In re Pigg, 14-50266-CAN7, 2015 WL 7424886, at *1 (Bankr. W.D. Mo. Nov. 20, 2015) Walrath

Attorney Michael McCrary appeared before the Court for a final, evidentiary hearing in response to two sanctions motions and the Court's Order to Show Cause why additional sanctions should not be imposed. Mr. McCrary's actions, admissions, and arguments did little to persuade the Court that he should escape sanctions. Rather, the Court believes that sanctions and disgorgement totaling $8,649.501 are warranted, and that Mr. McCrary should be referred to the appropriate disciplinary authorities for the admitted ethical violations that damaged his clients, other parties in interest, and the integrity of the bankruptcy system. ... Mr. McCrary is an experienced bankruptcy lawyer, representing consumer debtors in Chapters 7 and 13 in the various divisions of the Western District of Missouri. He is also the bankruptcy attorney who filed Chapter 7 petitions for Lori B. Pigg and Jessica L. Harkins.

65

In re Pigg, 14-50266-CAN7, 2015 WL 7424886, at *2-3 (Bankr. W.D. Mo. Nov. 20, 2015) Walrath

Mr. McCrary electronically filed a voluntary petition for Chapter 7 relief for Ms. Pigg on May 30, 2014, or approximately three months after she first contacted him. ...

Ms. Pigg listed no payments to or for the benefit of creditors or insiders in response to SOFA Questions 3.a and b, and no transfers outside the ordinary course under SOFA Question 10.a.

In reality, however, Ms. Pigg had received and deposited into her bank account federal and state tax refunds totaling $10,355 within the 90 days before she filed bankruptcy. Ms. Pigg had not only used the tax refunds to pay Mr. McCrary's attorney fees, but had also paid $3,654.53 for the benefit of one of her mother's creditors, Putnam County State Bank, and $2,000 to repay a loan to her sister. As will be discussed in more detail below, Mr. McCrary has admitted that he knew about the tax refunds and the payments to the family members before he filed Ms. Pigg's bankruptcy petition, schedules and statements, and that he advised her not to disclose the transfers.

66

In re Pigg, 14-50266-CAN7, 2015 WL 7424886, at *4 (Bankr. W.D. Mo. Nov. 20, 2015) Walrath

Mr. McCrary failed to properly advise Ms. Pigg about the receipt and expenditure of the tax refunds; failed to disclose the payments from the refunds to the family members and other creditors on the SOFA; failed to advise Ms. Pigg that the transfers could be recovered by the Trustee; and failed to amend the schedules until after the Trustee discovered the transfers. The UST sought disgorgement of Mr. McCrary's attorney fees under §329, in addition to sanctions in the suggested amount of $1,500 for violation of §707(b)(4). ... Mr. McCrary also admitted that by these failures he had violated §704(b)(4)(D), that his fees should be disgorged as excessive under §329(b), and that a $1,500 sanction should be imposed.

67

In re Pigg, 14-50266-CAN7, 2015 WL 7424886, at *5 (Bankr. W.D. Mo. Nov. 20, 2015) Walrath

Mr. McCrary did not deny that he knew about the transfers Ms. Pigg made with her tax refund money before he prepared and filed the SOFA. He attempted to defend his nondisclosure of the transfer for the benefit of Ms. Pigg's mother, however, saying that although he had “processed” the information, he thought the payment was for “disguised rent” which did not need to be disclosed. Mr. McCrary did not explain or address his failure to disclose the other omitted transfers, including the $2,000 loan repayment to Ms. Pigg's sister. He did not explain or address why he allowed Ms. Pigg to testify falsely that her schedules and statements were accurate when he knew otherwise. He did not explain or address the three-month delay in amending the SOFA to finally disclose the transfers.

68

In re Pigg, 14-50266-CAN7, 2015 WL 7424886, at *5 (Bankr. W.D. Mo. Nov. 20, 2015) Walrath

In response to the Trustee's questioning on cross-examination, Mr. McCrary also made two other important admissions. He admitted that he told the Trustee after the § 341 meeting that Ms. Pigg had not told him about the transfers, which was a lie.

He also admitted that he was not controverting Ms. Pigg's sworn testimony at her Rule 2004 examination that he affirmatively advised her—in his office in the presence of her boyfriend—that she did not have to disclose the transfers.

69

In re Pigg, 14-50266-CAN7, 2015 WL 7424886, at *7 (Bankr. W.D. Mo. Nov. 20, 2015) Walrath

Here, Mr. McCrary admitted in his response to the UST's Motion that he violated Rule 9011 and §707(b)(4)(D). He admitted he knew before he signed the petition that Ms. Pigg had transferred funds to her mother and sister before the bankruptcy filing. He admitted he knew that the transfers were required to be disclosed and knew that the transfers were avoidable. And he admitted that he nonetheless advised her not to disclose them. No competent lawyer—let alone an experienced bankruptcy lawyer—could objectively believe that the transfers did not have to be disclosed in at least three places in the SOFA ...

70

In re Pigg, 14-50266-CAN7, 2015 WL 7424886, at *29 (Bankr. W.D. Mo. Nov. 20, 2015)

Walrath

It is apparent to the Court that Mr. McCrary thinks he can buy his way out and avoid any real consequences for the problems his actions caused his clients. And, the Court believes that the record establishes an inference that Mr. McCrary violated far more MRPCs than the ones that were fairly presented in the UST's Motions.

Given that the same deceitful and unethical conduct occurred in two cases—and that in neither case was Mr. McCrary ... remorseful or able to offer a credible explanation—the Court does not believe that imposing further sanctions in this Court would have an educational or deterrent effect on Mr. McCrary. Rather, the Court believes that a referral to the State of Missouri and the Court en banc for the Western District of Missouri will ensure that a full investigation of Mr. McCrary's dishonest and unethical conduct occurs.

71

Discussion: pre-bankruptcy planning vs. the concealment of assets

Gunn

Why would a lawyer ever advise his client not to disclose non-exempt assets?

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

72

Discussion: reaffirmation agreements

Cary

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

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

Is it practical to require an independent assessment, when the attorney's fee is only $1,500.00 to file a simple chapter 7?

Is access to justice denied for the poorest debtors, if regular bankruptcy practitioners decide to charge an extra $1,000.00 or more to cover the costs of investigations before filing petitions?

73

In re Anzaldo, 612 B.R. 205, 213-214 (Bankr. S.D. Cal. 2020)

Cary

> For a reaffirmation agreement to be immediately enforceable under § 524(c), it must be signed before the discharge is entered, include the disclosures of debtors' monthly income and expenses under §524(k)(6)(a), including the reaffirmed debt; be certified by the debtor's attorney, and be enforceable under state law. ...
>
> Court review is necessary in three circumstances: if the certification is not proper, if a presumption of undue hardship arises, or if the debtors are unrepresented.
>
> Where debtors are unrepresented, the court must hold a hearing under §§ 524(c)(6) and (d) to ensure the debtor is informed of the legal consequences and voluntary nature of reaffirming a debt. The court must determine whether the reaffirmation agreement is in the debtor's best interest and not an undue hardship, regardless of whether an undue hardship presumption arises under §§524(c)(6)(A)(i) and (ii).

74

In re Anzaldo, 612 B.R. 205, 214-215 (Bankr. S.D. Cal. 2020)

Cary

The third review requirement is for the court to "determine the bona fides" of an attorney's §524(c)(3) certification. Although the common avenue to evaluating the certification is Fed. R. Bankr. P. 9011, invoking that rule is not necessary to invalidate a flawed certification. ...

The court's review authority was triggered in this case because Anzaldo was misinformed by her attorney about the legal effect and consequences of reaffirming her debt, and because her budget information was unreasonable giving rise to a presumption of undue hardship. ...

Anzaldo's vulnerable financial condition creates a significant risk of default on the reaffirmed debt that counsel never explained. ...

Because this unrealistic budget leaves Anzaldo at risk of default in making her car payments, despite her best intentions, the court finds a presumption of undue hardship arose under §524(m). Since this presumption was not rebutted by Anzaldo's counsel, the agreement cannot be approved.

75

In re Anzaldo, 612 B.R. 205, 215–216 (Bankr. S.D. Cal. 2020)

Cary

Counsel certified the reaffirmation agreement was in Anzaldo's best interest mistakenly assuming this was necessary to protect her car from repossession. He admitted his error after WF responded to the OSC and he learned Anzaldo did not have to reaffirm the debt to manage the repossession risk. This policy is not unusual. As a matter of economics, many lenders, including WF, will not repossess debtors' cars unless they default on the payments. ...

Anzaldo's primary reason to reaffirm the car, once she learned that reaffirmation was not necessary to protect her car from repossession, was to improve her credit score. This decision was also misinformed. WF's expert opined that reporting the payments after bankruptcy does not have much of a positive impact on her credit score and the negative impact of missing a payment is exacerbated.

76

In re Anzaldo, 612 B.R. 205, 217-218 (Bankr. S.D. Cal. 2020)

Cary

Counsel here did not consider the range of circumstances here for Anzaldo, who was misinformed by counsel about numerous aspects of the reaffirmation decision. Even though counsel cannot be faulted for being unaware of the credit reporting practices of the industry which remain elusively opaque here, counsel's certification was also not based on an objective assessment of Anzaldo's ability to repay the reaffirmed debt. Although a Rule 9011 (b) violation occurred, non-monetary sanctions suffice to deter future conduct since the problem was informational, and no further sanctions need be issued. ...

Because of counsel's misapprehension of the effect of reaffirmation and understatement of her budget, court review was required in this case. Because the certification is stricken, and the presumption of undue hardship not rebutted, the reaffirmation agreement Anzaldo signed is unenforceable but she may retain her car if she stays current on the payments. Her discharge may then be entered.

77

Discussion: accuracy of the schedules

Schaaf

Should an attorney always look at the documentation of claims before preparing the schedules?

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

78

In re Thomas, 612 B.R. 46, 63, 65 (Bankr. E.D. Pa. 2020)

Schaaf

The record shows that Thomas filed **essentially identical schedules** on the Debtor's behalf in the First Case and the Present Case. Evidence of Thomas having simply recycled the schedules from the Debtor's first bankruptcy ranges from the trivial to the serious. ... I also find that Thomas failed to ask the Debtor about the full scope of her changed financial affairs prior to filing her schedules in the Present Case. ...

Simply put, I do not believe Thomas' testimony that the similarity between the disclosures in the two (2) bankruptcy cases was the product of mere oversight; to the contrary, the only possible inference is that Thomas' actions were intentional. ...

Here, Thomas' lack of investigation caused him to submit to the court schedules that were incomplete, inaccurate, and misleading.

79

In re Thomas, 612 B.R. 46, 66 (Bankr. E.D. Pa. 2020)

Schaaf

The issues here required attention to detail, but were not complex;

Thomas' failing resulted either from extreme carelessness or an intentional disregard of his obligations, rather than a misunderstanding of how or why to proceed;

The Debtor's case was not referred to Thomas. He was the lawyer of record in the First Case;

While there was some necessary reliance on the Debtor for underlying factual information, a large part of the relevant factual information was available to Thomas on records already in his possession and in the public domain (i.e., the bankruptcy court record in the First Case);

There is no plausible explanation for the shocking incompleteness of the information provided to the court; and

While Thomas was under some pressure to file the Present Case, he had sufficient time to file accurate schedules (thirty-two (32) days), particularly in light of the fact that he asked for and was granted an extension to do so. ...

For these reasons, I find that Thomas violated Rule 9011(b)(3).

80

In re Thomas, 612 B.R. 46, 67 (Bankr. E.D. Pa. 2020)

Schaaf

Even if Thomas is correct that his assistant dropped the ball, the misstep of one's staff is neither an explanation nor an excuse for professional deficiencies. An attorney may not excuse errors in matters or pleadings for which he is responsible by throwing his staff under the bus. See e.g., In re Johnson, 35 B.R. 79, 81-82 (Bankr. D. Conn. 1983) (finding that a mistake by clerical staff is not "excusable neglect"); see also In re Moffett, 2012 WL 693362, at *4 (Bankr. C.D. Ill. Mar. 2, 2012) (admonishing attorney that he is "responsible for his own acts" and cannot rely on staff to do legal work for him).

Further, I will draw a negative inference from the fact that Thomas did not make his assistant Melinda available to testify at the Show Cause Hearing. I am unwilling simply to infer from Thomas' say-so that Melinda, who did not testify, is so incompetent that she is to blame for the overwhelming omissions and inconsistencies in the Debtor's schedules.

81

Discussion: the debtor's representations

Walrath

Must an attorney treat his debtor like a child? We can't rely on what a debtor says?

82

Discussion: quality of attorney services

Wanslee

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

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

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

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

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

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

83

Discussion: appearance counsel

Gunn

Are "appearance counsel" common in your jurisdiction?

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

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

How should a primary attorney prepare the appearance counsel?

When appearance counsel reports a problem at the 341(a) examination, what should the primary attorney do?

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

84

Discussion: attorney signature

Cary

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

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

85

Discussion: honest debtors

Schaaf

Are most debtors honest?

Are most attorneys doing a competent job in your courtroom?

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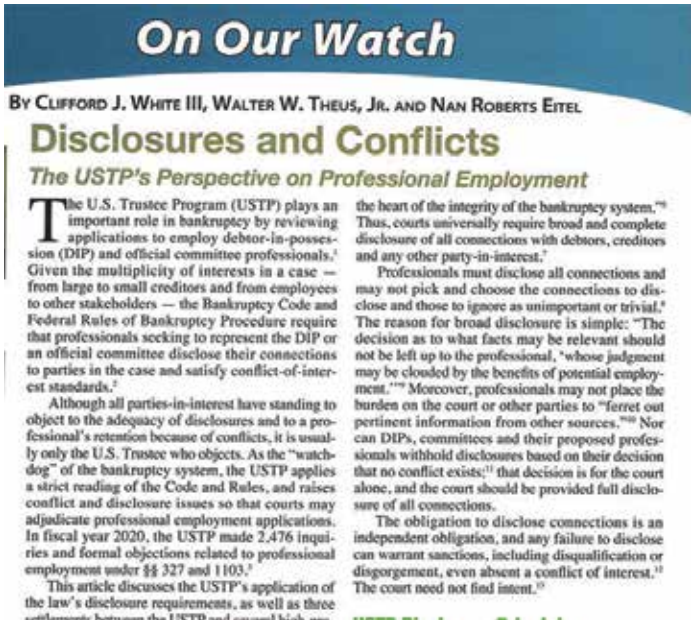

On Our Watch

BY CLIFFORD J. WHITE III, WALTER W. THEUS, JR. AND NAN ROBERTS EITEL

Disclosures and Conflicts

The USTP's Perspective on Professional Employment

The U.S. Trustee Program (USTP) plays an important role in bankruptcy by reviewing applications to employ debtor-in-possession (DIP) and official committee professionals.[1] Given the multiplicity of interests in a case — from large to small creditors and from employees to other stakeholders — the Bankruptcy Code and Federal Rules of Bankruptcy Procedure require that professionals seeking to represent the DIP or an official committee disclose their connections to parties in the case and satisfy conflict-of-interest standards.[2]

Although all parties-in-interest have standing to object to the adequacy of disclosures and to a professional's retention because of conflicts, it is usually only the U.S. Trustee who objects. As the "watchdog" of the bankruptcy system, the USTP applies a strict reading of the Code and Rules, and raises conflict and disclosure issues so that courts may adjudicate professional employment applications. In fiscal year 2020, the USTP made 2,476 inquiries and formal objections related to professional employment under §§ 327 and 1103.[3]

This article discusses the USTP's application of the law's disclosure requirements, as well as three

the heart of the integrity of the bankruptcy system."[5] Thus, courts universally require broad and complete disclosure of all connections with debtors, creditors and any other party-in-interest.[7]

Professionals must disclose all connections and may not pick and choose the connections to disclose and those to ignore as unimportant or trivial.[8] The reason for broad disclosure is simple: "The decision as to what facts may be relevant should not be left up to the professional, 'whose judgment may be clouded by the benefits of potential employment.'"[9] Moreover, professionals may not place the burden on the court or other parties to "ferret out pertinent information from other sources."[10] Nor can DIPs, committees and their proposed professionals withhold disclosures based on their decision that no conflict exists;[11] that decision is for the court alone, and the court should be provided full disclosure of all connections.

The obligation to disclose connections is an independent obligation, and any failure to disclose can warrant sanctions, including disqualification or disgorgement, even absent a conflict of interest.[12] The court need not find intent.[13]

Disclose Affiliate Connections

The professional firm's connections — and that of its affiliates and practice areas — must be disclosed; the requirement to disclose is not confined to professionals working on the bankruptcy engagement. To assess whether there are disabling conflicts, the court, USTP and all parties are entitled to know the connections of the entire organization. For example, if the proposed professional's parent company represents another client interest adverse to the DIP (or the committee's constituency), that information must be disclosed.

Every case is fact-specific, and in rare circumstances, an applicant may be able to establish that the firm is sufficiently separate from affiliated companies or practices by filing a Rule 2014(a) verified statement containing detailed information sufficient to excuse affiliate disclosure. Only the court has the authority to excuse affiliate disclosure.

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Failure to disclose connections

Walrath

https://www.reuters.com/business/legal/purdue-bankruptcy-judge-oks-law-firms-deal-giving-up-1m-fees-2021-05-21/ (May 21, 2021)

> During a virtual hearing, U.S. Bankruptcy Judge Robert Drain in White Plains, New York signed off on the deal between the U.S. Trustee's office, which serves as the U.S. Department of Justice's bankruptcy watchdog, and Skadden Arps Slate Meagher & Flom; Wilmer Cutler Pickering Hale and Dorr; and Dechert. … Under the deal, the firms will reduce their fee applications for their legal services to Purdue by a total of $1 million. … The U.S. Trustee accused the three firms of failing to comply with bankruptcy disclosure requirements when they were hired by Purdue by failing to disclose "joint interest agreements" with Sackler family members. The agreements required the law firms, representing Purdue in pre-bankruptcy opioid-related litigation, to keep information shared between Purdue and Sackler family members confidential. The U.S. Trustee contends that this arrangement created a conflict in the bankruptcy case, where the Sackler family members' interests are adverse to the company's creditors, noting that the company invoked the joint interest agreement to avoid handing over documents to its unsecured creditors' committee in its probe of the company's pre-bankruptcy activities. All three firms have said they do not believe they were required to make the disclosures under bankruptcy law. Drain called the settlement "a reasonable resolution." In addition to relinquishing fees, the firms agreed to supplement their disclosures of potential conflicts to reflect joint defense agreements.

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In re NNN 400 Capitol Ctr. 16 LLC, 632 B.R. 243, 258-259 (D. Del. 2021)

Walrath

It is clear Rubin & Rubin "was provided with sufficient, advance notice of exactly which conduct was alleged to be sanctionable"—its defective Rule 2014 disclosures. ...

A law firm may not serve as special counsel to a chapter 11 debtor in possession if it "represent[s] or hold[s] any interest adverse to the debtor or to the estate with respect to the matter on which [it] is to be employed." 11 U.S.C. § 327(e). A law firm found to possess such an adverse interest during the case may be disqualified, at the court's discretion. *See, e.g., Rome*, 19 F.3d at 58; *BH & P*, 949 F.2d at 1315. If a law firm is found to have an actual conflict of intertest, disqualification is mandatory. *In re Congoleum*, 426 F.3d 675, 692 (3d Cir. 2005).

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In re NNN 400 Capitol Ctr. 16 LLC, 632 B.R. 243, 261 (D. Del. 2021)

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Every law firm representing a debtor in bankruptcy must disclose (i) the amount and source of any compensation received or agreed to be paid; and (ii) all connections to creditors and parties in interest. 11 U.S.C. § 329(a); Fed. R. Bankr. P. 2014(a) & 2016(b); see also Del. Bankr. L.R. 2014-1(a) & 2016-1. These obligations begin with the application to be employed and continue throughout the case; failure to comply may, at the bankruptcy court's discretion, result in the law firm's disqualification. See, e.g., Miller v. U.S. Trustee (In re Indep't Eng'g Co.), 197 F.3d 13, 17 (1st Cir. 1999); BH & P, 949 F.2d at 1317. An attorney's failure to disclose all compensation agreements and fee-sharing agreements under § 329(a), Rule 2016(b), and Local Rule 2016-1, and all connections with creditors and parties in interest under § 327(e), Rule 2014, and Local Rule 2014-1(a), is a separate and independent ground for disqualification under § 327. ...

As there is no dispute that Rubin & Rubin's fee-sharing agreements with Denison and representation of Moses Tucker were not disclosed, the court was required to determine whether they were agreements and connections that Rubin & Rubin was required to disclose under the Bankruptcy Code, Rules, and local rules. After considering the evidence, the court held that they were and that disqualification was warranted.

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Final thoughts from our judges

Cary, Gunn, Schaaf, Walrath, Wanslee

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Prepared for the American Board of Certification
Whoops! Ethics Issues Ripped from the Headlines: Recent Attorney Faux Pas

BY: JEANA M. MASON, LAW CLERK TO THE HON. GREGORY R. SCHAAF (E.D. KY.)
DALTON STANLEY, LAW CLERK TO THE HON. TRACEY N. WISE (E.D. KY.) [1]

I. Cases Under 11 U.S.C. § 329.

***In re Pigg*, No. 14-50266-CAN7, 2015 WL 7424886 (Bankr. W.D. Mo. Nov. 20, 2015).**

This is a consolidated opinion where the lawyer represented the debtors in two separate cases. Within 90-days of filing, debtor #1 received $10,000 from a tax refund, paid $3,000 to her mother's creditor, and loaned $2,000 to her sister. Debtor #2 received $8,000 in insurance proceeds and put $5,000 cash in a safe.

Aware of these events, the debtors' lawyer advised them to exclude this information from their schedules. The information was uncovered at the 341 meetings, and it was brought to the court's attention. The lawyer was disgorged of his fees and sanctioned for violations under 11 U.S.C. §§ 329(b), 707(b)(4) and Rule 9011. The matter was also referred for further disciplinary investigation regarding probable violations under the model rules of professional conduct.

***Sundquist v. Bank of America (In re Sundquist)*, 576 B.R. 858 (Bankr. E.D. Cal. 2017).**

The bankruptcy case was reopened after four years to address entitlement to damages based on egregious stay violations. 11 U.S.C. § 362(k)(1). The debtors' lawyer was retained to file the complaint, even though she had done nothing to address the violation when it occurred. The debtors received a multi-million-dollar judgment, although their lawyer was severely unprepared, lacked coherent arguments, failed to present helpful evidence that was existing and available, and failed to demonstrate an adequate understanding of the federal rules of evidence and procedure.

The lawyer did no better supporting her fee request. Her papers were late and inconsistent, and she presented a doctored, back-dated contingency agreement. Ultimately, she requested the lesser of the contingency fee or a reasonable fee based on a Lodestar calculation. She was awarded $70,000 as reasonable compensation, which was slightly higher than the lawyer's Lodestar calculation.

Despite agreeing to accept a Lodestar fee, the lawyer asserted the court lacked jurisdiction and placed a lien on the judgment in an attempt to receive the full contingency fee. The court exercised jurisdiction and found the contingency fee far exceeded the reasonable value for services, given the poor quality of counsel's work and lack of competence. The court also recognized it could have denied all fees based on the lawyer's failure to comply with the compensation disclosure and she waived any claim to additional compensation when she agreed to accept the Lodestar fee. The contingency fee agreement was cancelled, and the lien was expunged.

[1] This document is not intended to express the opinions of the Court, but instead to provide general information regarding the cases discussed herein.

***Henderson v. Sundquist (In re Sundquist)*, 827 F. App'x 763 (9th Cir. 2020).**

The bankruptcy court cancelled the lawyer's contingency fee agreement, instead awarding Lodestar fees and expunging the attorney's lien. The Ninth Circuit affirmed. The bankruptcy court observes the lawyer and is best-suited to evaluate performance. Therefore, the bankruptcy court has broad discretion to determine reasonable compensation.

***In re Cargill*, No. 20-12261-7, 2021 WL 2069936 (Bankr. W.D. Wis. May 21, 2021).**

The debtor signed a flat fee agreement for $2,000 and filed for bankruptcy relief. The first 341 meeting was continued twice because required bank statements were missing. The hearing was again continued after blatantly insufficient information was provided, but the debtor and his attorney failed to appear. The court became involved, the debtors produced the documents, and the trustee determined there were no assets.

The UST filed a motion to examine fees requesting that the court void the fee agreement and the lawyer return or waive $800 of the $2,000 fee he received pursuant to 11 U.S.C. § 329. The lawyer provided time records that supported fees just above $2,000. The court determined the rate was reasonable, but the total fees were not based on the poor quality of the work.

The record suggested the lawyer did not communicate with his client for several months, and a cursory review of the bank statements would have revealed their insufficiency. Additionally, despite multiple opportunities, the issues were not corrected until a show cause order was issued. The delays caused by the lawyer's inattention and poor communication jeopardized the debtor's discharge and wasted the trustee's and court's time and resources. Since the lawyer failed to establish the reasonableness of his fees, the agreement was canceled under § 329(b).

***Rubin & Rubin, P.A. v. Office of the U.S. Trustee (In re NNN 400 Capitol Ctr. 16 LLC)*, 632 B.R. 243 (D. Del. 2021).**

Rubin & Rubin was hired as the debtors' chapter 11 special counsel. During the case, it was discovered that Rubin & Rubin was the fictious trade name of an informal partnership between two different law firms separately owned by two brothers. This created an issue of undisclosed fee-sharing between the two firms. Since the two firms operated as a partnership, fee sharing was not deemed an issue; however, not disclosing this partnership violated Rule 2014's disclosure obligation. Rubin & Rubin was not disqualified for this nondisclosure but was required to update the disclosures and pay the movant's costs.

Subsequently, the UST moved to disqualify Rubin & Rubin after discovering the firm failed to disclose: (1) prior representation of the debtors' largest unsecured creditor; and (2) an agreement to split a finder's fee with the debtors' loan broker. Rubin & Rubin told the broker not to speak with the debtors' counsel (presumably attempting to conceal the fee sharing agreement), and Rubin & Rubin paid the broker $11,000 from the DIP account without court approval.

Receiving less latitude for the second nondisclosure, Rubin & Rubin was found to have violated 11 U.S.C. §§ 327(e) and 329(a); Rules 2016(b), 2014(a), and 9011; and Rule of Professional Conduct 1.8(a). Rubin & Rubin was disqualified from further representation, disgorged of all fees paid or payable, and required to reimburse the estate for the $11,000 paid to the broker.

II. Cases Under Federal Rule of Bankruptcy Procedure 9011.

***Reither v. Knox (In re Reither)*, Ch. 13 Case No. 17-13815-JNF, Adv. No. 18-1031, 2018 WL 5310658 (Bankr. D. Mass. Oct. 25, 2018).**

Rule 9011 sanctions were imposed because the debtor's lawyer was incompetent, ignorant, and/or flagrantly inattentive to bankruptcy laws and rules. The debtor had filed a last-minute chapter 13 petition to avoid a foreclosure sale. Filing deficiencies were not timely addressed, so the case was dismissed.

The case was then reinstated to give the debtor a second chance, but the problems continued. Errors included improper service, omitting or improperly scheduling creditors, mischaracterizing obligations as consumer debt, and failing to disclose the debtor's property interests. The debtor also filed an adversary complaint that was described as "a poorly pled jumble of facts and virtually unintelligible legal theories" and a motion for summary judgment that "served to merely delay the proceeding."

The lawyer's attempt to save the debtor's home was no excuse for commencing a case replete with errors. "Put bluntly, a pure heart no longer excuses an empty head." The lawyer was sanctioned $29,000.

***In re Schemelia*, 607 B.R. 455 (2019).**

The secured creditor purchased the debtor's real property at a foreclosure sale. The debtor filed for bankruptcy relief and listed the real property and a secured claim in favor of the creditor on her schedules. The debtor then filed a cure-and-maintain plan.

The creditor objected to the plan and moved for stay relief, arguing the property was sold, the plan was not feasible, and the debtor was acting in bad faith. The creditor also requested sanctions against the debtor's lawyer for failing to make a reasonable inquiry into the facts of the case as required by the rules. The court held a hearing, and the creditor sought fees and costs from the debtor under Rule 9011 or the court's inherent powers.

The court determined the case was improperly filed to delay an eviction after the title foreclosure sale process was complete and the lawyer failed to conduct a reasonable inquiry. The lawyer knew about the foreclosure sale and the status of the title transfer was easily discoverable by a phone call or an online search. Additionally, the petition and plan did not suggest other legitimate reasons for the bankruptcy. Sanctions were assessed in an amount that would deter the lawyer from failing to conduct reasonableness inquiries in the future.

***In re Anzaldo*, 612 B.R. 205 (Bankr. S.D. Cal. 2020).**

The debtor's lawyer advised her to reaffirm the debt on her vehicle to prevent repossession and improve her credit score. The lawyer certified the debtor was fully informed and the obligation would not impose an undue hardship, even though the debtor only had $14.89 in disposable income.

Testimony at a reaffirmation hearing confirmed the creditor would not repossess if the debtor remained current and the reaffirmation would not improve the debtor's credit score. Also, the debtor's expenses were unrealistically low, making the potential hardship more severe. Although

the debtor's lawyer was found to have misinformed the debtor, he was not sanctioned under Rule 9011.

***In re Thomas*, 612 B.R. 46 (Bankr. E.D. Pa. 2020).**

The debtor was a real estate investor with various rental properties. The debtor filed a petition and schedules, which were amended as new information was uncovered. Unscheduled creditors subsequently filed claims. The case was dismissed, and the debtor refiled with the same lawyer.

In the second case, the lawyer filed schedules nearly identical to those initially filed in the first case. In doing so, the lawyer failed to make a reasonable inquiry in violation of Rule 9011. The lawyer's fee was denied, and he was ordered to pay the estate $1,000. Any further discipline or reporting was left to the UST's discretion.

***In re Gistis*, No. 18-10710, 2020 WL 1486777 (Bankr. D. Me. Mar. 24, 2020).**

The debtor's attorney violated 11 U.S.C. § 707(b)(4)(d) and Rule 9011(b) by having the debtor claim a homestead exemption even though the lawyer knew the debtor did not reside at the property. The debtor's attorney also filed a Statement of Intent to reaffirm the mortgage on the debtor's real property and Schedule G indicating the debtor had not signed an executory contract prepetition. These filings were inaccurate because the debtor had executed a listing agreement and sale contract prepetition.

The attorney was not sanctioned for these errors because the debtor did not disclose this information when his attorney asked before filing if the Statement of Intent and Schedule G were accurate.

***In re Perez*, 627 B.R. 702 (Bankr. S.D. Fla. 2021).**

The creditor purchased the debtor's home in a foreclosure sale, and the debtor immediately filed for bankruptcy relief, listing himself as the owner of the property. The creditor moved to dismiss the bankruptcy case with prejudice and requested sanctions. The bankruptcy court granted the motion to dismiss and set a hearing on the request for sanctions pursuant to Rule 9011.

The debtor appealed the dismissal order, which the district court summarily dismissed. The debtor then moved the bankruptcy court to continue the sanctions hearing, which was granted. Immediately before the hearing, the debtor stipulated to all facts in the creditor's request for sanctions, including the fees and costs requested.

Under Rule 9011, a court may impose sanctions upon lawyers, law firms, or parties that have violated subsection (b). Consequently, the debtor's lawyer and his firm were held jointly and severally liable under Rule 9011(b) for frivolously appealing the dismissal order, waiting until the last minute to stipulate to facts, and other non-litigation tactics, including refusing access to the property.

***Allred v. Arendt (In re Dozier)*, Ch. 13 Case No. 15-30018, Adv. No. 20-3006, 2021 WL 5991749 (Bankr. D.S.D. Dec. 15, 2021).**

The debtor filed bankruptcy to address significant medical bills. The debtor's filing indicated his mother was alive, even though she had died prepetition and left him her entire estate. The debtor doubled down at the 341 meeting, affirming the accuracy and completeness of his filings and

denying knowledge of the probate case. The trustee determined there were no assets, and the debtor received his discharge.

After the bankruptcy case was closed, the same lawyer was retained to administer the mother's estate. The estate's assets ultimately went to the debtor's children because the debtor died during the probate action.

The trustee discovered these facts, and the bankruptcy case was reopened so the trustee could pursue an adversary proceeding against the lawyer for claims including fraud and violation of 11 U.S.C. § 707(b)(4)(B), (C), and (D), 28 U.S.C. § 1927, and Rule 9011.

The trustee filed a motion for summary judgment, which was denied because the trustee failed to prove the facts surrounding the filing and the extent of the lawyer's duty to investigate or ensure the accuracy of the debtor's schedules and testimony. Further, the record did not show facts regarding an intent to deceive the trustee or the existence of a fraud on the court (which requires proof that there is no adequate remedy at law). The trustee also failed to establish legal authority to award sanctions under 28 U.S.C. § 1927. The matter proceeded to trial.

III. Cases Involving Internet-Based Law Firms.

***In re Pearson*, No. 20-30077, 2020 WL 1845048 (Bankr. N.D. Tex. Apr. 9, 2020).**

A serial-bankruptcy filer filed a highly inaccurate petition and related filings pro se. Shortly thereafter, a lawyer employed by an internet-based law firm entered an appearance for the debtor. His attorney's disclosure indicated he would charge a standard flat fee and had already received a retainer. He also stated he would use local counsel for appearances at the debtor's 341 meeting. The lawyer's primary location was California, but he was licensed in Texas and had a local address.

Multiple unscheduled creditors filed motions to dismiss and for stay relief, citing the debtor's prior bankruptcies and fraudulent activities. The trustee also requested dismissal, and a hearing was set. The debtor filed a motion to dismiss the case on the eve of the hearing. The debtor was represented at the hearing by an unaffiliated lawyer that was only told to appear and state there was no opposition to dismissal. The creditors presented evidence establishing bad faith, and the court dismissed the case with prejudice and referred the matter for criminal investigation.

The court retained jurisdiction to determine whether the lawyer's practices and procedures were inconsistent with the Bankruptcy Code, Rules, and other applicable authority. The proposed plan was nonsensical, and the court questioned the ethics of using appearance counsel at 341 meetings and other hearings. Additionally, the lawyer did not attempt to correct the inaccurate papers or take usual steps, including a request for approval of the post-petition retainer, an extension of the automatic stay, and adequate disclosure of the lawyer-client relationship. In light of the issues, the lawyer of record was directed to appear and show cause.

***L. Sols. of Chicago LLC v. Corbett*, 971 F.3d 1299 (11th Cir. 2020).**

This is a consolidated case involving debtors who sought representation from a law firm found on the internet. The law firm was an amalgamation of attorneys from various firms across the nation.

Two cases were referred to the same local lawyer located in the debtors' district. The lawyer filed disclosures in both cases indicating the debtors paid a flat fee covering basic bankruptcy representation but excluding an array of other bankruptcy services.

The Bankruptcy Administrator (BA) for the district filed adversary proceedings against the law firm and lawyer alleging a car-repossession scam was used to pay the lawyer and filing fees. The parties mediated and agreed to a settlement requiring the law firm to provide the excluded services to certain clients without additional charge. The settlement was approved.

Thereafter, the BA discovered six cases involving clients covered by the settlement where the lawyer's disclosures stated that the law firm would charge additional fees for the excluded services. In the three cases that remained open, the disclosures were amended after the BA argued they conflicted with the settlement and were materially inaccurate, untrue, and/or misleading in violation of 11 U.S.C. §§ 707 and 526 and Rule 2016.

A hearing was held to consider sanctions. The court expressed serious ethical concerns with the structure of the law firm and its referral of cases across the nation. The court show-caused the lawyer and law firm and set an evidentiary hearing to determine the issue of sanctions.

The court heard testimony and found that the lawyer and law firm intentionally ignored their obligations under the settlement agreement and the untrue statements in the disclosures were not the result of simple oversight or excusable neglect. Instead, those actions constituted an arrogant disregard and indifference tantamount to intentional misrepresentation. The attempts to amend the disclosures were considered self-serving and too-little-too late because they only came after the threat of further sanctions. Although there was no evidence a debtor was charged for the services, the court could not "ignore the chilling effect that the exclusionary language necessarily imposed on cash-strapped debtors who may have been in need of further representation they could not afford." The court held the lawyer and law firm violated §§ 707 and 526 and Rule 9011, and it imposed monetary and non-monetary sanctions.

The district court affirmed, and the matter was appealed to the Eleventh Circuit. The non-monetary sanctions were moot, so the court only reviewed the monetary sanctions. The Eleventh Circuit found the attorney disclosures were misleading within the meaning of § 526(a)(2) because they suggested the law firm was able to charge for the excluded services. Additionally, the totality of the evidence supported a finding that the lawyer and law firm engaged in a clear and consistent pattern or practice of violating § 526(a)(2). The record was sufficient to justify the sanctions imposed and the amount levied was within the normal range of sanctions for a serious violation in that district. The sanctions were not grossly excessive, and they were affirmed.

***In re Ward*, No. CV 20-03176-HB, 2021 WL 1940743 (Bankr. D.S.C. May 13, 2021).**

South Carolina debtors searched for bankruptcy lawyers online and found the firm owned by Mr. Babbs, a lawyer in Florida who was not admitted to practice in South Carolina. Notwithstanding a retainer agreement that indicated only Babbs' firm would provide legal services for the debtors, Babbs' firm employed local counsel for $400 to $800 to assist with the case.

The retainer agreement did not disclose the need for, or payment to, local counsel. Therefore, the terms of the agreement were untrue and misleading in violation of 11 U.S.C. § 526(a)(2) and the agreement's fees disclosure was inadequate in violation of §§ 528(a)(1)-(2) and 329(a). Additionally, no attorney provided or supervised the prepetition legal services the debtors received, which included preparing documents, answering the debtors' questions, and advising the debtors whether to file for bankruptcy relief and under which chapter.

Babbs' firm charged fees that were not reasonable under § 329(b) and violated the several disclosure requirements cited. The retainer agreements were voided, all payments were returned to the debtors, and Mr. Babbs and his firm were barred from practicing bankruptcy cases in the district.

***In re Driggers*, No. 20-03239-dd, 2021 WL 2134647 (Bankr. D.S.C. May 25, 2021).**

This case also involves Mr. Babbs and his firm, and it generally mirrors the case above. The debtors' retention agreements were insufficient in violation of 11 U.S.C. § 528 because, while the retention agreements disclosed that the firm would retain local counsel, they did not detail the fee sharing arrangement with local counsel, who would serve in that capacity, or the services that would be performed. Further, the court found Babbs' firm violated § 526(a)(2) and (3) by misleading the debtors in stating that Babbs' firm would provide legal services for the debtors even though that was not possible since the firm did not employ an attorney licensed to practice where the case was filed.

Babbs' firm also violated § 329 since the disclosures of compensation contained errors, omissions, and discrepancies similar to those in the retention agreements. Additionally, work was performed by non-attorneys at Babbs' firm who participated in the unauthorized practice of law by giving legal advice to the debtors as to the effects of filing bankruptcy and by preparing bankruptcy filings without supervision.

Consequently, all contracts and agreements the debtors made with Mr. Babbs' and his firm were voided, all payments were returned to the debtors, and Mr. Babbs and his firm were enjoined from practicing bankruptcy cases in the district.

IV. Miscellaneous.

***In re Negron*, 616 B.R. 583 (Bankr. D.P.R. 2020).**

The Chapter 13 trustee challenged the validity of contracts for bankruptcy assistance in two cases. The debtors were represented by a debt relief agency through the same lawyer and executed contracts before their cases were filed. The contracts described a local rule limiting flat fee compensation but also provided compensation was on an hourly rate. Additionally, the agreements failed to explain lawyer-provided services or estimate the cost of those services.

Debt relief agencies must comply with 11 U.S.C. §§ 526-528, which require contracts with debt relief agencies to clearly and conspicuously list the services provided and related fees. These provisions compliment other contractual or ethical obligations and protect financially unsophisticated debtors from deceptive practices.

The contracts violated §§ 527-528 because they did not clearly and conspicuously explain the services performed or explain the fees and charges for such services. These explanations are critical in cases involving an hourly rate so the debtors will understand the approximate amount they will pay and that any estimate is not a cap. The contracts were null and void under § 526(a) as a result of the omissions. The omissions were material and not curable by the debtors' requests to enforce the contracts.

***In re Horvath*, No. 10-60520, 2021 WL 371771 (Bankr. N.D. Ohio Feb. 2, 2021).**

The debtor's lawyer reopened the debtor's prior bankruptcy case to avoid a judgement lien under 11 U.S.C. § 522(f). The creditor objected arguing latches barred lien avoidance since the lien was recorded over 10 years prior.

The debtor's lawyer knew of a lawsuit pending against the debtor when the petition was initially filed but failed to check for liens on the debtor's real property. This "failure to conduct a simple lien search, [knowing] of a lawsuit against a debtor who owns real estate, does not satisfy [Rule 9011's] 'reasonable investigation' requirement." Because the lawyer's prepetition due diligence failed to include a lien search on the debtor's real estate, the debtor's motion to avoid the creditor's lien was denied under the equitable doctrine of latches.

***Foster v. First Interstate Bank (In re Shoot the Moon, LLC)*, Ch. 13 Case No. 2:15-BK-60979-WLH11, Adv. No. 2:21-ap-02005-WLH, 2022 WL 162431 (Bankr. D. Mont. Jan. 18, 2022).**

The trustee sought the consent of creditors to sell assets that were fully encumbered. The creditors agreed in exchange for a broad release of claims and unsecured creditors objected. During a recess of the sale hearing, the parties reached a resolution, and the objection was withdrawn. The court entered an order approving the sale and releases.

Five years later, the trustee commenced an adversary proceeding alleging that two of the secured creditors engaged in a check kiting scheme. The complaint acknowledged the releases but argued they were null and void based on fraud and concealment of the scheme. The creditors sought dismissal due to the releases and failure to otherwise state a claim.

The complaint failed to state a claim. The allegations for the fraud claim were conclusory and lacked sufficient specific allegations of affirmative conduct. Further, avoiding the releases was not justified. Releases play a vital role in bankruptcy cases, which move fast. It was the trustee's responsibility to investigate the acts, conduct, assets, liabilities, and financial condition of the debtor. Creditors have no independent duty to volunteer unsolicited information, even in settlement negotiations. Dismissal was warranted, but the trustee requested and was given leave to amend the complaint.

Faculty

J. Scott Bovitz is a senior partner with Bovitz & Spitzer in Los Angeles, where he practices both consumer and business bankruptcy law and represents debtors and creditors. He is Board Certified in Business Bankruptcy Law by the American Board of Certification, which he chaired, and he is a Certified Specialist in Bankruptcy Law for the State Bar of California Board of Legal Specialization, which he also chaired. Mr. Bovitz is rated AV-Preeminent by Martindale-Hubbell and has been selected as *Southern California Super Lawyer* in bankruptcy and creditor/debtor rights. In addition, he is a lawyer representative for the Ninth Circuit Judicial Conference, was a coordinating editor of the *ABI Journal* from 2014-21, and is a former member of the California Committee of Bar Examiners, a former adjunct professor of law at Loyola Law School in Los Angeles, a former executive editor and author of *Personal and Small Business Bankruptcy Practice in California*, a contributing editor to *Bankruptcy Mediation News* for the U.S. Bankruptcy Court for the Central District of California, a former president of the Los Angeles Bankruptcy Forum and a former education and conference co-chair of the California Bankruptcy Forum. In addition, he sits on the Information Technology Committee for the Central District of California Bankruptcy Court and is webmaster of bankruptcydog.com, a calendar site for bankruptcy professionals. Mr. Bovitz received his J.D. in 1980 from Loyola Law School in Los Angeles.

Hon. Peter G. Cary is Chief Bankruptcy Judge for the U.S. Bankruptcy Court for the District of Maine in Portland, initially appointed in 2014. He also serves on the U.S. Bankruptcy Appellate Panel for the First Circuit. Previously, he clerked for one year for the Maine Superior Court and in 1988 joined the law firm of MittelAsen, LLC, where he practiced law until his appointment to the bankruptcy court. Judge Cary is the treasurer of the Maine State-Federal Judicial Council, an advisory director of the Nathan & Henry B. Cleaves Law Library and a member of the First Circuit Workplace Conduct Committee, and he is certified in both Consumer and Business Bankruptcy Law by the American Board of Certification. He also was an adjunct faculty member at the University of Maine School of Law. Judge Cary received his undergraduate degree *cum laude* and Phi Beta Kappa from the University of Massachusetts at Amherst in 1982 and his J.D. *cum laude* from Boston College Law School in 1987.

Hon. Elizabeth L. Gunn is a U.S. Bankruptcy Judge for the District of Columbia in Washington, D.C., appointed on Sept. 4, 2020. A COVID-era selection and appointment, she was sworn in by Zoom from her living room. Prior to her appointment, Judge Gunn served as an Assistant Attorney General for the Commonwealth of Virginia as the sole the bankruptcy specialist for the Division of Child Support Enforcement. She also practiced law in Richmond, Va., at Sands Anderson PC and McGuireWoods LLP. In 2017, Judge Gunn was honored as a member of ABI's inaugural class of "40 Under 40." She serves on the advisory board of the *American Bankruptcy Law Journal* and the board of the Federal Bar Association Bankruptcy Section, and she is a former board member of the International Women's Insolvency & Restructuring Confederation, a former committee chair of ABI's Consumer Bankruptcy and Litigation Committees, and an associate editor of the *ABI Journal*. Judge Gunn is a member of the Walter Chandler Bankruptcy Inn of Court and is Board Certified in Consumer Bankruptcy Law by the American Board of Certification. She received her B.A. *cum laude* from Willamette University and her J.D. *cum laude* from Boston College Law School.

Hon. Gregory R. Schaaf is Chief U.S. Bankruptcy Judge for the Eastern District of Kentucky in Lexington, initially appointed on Oct. 1, 2012, and named Chief Judge on Oct. 1, 2019. Prior to his appointment, he practiced in the areas of commercial reorganizations, including bankruptcies and workouts, and commercial transactions, including energy-related matters. He represented debtors, creditors' committees, trustees and individual creditors. Judge Schaaf is a CPA and worked as a solicitor in London from 1997-99, handling corporate matters and real estate transactions for English, Russian and American clients. He is a Fellow of the American College of Bankruptcy and is Board Certified in Business Bankruptcy Law and Consumer Bankruptcy Law by the American Board of Certification. Judge Schaaf received his B.B. in accounting and his B.S. in law enforcement administration from Western Illinois University in 1984 with high honors, and his J.D. in 1991 from the University of Kentucky College of Law, where he was a member of the Order of the Coif and participated in its national moot court team and on its moot court board, as well as on the school's *Journal of Mineral Law and Policy*.

Hon. Mary F. Walrath is a U.S. Bankruptcy Judge for the District of Delaware in Wilmington, appointed in 1998. She served as Chief Bankruptcy Judge from 2003-08. Judge Walrath previously clerked for Hon. Emil F. Goldhaber, Chief Bankruptcy Judge for the Eastern District of Pennsylvania, and was an attorney at Clark Ladner Fortenbaugh & Young in Philadelphia, concentrating in the areas of debtor/creditor rights and commercial litigation. In addition to speaking at numerous bankruptcy educational programs and panels throughout the country, Judge Walrath is a founding member and co-president of the Delaware Bankruptcy American Inn of Court, a member of the Delaware Chapter of the International Women's Insolvency & Restructuring Confederation (IWIRC), a member of ABI and a Fellow in the American College of Bankruptcy. She is also an editor of the *Rutter Group Bankruptcy Practice Guide*. Judge Walrath is active in the National Conference of Bankruptcy Judges (NCBJ), having served on its Board of Governors from 2007-12, as secretary from 2013-14, as chair of its Education Committee from 2014-15 and as president from 2016-17. Judge Walrath served as an associate editor and then business manager of the *American Bankruptcy Law Journal* from 2009-15. She also testified before the House Judiciary Committee on H.R. 1667, the Financial Institution Bankruptcy Act of 2017. Judge Walrath received her A.B. in history from Princeton University and earned her J.D. *cum laude* from Villanova University, where she was a member of the *Villanova Law Review* and was awarded the Order of the Coif.

Hon. Madeleine C. Wanslee is a U.S. Bankruptcy Judge for the District of Arizona in Phoenix, sworn in on March 17, 2014. Previously, she was an associate and then partner at Gust Rosenfeld, PLC, where she was active in the firm's management committee and co-chaired the firm's Bankruptcy Practice Group. Her practice focused on bankruptcy and creditors' rights, and she represented small businesses, financial institutions, corporations and state agencies. While in private practice, Judge Wanslee was a certified bankruptcy specialist. She also argued a number of appeals, including *United Student Aid Funds Inc. v. Espinosa* before the U.S. Supreme Court. Judge Wanslee sits on the Ninth Circuit Conference Executive Committee, is program chair for the 2023 Ninth Circuit Judicial Conference, and is a former chair of the Ninth Circuit Bankruptcy Judges Education Committee. She helped to charter and is past president of the Arizona Bankruptcy American Inn of Court. She previously served on the ABC's Standards Committee and on the Arizona State Bar's Bankruptcy Advisory Committee, and chaired the Arizona State Bar's Bankruptcy Section. Judge Wanslee received her B.F.A. and B.A. from the University of Arizona and her J.D. from Gonzaga University School of Law, where she served as a writer and executive editor of the *Gonzaga Law Review*.

Following law school, she clerked for Chief Bankruptcy Judge Robert C. Jones of the District of Nevada.