469 Md. 281
Court of Appeals of Maryland.

ATTORNEY GRIEVANCE COMMISSION OF MARYLAND
v.
Arlene Adasa SMITH-SCOTT

Misc. Docket AG Nos. 8 & 64 Sept. Term, 2018
|
June 29, 2020

Synopsis

Background: Attorney Grievance Commission filed petition for disciplinary or remedial action against attorney. The Circuit Court, Prince George's County, No. CAE-18-23035, Peter K. Killough, J., held hearing concerning alleged violations, and issued findings of fact and conclusions of law.

Holdings: The Court of Appeals, Getty, J., held that:

[1] attorney violated Maryland rule of professional conduct requiring attorney to provide competent representation to her clients;

[2] attorney violated Maryland rule of professional conduct governing scope of representation of client, and allocation of authority between attorney and client;

[3] attorney violated Maryland rule of professional conduct governing communication with client;

[4] attorney violated Maryland rule of professional conduct governing confidentiality of client information;

[5] attorney violated Maryland rule of professional conduct requiring attorney to make reasonable efforts to expedite litigation;

[6] attorney violated Maryland rule of professional conduct compelling attorneys to demonstrate candor and cooperation with disciplinary authorities of Bar; and

[7] attorney's violations of 16 different Maryland rules of professional conduct warranted disbarment.

Ordered accordingly.

See also 222 A.3d 1069.

West Headnotes (54)

[1] **Attorneys and Legal Services** Evidence, verdict, and findings

A hearing judge's findings of fact in attorney disciplinary proceeding are not clearly erroneous where there is any competent evidence to support the finding of fact.

3 Cases that cite this headnote

[2] **Attorneys and Legal Services** Questions of law or fact in general

If the hearing judge's factual findings are not clearly erroneous in attorney disciplinary proceeding, and the conclusions drawn from them are supported by the facts found, exceptions to conclusions of law will be overruled.

2 Cases that cite this headnote

[3] **Attorneys and Legal Services** Questions of law or fact

A hearing judge is entitled to a great deal of discretion in determining which evidence to rely upon in attorney disciplinary proceedings.

[4] **Attorneys and Legal Services** Questions of law or fact

As far as what evidence a hearing judge must rely upon to reach his or her conclusions in attorney disciplinary proceedings, the judge may pick and choose what evidence to believe.

[5] **Attorneys and Legal Services** Particular cases

Hearing judge did not clearly err, in attorney grievance proceeding, by determining attorney's

statements contained in her response to Bar Counsel investigations into her representation of former client, as to whether attorney filed motion in bankruptcy proceeding, were knowing, intentional and willful.

[6] **Attorneys and Legal Services** Particular cases

Hearing judge did not clearly err, in attorney grievance proceeding, by determining attorney filed bankruptcy petition on behalf of client without substantial justification; client had no intention of going through with bankruptcy and so informed attorney, as she simply wanted foreclosure sale to not occur on her birthday, and attorney filed "skeleton form," notably missing required documents for legitimate bankruptcy petition.

[7] **Attorneys and Legal Services** Particular cases

Hearing judge did not clearly err, in attorney grievance proceeding, by determining attorney made knowingly false statement that client agreed to pay $4,200 as total legal fee for bankruptcy representation, as client stated at hearing she paid attorney $1,500 for representation at time of filing, and attorney certified the same by signing bankruptcy petition.

[8] **Attorneys and Legal Services** Competence and professional judgment in general

Attorneys and Legal Services Diligence and promptness

A violation of Maryland rule of professional conduct requiring attorney to provide competent representation to a client occurs when an attorney fails to act or acts in an untimely manner, resulting in harm to his or her client. Md. R. Attorneys, Rule 19-301.1.

[9] **Attorneys and Legal Services** Competence and professional judgment in general

An attorney's failure to appear on behalf of a client without explanation is an egregious violation of Maryland rule of professional conduct requiring attorney to provide competent representation to a client. Md. R. Attorneys, Rule 19-301.1.

[10] **Attorneys and Legal Services** Competence and professional judgment in general

Evidence of a failure to apply the requisite thoroughness and preparation in representing a client is sufficient alone to support a violation of Maryland rule of professional conduct requiring attorney to provide competent representation to a client. Md. R. Attorneys, Rule 19-301.1.

[11] **Attorneys and Legal Services** Client trust accounts

The failure to maintain client funds in a proper trust account demonstrates incompetence, in violation of Maryland rule of professional conduct requiring attorney to provide competent representation to a client. Md. R. Attorneys, Rule 19-301.1.

2 Cases that cite this headnote

[12] **Attorneys and Legal Services** Competence and professional judgment in general

Attorneys and Legal Services Client trust accounts

Attorney violated Maryland rule of professional conduct requiring attorney to provide competent representation to her client by failing to deposit and maintain unearned portion of client's payment in attorney trust account until earned or expenses incurred, by failing to competently represent client in court when she neglected to provide clerk of court with signed information report even after being contacted

to do so, causing the court to dismiss appeal, by misinforming client that her bankruptcy court hearing had been rescheduled and that appearance was not required when hearing had not been rescheduled, by acting without required thoroughness and preparation by filing untimely emergency motion for reconsideration six weeks after client requested attorney file motion, and by refusing to provide timely or accurate billing statements to client. Md. R. Attorneys, Rule 19-301.1.

[13] **Attorneys and Legal Services** Competence and professional judgment in general

Attorneys and Legal Services Client trust accounts

Attorney violated Maryland rule of professional conduct requiring attorney to provide competent representation to her client by failing to deposit and maintain unearned portion of client's payments in an attorney trust account until earned or expenses incurred, by failing to competently represent client before court by neglecting to file appellate brief or request extension of time, causing court to dismiss appeal, and by failing to appear at hearings in course of her representation of two other clients. Md. R. Attorneys, Rule 19-301.1.

[14] **Attorneys and Legal Services** Scope of representation; allocation of authority

Attorneys and Legal Services Communications, representations, and disclosures

Under Maryland rule of professional conduct governing the scope of representation and allocation of authority in representation, an attorney must inform a client of the status of his or her case so the client has the ability to make informed decisions. Md. R. Attorneys, Rule 19-301.2(a).

[15] **Attorneys and Legal Services** Conduct as to Client

A violation of Maryland rule of professional conduct governing the scope of representation and allocation of authority in representation may occur when an attorney fails to prosecute his or her client's case and fails to communicate the status of the case to the client. Md. R. Attorneys, Rule 19-301.2(a).

[16] **Attorneys and Legal Services** Scope of representation; allocation of authority

Attorneys and Legal Services Diligence and promptness

Attorney violated Maryland rule of professional conduct governing scope of representation of client, and allocation of authority between attorney and client, by failing to prepare or file an appellate brief in her representation of client in foreclosure action, or even request an extension of time to accomplish client's sole objective in representation. Md. R. Attorneys, Rule 19-301.2(a).

[17] **Attorneys and Legal Services** Diligence and promptness

Attorneys and Legal Services Communications, representations, and disclosures

Attorneys and Legal Services Accounting and reporting

Maryland rule of professional conduct requiring attorney to act with reasonable diligence and promptness in representing a client can be violated by: (1) failing to advance the client's cause or endeavor; (2) failing to investigate a client's matter; and (3) repeatedly failing to return phone calls, respond to letters, or provide an accounting for earned fees. Md. R. Attorneys, Rule 19-301.3.

1 Cases that cite this headnote

[18] **Attorneys and Legal Services** Competence and professional judgment in general

Attorneys and Legal Services Diligence and promptness

The same justifications for finding a violation of Maryland rule of professional conduct governing competent representation to a client can support a violation of Rule requiring attorney to act with reasonable diligence and promptness in representing a client. Md. R. Attorneys, Rules 19-301.1, 19-301.3.

1 Cases that cite this headnote

[19] **Attorneys and Legal Services** Communications, representations, and disclosures

Under Maryland rule of professional conduct governing attorney's communications with client, an attorney is required to communicate with their clients and keep them reasonably informed of the status of their legal matters. Md. R. Attorneys, Rule 19-301.4.

[20] **Attorneys and Legal Services** Communications, representations, and disclosures

A violation of Maryland rule of professional conduct governing attorney's communication with client occurs when a client repeatedly attempts to contact the attorney, but the attorney fails to respond. Md. R. Attorneys, Rule 19-301.4.

1 Cases that cite this headnote

[21] **Attorneys and Legal Services** Communications, representations, and disclosures

Maryland rule of professional conduct governing attorney's communication with client is violated when an attorney fails to communicate crucial information about the status of the case, or where the attorney fails to comply promptly with a client's reasonable requests for information, which may include a general status update or for documents pertaining to the case. Md. R. Attorneys, Rule 19-301.4.

[22] **Attorneys and Legal Services** Communications, representations, and disclosures

Attorneys and Legal Services Communications with client; billing

Attorney violated Maryland rule of professional conduct governing communication with client by failing to provide client with timely or accurate billing statements, despite client's repeated requests, by failing to adequately communicate about hearing in bankruptcy proceeding, and by intentionally misrepresenting to client that she had filed motion for reconsideration. Md. R. Attorneys, Rule 19-301.4(a)(2, 3), (b).

[23] **Attorneys and Legal Services** Communications, representations, and disclosures

Attorney violated Maryland rule of professional conduct governing communication with client by failing to inform client she would not file appellate brief by deadline in foreclosure proceeding, despite agreeing to representation and accepting client's payments, by concealing for approximately six weeks the fact the appeal had been dismissed due to failure to file brief, and by intentionally misrepresenting to client that she completed additional work on appeal to justify keeping a portion of fee in installment payments. Md. R. Attorneys, Rule 19-301.4(a)(2, 3), (b).

[24] **Attorneys and Legal Services** Amount in general

Under Maryland rule of professional conduct requiring attorney to agree to, charge or collect only reasonable fees and expenses from client, an advance fee given in anticipation of legal service that is reasonable at the time of the receipt can become unreasonable if the attorney does not perform the agreed-upon services. Md. R. Attorneys, Rule 19-301.5.

[25] **Attorneys and Legal Services** Amount in general

Attorney violated Maryland rule of professional conduct requiring attorney to agree to, charge or collect only reasonable fees and expenses from client by charging client's credit card for amount, some of which client had already paid, without client's authorization, and by charging client on an hourly basis for services client never agreed to pay. Md. R. Attorneys, Rule 19-301.5(a).

[26] **Attorneys and Legal Services** Amount in general

Attorney violated Maryland rule of professional conduct requiring attorney to agree to, charge or collect only reasonable fees and expenses from client by accepting payment from client and agreeing to author and file an appellate brief on her behalf but, after collecting payment, attorney failed to perform any meaningful legal work on client's appeal, and then refused to provide client a full refund. Md. R. Attorneys, Rule 19-301.5(a).

[27] **Attorneys and Legal Services** Confidentiality

Attorney violated Maryland rule of professional conduct governing confidentiality of client information when she intentionally attached, as exhibits, confidential email communications exchanged with client in motion filed with Bankruptcy Court; attorney neither attempted to obtain client's permission to disclose communications, nor take any preventative measures to limit disclosure. Md. R. Attorneys, Rule 19-301.6(b)(5).

[28] **Attorneys and Legal Services** Client trust accounts

When an attorney is entrusted with a client's money, such funds are to be placed in an attorney trust account in accordance with Maryland rule of professional conduct governing required deposits in trust accounts. Md. R. Attorneys, Rule 19-301.15.

1 Cases that cite this headnote

[29] **Attorneys and Legal Services** Client trust accounts

Attorneys and Legal Services Property and funds of non-clients

An attorney violates Maryland rule of professional conduct governing safekeeping property of clients or third parties when the attorney does not deposit trust funds into an attorney trust account and does not obtain the client's informed consent to do otherwise; the attorney may also violate the Rule by depositing a client's money into his or her personal or operating account before the money is earned. Md. R. Attorneys, Rule 19-301.15.

1 Cases that cite this headnote

[30] **Attorneys and Legal Services** Client trust accounts

Attorney violated Maryland rules of professional conduct governing safekeeping of property of clients and third persons, and requiring deposits to be placed in trust accounts, by failing to deposit and maintain unearned portion of client's payment in an attorney trust account until earned as fees or used for expenses, and by failing to obtain client's informed consent in writing to deposit funds in non-attorney trust account. Md. R. Attorneys, Rule 19-301.15, 19-404.

1 Cases that cite this headnote

[31] **Attorneys and Legal Services** Maintaining and returning records and files

Attorneys and Legal Services Refunds

The failure to return unearned fees and documents regarding the representative matter violates Maryland rule of professional conduct governing terminating the representation of a client. Md. R. Attorneys, Rule 19-301.16.

[32] **Attorneys and Legal Services** Refunds

Attorney violated Maryland rule of professional conduct governing terminating the representation of a client by failing to refund to client unearned portion of charge, some or most of which client did not owe, by failing to refund same client a payment made that she did not owe, and by failing to refund a second client unearned legal fees. Md. R. Attorneys, Rule 19-301.16.

1 Cases that cite this headnote

[33] **Attorneys and Legal Services** Meritorious claims and contentions

Attorney violated Maryland rule of professional conduct requiring attorney to bring or defend meritorious claims and contentions by filing numerous baseless pleadings, motions and appeals in her personal bankruptcy action. Md. R. Attorneys, Rule 19-303.1.

[34] **Attorneys and Legal Services** Expediting litigation

Maryland rule of professional conduct requiring attorney to make reasonable efforts to expedite litigation applies with equal force to an attorney who represents himself or herself. Md. R. Attorneys, Rule 19-303.2.

[35] **Attorneys and Legal Services** Expediting litigation

Attorney violated Maryland rule of professional conduct requiring attorney to make reasonable efforts to expedite litigation by failing to file client's appellate brief by filing deadline or otherwise prosecute client's appeal, and by intentionally hindering, for two years, the Chapter 7 trustee's ability to administer attorney' bankruptcy proceeding in timely fashion. Md. R. Attorneys, Rule 19-303.2.

[36] **Attorneys and Legal Services** Candor in general; communications, representations, and disclosures in general

Candor and fairness should characterize the conduct of an attorney at the beginning, during, and at the close of litigation.

[37] **Attorneys and Legal Services** Candor in general; communications, representations, and disclosures in general

An attorney violates Maryland rule of professional conduct governing candor toward the tribunal when he or she knowingly provides the court with false information or fails to correct any false information previously provided. Md. R. Attorneys, Rule 19-303.3.

[38] **Attorneys and Legal Services** Candor in general; communications, representations, and disclosures in general

Attorney violated Maryland rule of professional conduct governing candor toward tribunal by indicating client agreed to pay a flat fee of $4,200 on disclosure of compensation of attorney for debtor in client's bankruptcy proceeding, yet client actually agreed to pay flat fee of $1,500, and by knowingly making numerous false statements of fact in motions and appeals before Bankruptcy and District Courts throughout the course of her personal bankruptcy action. Md. R. Attorneys, Rule 19-303.3.

[39] **Attorneys and Legal Services** Candor in general; communications, representations, and disclosures in general

Attorneys and Legal Services Conduct as to Adverse Parties and Counsel

Attorney violated Maryland rule of professional conduct requiring fairness to opposing party and attorney by knowingly and intentionally disobeying several orders of Bankruptcy Court, and by failing to disclose to Bankruptcy Court the receipt of additional fees related to her representation of client. Md. R. Attorneys, Rule 19-303.4.

[40] **Attorneys and Legal Services** Honesty in general; communications, representations, and disclosures in general

Attorney violated Maryland rule of professional conduct governing an attorney's truthfulness in statements to others by falsely stating in letter to tenants of her properties that bank did not have Bankruptcy Court orders permitting it to foreclose on properties and collect rent; attorney intentionally concealed existence of orders so tenants would continue to pay rent to her directly. Md. R. Attorneys, Rule 19-304.1.

[41] **Attorneys and Legal Services** Cooperation and participation

Attorney violates Maryland rule of professional conduct compelling attorneys to demonstrate candor and cooperation with disciplinary authorities of Bar if he or she does not answer timely requests from the Attorney Grievance Commission regarding a complaint in a potential disciplinary matter. Md. R. Attorneys, Rule 19-308.1.

[42] **Attorneys and Legal Services** Conduct as to Disciplinary Process

Attorney violated Maryland rule of professional conduct compelling attorneys to demonstrate candor and cooperation with disciplinary authorities of Bar by attaching a knowingly false statement in response to Bar Counsel regarding charge to client's credit card, by intentionally misrepresenting to Bar Counsel she justifiably withheld fees in second client's representation, when in fact she intentionally concealed the fact second client had paid separately for that legal work, by knowingly misrepresenting to Bar Counsel that Chapter 7 trustee intentionally omitted and misrepresented facts to Bankruptcy Court, and by failing to timely and completely respond to Bar Counsel's inquiries. Md. R. Attorneys, Rule 19-308.1.

[43] **Attorneys and Legal Services** Particular Standards and Obligations

An attorney violates Maryland rule of professional conduct governing professional misconduct by attorney when he or she violates other Rules of Professional Conduct. Md. R. Attorneys, Rule 19-308.4.

[44] **Attorneys and Legal Services** Seriousness of offense or conviction

In determining if an attorney violated Maryland rule of professional conduct governing professional misconduct, the court considers whether an attorney's criminal act reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. Md. R. Attorneys, Rule 19-308.4.

[45] **Attorneys and Legal Services** Communications, representations, and disclosures

Maryland rule of professional conduct governing professional misconduct by attorney involving dishonesty, fraud, deceit or misrepresentation encompasses a broad universe of misbehavior, and Rule is violated by making misrepresentations to the client, which includes the concealment of material information from the client. Md. R. Attorneys, Rule 19-308.4.

[46] **Attorneys and Legal Services** Conduct as to Courts and Administration of Justice in General

Conduct prejudicial to the administration of justice, under Maryland rule of professional conduct governing professional misconduct by attorney, is that which reflects negatively on the legal profession and sets a bad example for the public at large. Md. R. Attorneys, Rule 19-308.4.

[47] **Attorneys and Legal Services** Conduct as to Courts and Administration of Justice in General

Attorneys and Legal Services Diligence and promptness

An attorney's failure to appear in court at a hearing on behalf of his or her client constitutes conduct prejudicial to the administration of justice violative of Maryland rule of professional conduct governing professional misconduct by attorney, because an attorney plays such an integral role in the judicial process that, without his or her presence, the wheels of justice must, necessarily, grind to a halt. Md. R. Attorneys, Rule 19-308.4.

[48] **Attorneys and Legal Services** Purpose of proceedings in general

The purpose of attorney disciplinary proceedings is to protect the public and deter other lawyers from engaging in misconduct rather than simply to punish the lawyer.

[49] **Attorneys and Legal Services** Purpose of proceedings in general

The public is protected, which is the purpose of attorney disciplinary proceedings, when sanctions in attorney disciplinary proceedings are commensurate with the nature and gravity of the violations, and the intent with which they were committed.

3 Cases that cite this headnote

[50] **Attorneys and Legal Services** Factors Considered

In fashioning an appropriate sanction in attorney disciplinary proceedings, the court determines the appropriate sanction by considering the facts of the case, as well as balancing any aggravating or mitigating factors.

1 Cases that cite this headnote

[51] **Attorneys and Legal Services** Aggravating factors

Attorneys and Legal Services Mitigating factors

Unlike aggravating factors, the existence of mitigating factors tends to lessen or reduce the sanction an attorney may face in attorney disciplinary proceeding.

2 Cases that cite this headnote

[52] **Attorneys and Legal Services** Property or Funds of Client

Principal and Agent Nature of agent's obligation

Fiduciaries in general, and attorneys in particular, must remember that the entrustment to them of the money and property of others involves a responsibility of the highest order.

[53] **Attorneys and Legal Services** Misappropriation; theft

An attorney must carefully administer and account for the funds of others, and appropriating any part of those funds to their own use and benefit without clear authority to do so cannot be tolerated.

[54] **Attorneys and Legal Services** Disbarment; Revocation of License

Attorneys and Legal Services Mishandling of trust account or client funds

Disbarment was warranted as appropriate sanction due to attorney's violations of Maryland rules of professional conduct governing competence, scope of representation and allocation of authority, diligence, communications, the collection of reasonable fees and expenses, confidentiality of information, safekeeping property, declining or terminating representation, meritorious claims and contentions, expediting litigation, candor toward the tribunal, fairness to opposing party and attorney, truthfulness in statements to others, bar admission and disciplinary matters, misconduct, and depositing client funds into trust accounts; attorney engaged in intentional dishonest conduct in her

personal bankruptcy case as well as numerous cases in which she represented clients, she misappropriated client funds entrusted to her, and she willfully disregarded lawful court orders and was found in civil contempt. Md. R. Attorneys, Rule 19-301.1, 19-301.2, 19-301.3, 19-301.4, 19-301.5, 19-301.6, 19-301.15, 19-301.16, 19-303.1, 19-303.2, 19-303.3, 19-303.4, 19-304.1, 19-308.1, 19-308.4, 19-404.

****36** Circuit Court for Prince George's County, Case No. CAE-18-23035, Peter K. Killough, Judge.

Attorneys and Law Firms

Jennifer L. Thompson, Asst. Bar Counsel (Lydia E. Lawless, Bar Counsel Attorney Grievance Commission of Maryland), for Petitioner.

Nicholas Madiou and William C. Brennan, Jr. (Brennan, McKenna, Manzi, Shay, Chartered), Greenbelt, MD, for Respondent.

Argued before: Barbera, C.J., McDonald, Watts, Hotten, Getty, Booth, Biran, JJ.

Opinion

Getty, J.

****37** ***293** "A person who represents himself [or herself] has a fool for a client."[1]

The instant attorney discipline case fortifies the import of this age-old adage often attributed to President Lincoln. Regrettably, the underlying conduct involves an attorney's overzealous self-representation in a voluntary bankruptcy proceeding in the United States Bankruptcy Court for the District of ***294** Maryland ("Bankruptcy Court"). Over the course of the nearly three-year bankruptcy proceeding, among other things, the attorney filed countless frivolous pleadings, motions, and appeals, intentionally hindered the court-appointed trustee's ability to administer the case, and knowingly made false statements of fact in filings and appeals before the Bankruptcy Court and United States District Court for the District of Maryland ("U.S. District Court"). Moreover, this attorney represented several clients in Maryland's circuit courts, the Court of Special Appeals, and the Bankruptcy Court. In these instances, among other things, the attorney misappropriated client funds, made knowing misrepresentations to and intentionally concealed information from clients, and failed to prosecute clients' motions and appeals.

This attorney's conduct violated sixteen separate provisions of the Maryland Attorneys' Rules of Professional Conduct ("MARPC"). For the reasons that follow, we hold that this attorney's conduct merits disbarment.

BACKGROUND

Procedural Context

On June 27, 2018, the Attorney Grievance Commission of Maryland (the "Commission"), acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action ("Petition I") with this Court alleging that Arlene Smith-Scott had violated the Maryland Lawyers' Rules of Professional Conduct ("MLRPC" or "Rules").[2] *See* Md. Rule 19-721. On February 21, 2019, the Commission, acting through Bar Counsel, filed a second Petition for Disciplinary or Remedial Action ("Petition ***295** II") with this Court alleging that Ms. Smith-Scott violated the MLRPC by conduct unrelated to Petition I.

Petition I, which related to Ms. Smith-Scott's actions during a nearly three-year long personal bankruptcy case, and Petition II, which concerned Ms. Smith-Scott's unrelated representation of seven clients, together alleged that Ms. Smith-Scott violated the following Rules: 1.1 (Competence); 1.2 (Scope of Representation and Allocation of Authority); 1.3 (Diligence); 1.4 (Communication); 1.5 (Fees); 1.6 (Confidentiality of Information); 1.15 (Safekeeping ****38** Property); 1.16 (Declining or Terminating Representation); 3.1 (Meritorious Claims and Contentions); 3.2 (Expediting Litigation); 3.3 (Candor Toward the Tribunal); 3.4 (Fairness to Opposing Party and Attorney); 4.1 (Truthfulness in Statements to Others); 8.1 (Bar Admission and Disciplinary Matters); 8.4 (Misconduct); 19-403 (Duty to Maintain Account);[3] and 19-404 (Trust Account—Required Deposits).

We designated Judge Peter K. Killough (the "hearing judge") of the Circuit Court for Prince George's County by Order

dated June 28, 2018 to conduct a hearing concerning the alleged violations and to provide findings of fact and recommended conclusions of law. *See* Md. Rule 19-722(a). In relation to Petition I, Ms. Smith-Scott was personally served with process on July 30, 2018 and filed her Answer to Petition I on September 4, 2018. Bar Counsel filed a Motion to Consolidate Petition I and Petition II on February 21, 2019. We consolidated the two Petitions on March 6, 2019 and referred Petition II to the hearing judge. In relation to Petition II, Ms. Smith-Scott was personally served with process on April 1, 2019 and filed her Answer to Petition II on April 24, 2019.

The evidentiary hearing spanned five days: June 17, 18, 19, 20 and 28, 2019. In this Court, Bar Counsel filed exceptions to the hearing judge's findings of fact and recommended conclusions ***296** of law on November 13, 2019. Likewise, Ms. Smith-Scott filed exceptions to the same on November 15, 2019. This Court heard oral argument in this matter on January 10, 2020. We disbarred Ms. Smith-Scott and awarded costs against her by per curiam order dated January 10, 2020. *See Attorney Grievance Comm'n v. Smith-Scott*, 466 Md. 543, 543–44, 222 A.3d 1069 (2020). We explain in this opinion the reasons for the per curiam order.

Factual Findings

We begin with a summary of the hearing judge's factual findings. Ms. Smith-Scott was admitted to the Bar of the State of Maryland on February 2, 2012. Since then, she has maintained a law office—Strategic Law Group, LLC—in Prince George's County, Maryland and has focused on representing individuals in Chapter 7 and Chapter 13 bankruptcy proceedings. The instant matter involves Ms. Smith-Scott's wrongdoing in her own personal bankruptcy case and multiple instances of misconduct spanning several different bankruptcy clients.

Personal Bankruptcy Case

Ms. Smith-Scott filed a voluntary bankruptcy petition under Chapter 11 of Bankruptcy Code in the Bankruptcy Court on September 28, 2014. *See In re: Arlene Smith-Scott,* Case No. 14-25022. The case was assigned to the Honorable James F. Schneider.[4]

At the time of the bankruptcy petition, Ms. Smith-Scott held title to three investment properties: (1) 367-371 Main Street, Laurel, Maryland (mortgage held by Patapsco Bank) ("367 Main Street");[5] (2) 511 ****39** Main Street, Laurel, Maryland (mortgage ***297** held by Patapsco Bank) ("511 Main Street," together with 367 Main Street the "Laurel Properties") ; and (3) 10 Stanley Drive, Catonsville, Maryland (mortgage held by U.S. Bank) ("10 Stanley Drive"). All three properties had multiple residential tenants; the Laurel Properties also had commercial tenants. Ms. Smith-Scott maintained her law office at 367 Main Street.

In March 2014, before Ms. Smith-Scott filed for bankruptcy, U.S. Bank exercised its contractual rights under an assignment of rents clause contained in its loan documents with Ms. Smith-Scott to collect rental income directly from the 10 Stanley Drive tenants. U.S. Bank's attorney, Bradley Swallow, contacted the tenants and instructed them to pay rent to U.S. Bank directly. Two days later, Ms. Smith-Scott wrote the tenants and instructed them to send rent to her directly or face eviction. In the letter, Ms. Smith-Scott claimed that U.S. Bank did not have a legal basis to collect the rent and instructed the tenants to file complaints against Mr. Swallow with the Commission.

On April 10, 2014, Ms. Smith-Scott filed a lawsuit against U.S. Bank and Mr. Swallow in the U.S. District Court (the "U.S. Bank Action") claiming violations of the Fair Debt Collection Practices Act. *See Smith-Scott v. U.S. Bank,* Case No. 1:14-cv-01157-JFM. In response, U.S. Bank filed a counterclaim to foreclose on the property at 10 Stanley Drive. The U.S. District Court appointed a receiver to collect the rental income based on Ms. Smith-Scott's interference with U.S. Bank's rent collection efforts (the "August 26 Order I"). In a separate order, the U.S. District Court ruled that "[Mr. Swallow] acted entirely within his rights and the rights of his client in sending the letter" regarding the collection of rent to Ms. Smith-Scott's tenants (the "August 26 Order II," together with August 26 Order I the "August 26 Orders").

***298** Along with Ms. Smith-Scott's personal bankruptcy petition, filed on September 28, 2014, Ms. Smith-Scott filed a Motion to Use Cash Collateral. Ms. Smith-Scott sought authorization to use the rental income from the three properties for maintenance expenses. In the motion, Ms. Smith-Scott represented to the Bankruptcy Court that she was receiving rental income from all three properties. Ms. Smith-Scott failed to mention the U.S. District Court's August 26 Orders.

Two days later, on September 30, 2014, Ms. Smith-Scott informed the U.S. District Court in the U.S. Bank Action of her bankruptcy filing. That same day, U.S. Bank filed an opposition to Ms. Smith-Scott's Motion to Use Cash Collateral. Ms. Smith-Scott filed a reply, in which she argued that U.S. Bank was not the mortgage holder of the 10 Stanley Drive property because of a defect in the chain of title. This argument was unsupported by any facts and belied by the August 26 Orders. Nevertheless, Ms. Smith-Scott continued to assert this claim throughout her bankruptcy proceedings. The U.S. District Court administratively closed the U.S. Bank Action without prejudice on October 2, 2014.

On October 9, 2014, Patapsco Bank also filed a motion to oppose Ms. Smith Scott's Motion to Use Cash Collateral. The Bankruptcy Court denied Ms. Smith-Scott's motion by order dated October 29, 2014 ("October 29 Order") and barred her from using cash collateral—i.e., rental income—from ****40** the Laurel Properties without the consent of Patapsco Bank or the court.

In January 2015, Patapsco Bank filed Motions for Relief from Stay[6] asserting that Ms. Smith-Scott had defaulted on ***299** her loans and had failed to file monthly operating reports demonstrating that she had not used the rental income for any unauthorized purpose.[7] Ms. Smith-Scott filed an opposition to Patapsco Bank's motions on January 30, 2015. Ms. Smith-Scott provided operating reports for October, November and December 2014 on February 18, 2015. Bank statements attached to the report showed that Ms. Smith-Scott ignored the October 29 Order and routinely used cash collateral for personal expenses without the permission of the court or Patapsco Bank during the reporting periods.

Patapsco Bank filed a motion on February 24, 2015 to dismiss Ms. Smith-Scott's Chapter 11 case or, alternatively, convert the case to Chapter 7 because of Ms. Smith-Scott's unauthorized use of cash collateral in violation of the October 29 Order. Ms. Smith-Scott filed an opposition. On February 25, 2015, Patapsco Bank filed a Motion for Civil Contempt and Sanctions (the "Contempt Motion") against Ms. Smith-Scott for violating the October 29 Order. Ms. Smith-Scott filed an opposition to this motion as well, contending that she did not use cash collateral for any unauthorized purpose. On March 8, 2015, Ms. Smith-Scott filed a Motion for Contempt and Sanctions for Unreasonable and Vexatious Multiplication of Proceedings against Patapsco Bank. Ms. Smith-Scott argued that Patapsco Bank's motions were in bad faith and that Patapsco Bank improperly enlarged its proof of claim. Additionally, Ms. Smith-Scott alleged that she suffered emotional distress from Patapsco Bank's attempts to collect the mortgage payments and sought $5,000 in punitive damages. Later rulings of the Bankruptcy Court confirm that Patapsco Bank's motions were not made in bad faith. Instead, its claims were based on the terms of Ms. Smith-Scott's Deed of Trust.

***300** By order on April 7, 2015, the Bankruptcy Court converted Ms. Smith-Scott's case to a Chapter 7 proceeding ("April 7 Conversion Order") because of Ms. Smith-Scott's (1) violation of the October 29 Order prohibiting the unauthorized use of cash collateral; (2) failure to report on the operations of Strategic Law Group; (3) commingling of personal funds and rental income; and (4) untimely filing of financial reports. In ordering the conversion to a Chapter 7 proceeding, the Bankruptcy Court reasoned as follows:

> I'm very concerned at the various lapses that counsel has —and I say counsel because the debtor is an attorney, who actually is a bankruptcy lawyer, who evidenced today by her lack of knowledge of the Bankruptcy Code, the inability to properly proceed in this case. All of these things cause me to come to the conclusion that not only the creditors, but the debtor would be better off if this ****41** case were in a Chapter 7 because she will not then be in charge of the way this case is handled, which has been completely mismanaged from the beginning, to her own detriment, *and to her possible violation of various statutes and criminal laws as well. I don't want to see her get in trouble in this case. And she's going to be in big trouble if we don't stop this now and get somebody in there who knows what he or she is doing* .... And finally, the violation of a court order and the terms of its use of cash collateral, which she's been prohibited from doing, is the final straw that leads me to conclude that this case must have a Chapter 7 Trustee appointed. The case cannot continue in a Chapter 11, and the debtor has shown quite clearly her unable [sic] to properly manage this case from the very beginning.

(Emphasis and ellipsis in original). Ms. Smith-Scott appealed the April 7 Conversion Order to the U.S. District Court on April 8, 2015. *See Smith-Scott v. Patapsco Bank*, Case No. 1:15-cv-01013-RDB.

Patapsco Bank filed Amended Motions for Relief from the Automatic Stay relating to the Laurel Properties on April 8, 2015. Ms. Smith-Scott filed an opposition. The Bankruptcy Court heard arguments on June 18, 2015. Four days later, the ***301** court granted Patapsco Bank's motions (the "June

22 Order"). The June 22 Order granted Patapsco Bank relief from the automatic stay, allowed it to foreclose on the Laurel Properties, and collect the rents.

Meanwhile, the Bankruptcy Court appointed George W. Liebmann, Esq. ("Trustee") as the United States Chapter 7 Trustee to oversee Ms. Smith-Scott's bankruptcy case. The Trustee filed an Application to employ his law partner, Orbie R. Shively, Esq. ("Mr. Shively") as his attorney in his capacity as the Trustee. On May 11, 2015, during a conversation between Ms. Smith-Scott and Mr. Shively, Ms. Smith-Scott indicated her intent to move forward with the U.S. Bank Action, even though the case had been administratively closed by the U.S. District Court. Mr. Shively advised Ms. Smith-Scott that the U.S. Bank Action was property of the bankruptcy estate. As such, the lawsuit was within the exclusive control of the Trustee. Mr. Shively further explained that only the Trustee could proceed in the U.S. Bank Action—not Ms. Smith-Scott—and he requested that Ms. Smith-Scott provide him with relevant filings in the case. Ms. Smith-Scott failed to comply with Mr. Shively's request.

During the same conversation, Ms. Smith-Scott requested a postponement of her § 341 meeting of creditors,[8] which was originally scheduled for May 12, 2015. Mr. Shively consented, and postponed the meeting until May 26, 2015. However, Ms. Smith-Scott never appeared for the rescheduled meeting. Yet, on May 26, 2015, Ms. Smith-Scott emailed Mr. Shively and again informed him of her intent to proceed in the U.S. Bank Action. On May 27, 2015, Mr. Shively responded by email and reminded Ms. Smith-Scott that the Trustee exclusively controlled the U.S. Bank Action and she had no right to proceed in the case.

***302** Notwithstanding Mr. Shively's warnings, Ms. Smith-Scott filed three motions in the U.S. Bank Action on June 15, 2015: (1) Motion to Reopen Case; (2) Motion to Vacate Order Granting Receivership; and (3) Motion for Leave to File Amended Complaint ****42** to Add Party and Due to New Evidence. However, because of the Trustee's appointment, Ms. Smith-Scott lacked standing to file these motions. Additionally, Ms. Smith-Scott failed to serve the Trustee or Mr. Shively with copies or notice of the filings. On June 17, 2015, the Trustee filed a Motion and Notice of Substitution of Trustee arguing that the Trustee was the real party in interest and that Ms. Smith-Scott lacked standing to proceed in the case. Ms. Smith-Scott filed an opposition on July 1, 2015, arguing, without support, that the Trustee's motion was not ripe because the April 7 Conversion Order was pending on appeal. The Trustee filed a reply.

The U.S. District Court denied Ms. Smith-Scott's motions on June 17, 2015. Ms. Smith-Scott noted an appeal of the U.S. District Court's order to the United States Court of Appeals for the Fourth Circuit. In response, the Trustee filed a Line Withdrawing with Prejudice Notice of Appeal. Ms. Smith-Scott filed an opposition to the Trustee's line withdrawing the appeal on July 20, 2015. The U.S. District Court granted the Trustee's Motion and Notice of Substitution on August 5, 2015. Ms. Smith-Scott filed a second appeal to the U.S. Court of Appeals for the Fourth Circuit. The appellate court consolidated the two appeals and, on November 5, 2015, dismissed the case on joint stipulation between the Trustee and U.S. Bank.

Meanwhile, pursuant to the June 22 Order, Patapsco Bank sent letters to Ms. Smith-Scott's tenants directing them to send rent payments directly to Patapsco Bank. Patapsco Bank copied Ms. Smith-Scott on each letter. On July 13, 2015, Ms. Smith-Scott sent letters to her tenants acknowledging that Patapsco Bank had the right to collect the rents; however, she informed the tenants that she would be unable to maintain the properties without rental income. Ms. Smith-Scott instructed the tenants to remit their rent payments directly to her. On July 18, 2015, Patapsco Bank filed a Motion for Civil Contempt ***303** and Sanctions noting Ms. Smith-Scott's efforts to obstruct Patapsco Bank's rent collection. Patapsco Bank asserted that Ms. Smith-Scott continued to use rent payments in violation of the October 29 Order. Ms. Smith-Scott filed an opposition on July 20, 2015.

Patapsco Bank sent a second letter to Ms. Smith-Scott's tenants on July 31, 2015, directing them to remit their rental payments to a property management company, Summerfield Investment Group, LLC. On August 3, 2015, Ms. Smith-Scott sent another letter to the tenants falsely stating that Patapsco Bank did not have a court order to collect the rent; again, she directed the tenants to remit the rent payments directly to her. Ms. Smith-Scott directed the tenants to call 9-1-1 if any person came to the properties to collect the rents. Patapsco Bank filed a supplement to its earlier Motion for Civil Contempt and Sanctions on August 6, 2015.

Ms. Smith-Scott, without authorization from the Bankruptcy Court or the Trustee, filed a lawsuit against Patapsco Bank ("Patapsco Bank Action") in the Circuit Court for Prince George's County on August 14, 2015. *See Smith-Scott*

v. Patapsco Bank, Case No. CAL15-20704. Because Ms. Smith-Scott's complaint related to allegations and events occurring prior to the filing of her bankruptcy petition, the Patapsco Bank Action became a part of the bankruptcy estate; therefore, it fell under the exclusive control of the Trustee. The Trustee filed a Motion to Intervene as the real party in interest on November 25, 2015. The circuit court granted the Trustee's motion, and the Trustee and Patapsco Bank settled the matter by stipulation.

****43** On August 31, 2015, Ms. Smith-Scott filed a Motion to Alter or Amend the April 7 Conversion Order and the June 22 Order permitting Patapsco Bank to foreclose.[9] Howard Bank, successor-in-interest to Patapsco Bank, filed an opposition on September 14, 2015.

***304** In response to Ms. Smith-Scott's failure to attend the rescheduled § 341 meeting of creditors, the Trustee filed, on September 2, 2015, a Motion for Order Compelling Debtor to Attend Rescheduled Meeting of Creditors. The Trustee requested that the court compel Ms. Smith-Scott's attendance at another rescheduled meeting set for October 22, 2015. Ms. Smith-Scott filed a response on September 21, 2015, in which she alleged her case should not have been converted to Chapter 7 and that U.S. Bank did not hold the mortgage for 10 Stanley Drive based on a defect in the chain of title.[10] Her response did not address the Trustee's request to compel her presence at the October 22 meeting of creditors. The Bankruptcy Court granted the Trustee's motion on September 24, 2015 ("September 24 Order") and ordered Ms. Smith-Scott's attendance at the October 22 meeting. Nevertheless, Ms. Smith-Scott failed to appear. Indeed, after the April 7 Conversion Order, Ms. Smith-Scott refused to attend any of the required meetings of creditors.

On September 29, 2015, on the Trustee's motion, the Bankruptcy Court entered an order ("September 29 Order") compelling Ms. Smith-Scott to turn over the following to the Trustee within ten days: (1) copies of all leases identified on Schedules E and G of the bankruptcy petition;[11] (2) bank ***305** records showing the accounts where each of the tenants' security deposits were deposited and subsequent bank statements to the present; (3) the tenants' security deposits plus 3% interest; (4) the records showing each client of Strategic Law Group, amount and dates of legal services rendered constituting the pre-petition accounts receivable; (5) accounting, plus bank records, showing all of Ms. Smith-Scott's collection or other receipts of pre-petition accounts receivable from September 28, 2014 to April 7, 2015; (6) accounting, plus bank records, showing all of Ms. Smith-Scott's collection or other receipts of pre-petition accounts receivable from April ****44** 7, 2015 to the present; (7) copies of Ms. Smith-Scott's 2013 federal and Maryland income tax returns; (8) copies of the 2014 federal and Maryland income tax returns; and (9) the pro rata portion (74%) of the total amount in 2014 tax refunds. Ms. Smith-Scott provided her residential leases and 2013 tax returns, but failed to turn over the remaining documentation ordered by the Bankruptcy Court.

On October 1, 2015, the Trustee filed a Motion for Sale of 10 Stanley Drive Free and Clear of Liens and Encumbrances. Ms. Smith-Scott filed an opposition and, again, asserted that U.S. Bank did not hold the mortgage for 10 Stanley Drive. The Trustee's reply contended that Ms. Smith-Scott lacked standing to oppose the sale because the property had no equity and Ms. Smith-Scott was insolvent. The Bankruptcy Court heard arguments on November 5, 2015. Before the hearing, the Trustee explained to Ms. Smith-Scott that she did not have standing to oppose the sale and that Ms. Smith-Scott's accusations of fraud on the part of U.S. Bank were irrelevant to the validity of the mortgage. During the hearing, the Bankruptcy Court advised Ms. Smith-Scott that she lacked standing to challenge the sale of 10 Stanley Drive. The Bankruptcy ***306** Court granted the Trustee's motion on November 6, 2015 ("November 6 Order").

Meanwhile, the U.S. District Court affirmed the Bankruptcy Court's April 7 Conversion Order on October 8, 2015. *See Smith-Scott v. Patapsco Bank,* Case No. 1:15-cv-01013-RDB. The U.S. District Court's written opinion noted that, "the record in this case is replete with cause for conversion" and the Bankruptcy Court's "findings of fact were not clearly erroneous." The U.S. District Court continued, "the evidence in this case clearly supports [the bankruptcy court's] findings that [Ms.] Smith-Scott is not competent to administer her case." (First alteration in original). That same day, Ms. Smith-Scott filed an Amended Motion to Alter or Amend the Bankruptcy Court's April 7 Conversion Order—the very order the U.S. District Court affirmed on appeal. Again, Ms. Smith-Scott reiterated the same argument that U.S. Bank did not hold the mortgage for 10 Stanley Drive. The Bankruptcy Court denied the motion on November 6, 2015 ("November 6 Denial").

On November 6, 2015, Ms. Smith-Scott appealed the Bankruptcy Court's November 6 Order and November 6 Denial to the U.S. District Court. *See Smith-Scott v. Howard*

Bank, et al., Case No. 1:15-cv-03423-RDB. During the pendency of the appeal, on November 17, 2015, Ms. Smith-Scott filed a Motion to Reconsider November 6 Order. On November 23, 2015, on the Trustee's motion, the Bankruptcy Court struck Ms. Smith-Scott's motion ("November 23 Order") because it concerned "the same Order that [Ms. Smith-Scott] previously appealed to the United States District Court."

On November 17, 2015, the Trustee filed a Motion to Dismiss Appeal in the U.S. District Court. *See* Case No. 1:15-cv-03423-RDB. Ms. Smith-Scott filed an opposition. The U.S. District Court granted the Trustee's motion on March 18, 2016, affirmed the April 7 Conversion Order, and affirmed the November 6 Denial. In its memorandum opinion, the U.S. District Court found that Ms. Smith-Scott lacked standing to challenge the sale of 10 Stanley Drive, and that "there [ ] ***307** remains substantial evidence supporting the issuance of the [April 7] Conversion Order and [the Bankruptcy Court's] decision to uphold it." (Alteration in original). On March 22, 2016, Ms. Smith-Scott filed an appeal to the U.S. Court of Appeals for the Fourth Circuit. The appellate court affirmed the U.S. District ****45** Court's ruling in part and dismissed the appeal in part on August 8, 2016.

On November 22, 2015, Ms. Smith-Scott filed a Motion to Remove Chapter 7 Trustee for Cause. Ms. Smith-Scott alleged that the Trustee neglected his duties by declining to investigate Ms. Smith-Scott's claims against U.S. Bank and that the Trustee "purposely and knowingly conceal[ed] fraud" on the part of U.S. Bank. On November 25, 2015, before the Trustee could respond, the Bankruptcy Court denied the motion ("November 25 Order") stating, "the motion has no merit whatsoever. No hearing is required." That same day, Ms. Smith-Scott filed an appeal of the Bankruptcy Court's November 23 Order and November 25 Order. *See Smith-Scott v. Liebmann*, Case No. 1:15-cv-03637-RDB. The Trustee filed a Motion to Dismiss on February 3, 2016. Ms. Smith-Scott did not file an opposition.

The U.S. District Court entered an order on March 18, 2016 dismissing the appeal and affirming the November 25 Order. In its memorandum opinion, the U.S. District Court determined that the November 25 Order was not a final appealable order; therefore, it was not properly before the U.S. District Court and required dismissal. The U.S. District Court further concluded that Ms. Smith-Scott's appeal of the Bankruptcy Court's November 6 Order divested the Bankruptcy Court of jurisdiction to adjudicate her November 17 Motion to Reconsider. Ultimately, the U.S. District Court held that, "[w]ithout jurisdiction over the issue, [the Bankruptcy Court] properly struck [Ms. Smith-Scott's] Motion to Reconsider." (First and second alterations in original).

The Trustee filed a Motion for Approval of Settlement and Compromise with Howard Bank on November 25, 2015. Ms. Smith-Scott did not file an opposition. The Bankruptcy Court ***308** granted the Trustee's motion on January 4, 2016 ("January 4 Order"). Ms. Smith-Scott filed a Motion to Alter or Amend the January 4 Order on April 25, 2016. The Trustee filed an opposition. On September 26, 2016, the Bankruptcy Court denied Ms. Smith-Scott's motion, explaining that Ms. Smith-Scott failed to meet "the initial threshold for consideration [of the motion] pursuant to [Federal Rule of Civil Procedure] Rule 60(b)." (Alteration in original).

On December 21, 2015, the Bankruptcy Court found Ms. Smith-Scott in civil contempt for violating its October 29 Order, which prohibited Ms. Smith-Scott from using cash collateral. In response, Ms. Smith-Scott filed a Motion to Recuse Judge Schneider on January 5, 2016, contending that Judge Schneider was partial and biased against her. The Trustee and United States Trustee—who had not participated in the case until this point—filed oppositions. Ms. Smith-Scott filed on May 16, 2016 a supplement to her Motion to Recuse.

The Bankruptcy Court issued an order on March 22, 2016 requiring Ms. Smith-Scott and Strategic Law Group to vacate the Laurel Properties on or before April 1, 2016 ("March 22 Order"). Ms. Smith Scott defied the March 22 Order and refused to vacate 367 Main Street. On April 12, 2016, Mr. Shively went to the Laurel Properties with a locksmith to change the locks. There, Mr. Shively encountered two Strategic Law Group employees; he informed them that they needed to vacate the property immediately. One employee called Ms. Smith-Scott, who instructed the employees to stay in the office despite Mr. Shively's instructions. Mr. Shively then told the employees that they had three days to vacate the property. Later that month, without notice or authorization from the Trustee, Ms. Smith-Scott changed the locks to her law office.

****46** On April 13, 2016, Ms. Smith-Scott, on behalf of Strategic Law Group, filed an "Emergency Injunctive Relief as to and [sic] Motion to Alter and/or Amend Order dated March 24, 2016." Ms. Smith-Scott argued that the court did

not have jurisdiction over Strategic Law Group and could not force it to vacate 367 Main Street. The Trustee countered that the ***309** ownership of Strategic Law Group is an asset of the bankruptcy estate and the law firm had not paid rent in over a year to the detriment of the estate and the secured party.

On April 19, 2016, as a result of Ms. Smith-Scott's failure to vacate 367 Main Street in violation of the March 22 Order, the Trustee filed a Motion for Civil Contempt and Sanctions. Ms. Smith-Scott filed an opposition on May 5, 2016. Ms. Smith-Scott accused Mr. Shively of engaging in criminal conduct in an effort to secure possession of 367 Main Street. On April 25, 2016, Ms. Smith-Scott filed a second Motion to Remove Chapter 7 Trustee. Both the Trustee and the U.S. Trustee filed oppositions.

The Bankruptcy Court held a hearing on May 16, 2016 where it found Ms. Smith-Scott in civil contempt of its March 22 Order and warned Ms. Smith-Scott that continued contempt may result in her incarceration (the "May 16 Contempt Order"). The Bankruptcy Court ordered that Ms. Smith-Scott pay the Trustee, within ten days, the following: $612 in locksmith costs and $100 per day from April 1, 2016 until she vacated 367 Main Street. Ms. Smith-Scott did not pay the sanctions. Further, despite the contempt finding, Ms. Smith-Scott refused to vacate 367 Main Street. On May 19, 2016, the Trustee filed a Notice of Non-Compliance alerting the Bankruptcy Court of Ms. Smith-Scott's continued refusal to comply with the March 22 Order.

Ms. Smith-Scott noted an appeal of the May 16 Contempt Order to the U.S. District Court on May 20, 2016. *See Smith-Scott v. Howard Bank, et al.*, 1:16-cv-01572-RDB. In her brief, Ms. Smith-Scott accused Mr. Shively of committing perjury during the May 16 hearing, alleged the Bankruptcy Court was violating her Eighth Amendment right against cruel and unusual punishment by threatening incarceration, alleged a number of constitutional violations, and argued that "the Trial Court abused its discretion by failing to rule on [Ms. Smith-Scott's] Motion to Recuse while allowing perjury and mortgage fraud to take place which would lead an objective observer to question the judge's impartiality."

***310** On September 20, 2016, the U.S. District Court affirmed the May 16 Contempt Order and dismissed Ms. Smith-Scott's appeal. The U.S. District Court's opinion rejected all of Ms. Smith-Scott's arguments and held that Ms. Smith-Scott, "cites no facts which would support her [perjury] contentions but appears to rely upon the sheer audacity of her allegations" and that her allegations are "contradicted by signed submissions to the Court by counsel for [the Trustee.]" Concerning the Eighth Amendment challenge, the U.S. District Court held "[t]o be clear: [Ms. Smith-Scott] has not been incarcerated in conjunction with this case, and her Brief does not allege that she was .... [Ms. Smith-Scott's] claim that her Eighth Amendment rights have been violated is premature." (Ellipsis in original). On the judicial recusal challenge, the U.S. District Court held that Ms. Smith-Scott "cites no action or conflict which would warrant judicial disqualification—indeed, she alleges no facts involving Judge Schneider at all—but, again, relies only upon the audacity of her allegations."

****47** As of June 8, 2016, Ms. Smith-Scott still refused to vacate 367 Main Street, causing the Trustee to file a Second Notice of Non-Compliance with Contempt Order. On June 20, 2016, the U.S. Trustee filed an Adversary Complaint against Ms. Smith-Scott. The U.S. Trustee requested an order denying discharge of Ms. Smith-Scott's debts on the grounds that she (1) refused to comply with the court's September 24 Order; (2) transferred and concealed estate property, i.e., the Patapsco Bank rents; (3) refused to comply with the court's September 29 Order; (4) refused to comply with the court's March 22 Order, and (5) intended to delay the Trustee's administration of the estate by filing the Patapsco Bank Action.

The Trustee filed a Motion to Sell 511 Main Street free and clear of liens and encumbrances on June 17, 2016. Ms. Smith-Scott filed an opposition. On July 22, 2016, the Bankruptcy Court granted the Trustee's motion. By June 27, 2016, Ms. Smith-Scott still refused to vacate 367 Main Street, causing the Trustee to file a Third Notice of Non-Compliance with Turnover Order and with Contempt Order.

***311** On July 8, 2016, Ms. Smith-Scott filed a complaint in the U.S. District Court against the Trustee, Mr. Shively, and their law firm, Liebmann and Shively, P.A. (collectively, "Defendants"). The case was ultimately transferred to the Bankruptcy Court. In her complaint, Ms. Smith-Scott alleged that during the May 16 contempt hearing, Mr. Shively made four "negligent and willful misrepresentations" to the Bankruptcy Court intending to obtain a favorable ruling. She sought relief in the form of punitive damages in the amount of "$10,000 for each statement and from each Defendant." Additionally, Ms. Smith-Scott falsely alleged that the Trustee engaged in unlawful entry and trespass when he changed the locks to her law office on April 12, 2016. Ms. Smith-Scott sought further damages in the amount of $215 to "re-key the

lock" to her law office and punitive damages in the amount of "$10,000 from each Defendant." Ms. Smith-Scott's complaint included several other unsubstantiated charges against the Trustee, Mr. Shively, and their law firm. The Defendants filed a Motion to Dismiss on July 27, 2016. Ms. Smith-Scott failed to respond; therefore, the U.S. District Court dismissed the complaint with prejudice on September 15, 2016.

Also on July 8, 2016, Ms. Smith-Scott filed a Motion to Withdraw Bankruptcy Case to the U.S. District Court requesting the U.S. District Court to take complete jurisdiction over her bankruptcy case. Ms. Smith-Scott claimed that she had "proven that the Chapter 7 Trustee has perjured himself in the United States Bankruptcy Court" and has "breached [his] fiduciary duty to the unsecured creditors." (Alteration in original). Ms. Smith-Scott made several arguments that her constitutional rights had been violated. On July 22, 2016, the Trustee filed an opposition. On September 29, 2017, the U.S. District Court denied the motion, noting that Ms. Smith-Scott moved to withdraw her case "a full twenty-one months after she voluntarily commenced the case in the bankruptcy court ... where there were over 400 docket entries in the case, including three unsuccessful appeals to the District Court." (Ellipsis in original). The U.S. District Court held that Ms. Smith-Scott's motion "could be denied on timeliness grounds ***312** alone," that her complaint was "devoid of claims premised on other federal laws," and that the motion "appears to be an attempt by [Ms. Smith-Scott] to find a more favorable forum for her claims."

As of July 19, 2016, Ms. Smith-Scott still refused to vacate 367 Main Street, causing the Trustee to file a Fourth Notice of Non-Compliance ****48** with Turnover Order and with Contempt Order. On July 22, 2016, the Bankruptcy Court entered an order on its own accord ("July 22 Order") directing the U.S. Marshal to assist the Trustee in securing the property. The Bankruptcy Court's order found:

> [Ms.] Smith-Scott, the debtor and a member of the bar of this Court, has failed and refused to comply with the lawful orders of this Court. It is apparent from the Trustee's motion, notices of non-compliance and the record that the debtor is willfully disregarding court orders and refusing to allow the Trustee to undertake his statutory function to administer the assets of the estate.

Ms. Smith-Scott, that same day, noted an appeal of the July 22 Order to the U.S. District Court directing the U.S. Marshal to assist the Trustee and the order approving the sale of 511 Main Street. *See Smith-Scott v. Liebmann*, Case No. 1:16-cv-02658-GLR. Ms. Smith-Scott failed to file an appellate brief; therefore, the U.S. District Court dismissed the appeal on December 27, 2016.

On August 11, 2016, the Bankruptcy Court entered an order denying Ms. Smith-Scott's Motion to Recuse Judge ("August 11 Order") and held, "the debtor's allegations of bias are nothing more than 'unsupported, irrational, or highly tenuous speculation' " and that "her dissatisfaction with the results obtained in the instant case does not entitle her to a change of judge." The Bankruptcy Court entered another order on September 1, 2016, denying Ms. Smith-Scott's second Motion to Remove Trustee ("September 1 Order") and remarked, "the debtor has opposed every action by the Chapter 7 Trustee to administer this case... [t]he instant motion to remove the Trustee is without merit." (Ellipsis and alterations in original). ***313** On September 6, 2016, Ms. Smith-Scott noted an appeal to the U.S. District Court of the August 11 Order and September 1 Order. Ms. Smith-Scott failed to file the requisite appellate pleadings. On August 15, 2017, on the Trustee's motion, the U.S. District Court dismissed the appeal.

After the issuance of these orders, Mr. Shively, with the assistance of three Deputy U.S. Marshals, went to 367 Main Street to secure possession. The Strategic Law Group employees Mr. Shively encountered on April 12 were present at the office. After making a phone call, the employees refused to vacate the premises. The U.S. Marshals advised the employees that they would be handcuffed; ultimately, the employees vacated the property. U.S. Marshals and the property manager packed the contents of Ms. Smith-Scott's law office and moved the packed boxes to a parking lot behind the building. Shortly thereafter, Ms. Smith-Scott arrived with a moving truck. Mr. Shively observed Ms. Smith-Scott load all the items from the parking lot into the moving truck and drive away.

On January 23, 2017, the Bankruptcy Court entered summary judgment in favor of the U.S. Trustee in the Adversary Proceeding and found that "the Debtor in this case, did willfully disobey lawful Orders of this Court." The Bankruptcy Court further entered a judgment denying Ms. Smith-Scott's discharge ("Denial of Discharge Order"). On January 30, 2017, Ms. Smith-Scott again appealed the Denial of Discharge Order to the U.S. District Court. *See Smith-Scott v. U.S. Trustee*, Case No. 17-cv-00267-ELH. The U.S. District Court affirmed the Denial of Discharge Order on January 25,

2018. Ms. Smith-Scott filed an appeal to the U.S. Court of Appeals for the Fourth Circuit.

The Trustee filed a Motion of Sale of 367 Main Street on April 11, 2017 and an amendment thereto on April 26, 2017. Ms. ****49** Smith-Scott filed an opposition. On June 11, 2017 the Bankruptcy Court approved the Trustee's sale of 367 Main Street ("June 11 Order"). On June 27, 2017, Ms. Smith-Scott filed an untimely appeal to the U.S. District Court of the June 11 Order. On August 22, 2017, on the Trustee's motion, the ***314** U.S. District Court dismissed the appeal due its untimeliness and Ms. Smith-Scott's failure to file the required appellate pleadings.

The U.S. Trustee approved the Trustee's final accounting and final notice was sent to all parties on August 31, 2017.

Bar Counsel Investigation I

Bar Counsel wrote to Ms. Smith-Scott on September 23, 2016 and requested an explanation by October 14, 2016 for her failure to comply with the Bankruptcy Court's March 22 Order. Ms. Smith-Scott failed to respond to Bar Counsel in any manner. On October 18, 2016, Bar Counsel again wrote to Ms. Smith-Scott and requested a response to its September 23 letter within ten days. Ms. Smith-Scott informed Bar Counsel on November 4, 2016, by telephone, that she would hand-deliver a response on November 7, 2016. Ms. Smith-Scott failed to do so.

Bar Counsel notified Ms. Smith-Scott on December 6, 2016 that the matter had been docketed for further investigation and requested a response to the September 23 and October 18 letters by December 21, 2016. Ms. Smith-Scott submitted a response to Bar Counsel on January 17, 2017, wherein she knowingly and intentionally misrepresented the following: "The Chapter 7 Trustee began to sale [sic] property by omitting facts and misrepresenting other facts, which caused the Bankruptcy Judge to rule in [the Chapter 7 Trustee's] favor which included an order of contempt and being threatened with incarceration." Ms. Smith-Scott provided no other explanation for the Bankruptcy Court's contempt finding or her refusal to comply with the March 22 Order.

Representation of Crystal Combs

Ms. Crystal Combs retained Ms. Smith-Scott and Strategic Law Group in October 2015. Ms. Combs sought to remove her ex-husband's name from the deed to her home ("2603 Vicarage Court"). At that time, Bank of America held the mortgage to the home, which was in default. However, Bank of America offered Ms. Combs a loan modification on the condition that ***315** Ms. Combs' ex-husband—since his name remained on the deed—either become a party to the modification or his name be removed from the deed.

Ms. Combs agreed to pay Ms. Smith-Scott on an hourly basis, at the rate of $225 per hour. On October 14, 2015, Ms. Combs paid Ms. Smith-Scott $2,500 for the representation. Of that, $1,000 was for legal services Ms. Smith-Scott had already provided. The remaining $1,500 constituted a retainer against which Ms. Smith-Scott would bill future legal services. Ms. Combs paid Ms. Smith-Scott by credit card; Ms. Smith-Scott entered the credit card number in Square and charged the card.[12] Ms. Smith-Scott failed to deposit and maintain the funds in an attorney trust account until earned for fees or used for expenses. Ms. Smith-Scott failed to obtain Ms. Combs' informed consent in writing to deposit the funds in an account other than an attorney trust account.

On May 19, 2016, at Ms. Smith-Scott's request, Ms. Combs' paid an additional $1,850 towards the representation by credit card. Therefore, by May 18, 2016, Ms. Combs had paid Ms. Smith-Scott a total of $4,350. However, at no time during the ****50** representation of Ms. Combs did Ms. Smith-Scott provide an invoice reflecting how such fees were incurred. Ms. Smith-Scott successfully removed Ms. Combs' ex-husband from the 2603 Vicarage Court deed and Ms. Combs successfully completed her Bank of America loan modification.

At the time Ms. Combs retained Ms. Smith-Scott, Ms. Combs also owned an investment property ("9904 Doubletree Lane"). Ms. Combs was defending a foreclosure action against this property in the Circuit Court for Prince George's County. *See Brown, et al. v. Combs*, Case No. CAE10-20522. On August 9, 2016, the circuit court entered an order permitting the secured creditor to proceed with the foreclosure ("Foreclosure Order"). On August 12, 2016, Ms. Combs retained Ms. Smith-Scott to represent her in the foreclosure action. That same day, Ms. Smith-Scott entered her appearance and filed ***316** an Emergency Motion to Reconsider the Foreclosure Order. The secured creditor scheduled a foreclosure sale for September 13, 2016.

On August 26, 2016, prior to the circuit court's adjudication of the Emergency Motion to Reconsider, Ms. Smith-Scott appealed the Foreclosure Order to the Court of Special Appeals. Ms. Smith-Scott explained to Ms. Combs that an appeal of the Foreclosure Order would delay the foreclosure. With the Notice of Appeal, Ms. Smith-Scott filed in the circuit court a Motion to Stay the proceeding pending appeal. On September 7, 2016, Ms. Smith-Scott filed an unsigned Civil Appeal Information Report in the Court of Special Appeals. On September 21, 2016, the Clerk of the Court of Special Appeals requested Ms. Smith-Scott provide a signed copy of the report. Ms. Smith-Scott failed to respond and otherwise failed to pursue Ms. Combs' appeal in any manner. The Court of Special Appeals dismissed the appeal on November 15, 2016.

Ms. Combs agreed to pay Ms. Smith-Scott on an hourly basis for her representation in the circuit court and Court of Special Appeals. On August 15, 2016, Ms. Combs paid Ms. Smith-Scott $1,000 by credit card. Ms. Combs paid another $500 by credit card on August 25, 2016. Ms. Combs provided Ms. Smith-Scott with the credit card number either over the phone or in person. Ms. Smith-Scott and Ms. Combs did not execute a written retainer agreement for the representation. At no point throughout the representation or at its conclusion did Ms. Smith-Scott provide Ms. Combs with an invoice reflecting the legal fees that Ms. Combs incurred.

In early September 2016, with the September 13, 2016 foreclosure sale looming, Ms. Combs elected to file for bankruptcy. On September 12, 2016, Ms. Combs retained Ms. Smith-Scott to represent her in the bankruptcy proceedings and agreed to pay a flat fee of $4,200 for the representation. That same day, Ms. Combs met with Ms. Smith-Scott and made an initial payment of $1,500 by credit card. Ms. Smith-Scott advised Ms. Combs that once Ms. Combs paid the bankruptcy filing fee, which she agreed to pay in four monthly ***317** installments of $75 dollars, Ms. Combs could pay the remainder of Ms. Smith-Scott's legal fee. Ms. Combs paid the $300 bankruptcy filing fee. On September 12, 2016, Ms. Smith-Scott filed a Voluntary Chapter 13 Petition in the Bankruptcy Court on behalf of Ms. Combs. *See In re: Crystal A. Combs*, Case No. 16-22230. That same day, Ms. Smith-Scott filed a Disclosure of Compensation of Attorney for Debtor, which disclosed the fee arrangement Ms. Smith-Scott reached with Ms. Combs.

On October 7, 2016, the secured creditor for 9904 Doubletree Lane moved for relief ****51** from the automatic stay. On October 17, 2016, Ms. Smith-Scott filed an opposition to the motion and the Bankruptcy Court scheduled a hearing for November 3, 2016. Prior to the hearing date, Ms. Smith-Scott misinformed Ms. Combs that the hearing had been rescheduled and that she need not appear on November 3. However, the hearing had not been rescheduled. The Bankruptcy Court held the November 3 hearing and neither Ms. Smith-Scott nor Ms. Combs appeared.

The Bankruptcy Court granted the secured creditor's motion to lift the automatic stay on November 10, 2016. The Bankruptcy Court entered the order on November 14, 2016, permitting the secured creditor to proceed with foreclosure proceedings. Ms. Combs received a copy of the Bankruptcy Court's order and immediately requested Ms. Smith-Scott file a Motion for Reconsideration. Ms. Smith-Scott agreed to file the motion. Before December 12, 2016, Ms. Smith-Scott represented to Ms. Combs that she had filed the Motion for Reconsideration when she had not. On December 12, 2016, believing Ms. Smith-Scott filed the motion, Ms. Combs emailed Ms. Smith-Scott and inquired whether the court had issued a ruling. On December 28, 2016—six weeks after the Bankruptcy Court lifted the automatic stay—Ms. Smith-Scott filed an untimely Emergency Motion for Reconsideration. Ms. Smith-Scott filed an Amended Emergency Motion on January 4, 2017.

***318** On January 9, 2017, the Bankruptcy Court denied Ms. Smith-Scott's Amended Emergency Motion ("January 9 Order"). Respondent then filed an appeal of the January 9 Order to the U.S. District Court. Yet, before Ms. Smith-Scott could complete any substantive work, Ms. Combs elected to dismiss the appeal. On January 17, 2017, 9904 Doubletree Lane sold at a foreclosure sale. On February 1, 2017, the secured creditor filed a Report of Sale in the circuit court foreclosure action. On February 2, 2017, Ms. Smith-Scott filed Exceptions to the Foreclosure Sale.

Ms. Combs met with Ms. Smith-Scott at her law office on February 2, 2017. At Ms. Smith-Scott's request, Ms. Combs paid $2,500 toward the $4,200 flat fee for the bankruptcy representation by credit card. Therefore, by February 2, Ms. Combs had paid $4,000 of the agreed upon $4,200 flat fee. Bankruptcy Rule 2016(b) obligated Ms. Smith-Scott to inform the Bankruptcy Court of her receipt of additional legal fees, yet she failed to do so. At the February 2 meeting, Ms. Smith-Scott presented Ms. Combs with an invoice for services purportedly rendered. Ms. Combs reviewed the invoice and noticed inaccuracies. Ms. Combs requested Ms.

Smith-Scott send a corrected invoice via email. Ms. Smith-Scott failed to do so.

In February 2017, Ms. Combs and Ms. Smith-Scott began to disagree about the most effective legal strategy to reclaim 9904 Doubletree Lane. Ms. Combs acquired sufficient funds to reclaim the property and asked Ms. Smith-Scott to request permission from the circuit court to deposit the funds in the court's escrow account. Ms. Combs expressed a desire to make the request promptly—i.e., before the circuit court ratified the foreclosure sale. In an email on February 18, 2017, Ms. Combs memorialized her request and suggested that Ms. Smith-Scott withdraw her appearance in the foreclosure action if she declined to take the requested action. That same day, Ms. Smith-Scott notified Ms. Combs by email that she would be withdrawing her appearance in both the foreclosure and bankruptcy actions.

***319** On February 21, 2017, unsure whether Ms. Smith-Scott continued to represent her, Ms. Combs emailed Ms. Smith-Scott and alerted her to filing deadlines in the ****52** pending bankruptcy appeal and a scheduled hearing in Bankruptcy Court. Ms. Smith-Scott agreed to attend the hearing and stated to Ms. Combs, "I will need to be paid and I am withdrawing from both cases." Ms. Combs did not know how much she owed Ms. Smith-Scott because she never received a revised invoice. Ms. Combs sent Ms. Smith-Scott a second email on February 21 and requested that she dismiss the bankruptcy case and withdraw her appearance in the foreclosure action. On February 22, 2017, Ms. Smith-Scott filed a Motion to Dismiss Voluntary Chapter 13 Case in the bankruptcy action. The next day the Bankruptcy Court dismissed and closed Ms. Combs' bankruptcy action. On February 23, 2017, Ms. Smith-Scott filed a Line striking her appearance in Ms. Combs' foreclosure action.

On February 22, 2017, Ms. Smith-Scott emailed Ms. Combs two invoices. The invoices showed that Ms. Combs owed Ms. Smith-Scott a total of $4,986.13. Ms. Smith-Scott's email further informed Ms. Combs that she had an outstanding balance of $1,686.13 and an additional $3,300 in legal fees had accrued. The first invoice, labeled "Invoice #23," was dated February 1, 2017 and contained twenty-six entries. Most of the entries pertained to Ms. Smith-Scott's work on the bankruptcy action, for which Ms. Smith-Scott had already been paid $4,000 of the $4,200 total fee. Invoice #23 incorrectly reflected that on February 1, 2017, Ms. Combs paid (1) $216.25 toward the balance; and (2) $2,283.76 toward another invoice, Invoice #22. Ms. Smith-Scott acknowledged to the hearing judge below that Invoice #23 was entirely inaccurate. Likewise, Ms. Combs never owed Ms. Smith-Scott the $1,686.13 balance.

The second invoice attached to Ms. Smith-Scott's email, labeled "Invoice #31," was dated February 22, 2017 and contained entries related to the bankruptcy appeal in the U.S. District Court. Despite agreeing to represent Ms. Combs on appeal for a flat fee, Invoice #31 contained hourly billing entries for work purportedly performed on the appeal. However, ***320** as noted *supra*, Ms. Combs elected to dismiss the appeal before Ms. Smith-Scott undertook any substantive work. Prior to sending Invoice #31, Ms. Smith-Scott never informed Ms. Combs that she would charge on an hourly basis if Ms. Combs chose not to pursue the appeal. The billing entries in Invoice #31 were not accurate and Ms. Combs did not owe the $3,300 balance to Ms. Smith-Scott.

Ms. Combs reviewed these invoices and emailed Ms. Smith-Scott on February 23, 2017 at 6:13 a.m., to express her concern that they contained inaccuracies and failed to account for previous payments. At 7:55 a.m., Ms. Smith-Scott, without having addressed any of Ms. Combs' concerns, charged Ms. Combs' credit card through Square in the amount of $4,986.13. Twenty minutes later, Ms. Smith-Scott responded to Ms. Combs' email. Ms. Smith-Scott made several threatening statements to Ms. Combs and threatened to disclose confidential information about Ms. Combs to adverse parties. Ms. Smith-Scott's email concluded by stating, "But, don't call me or prevent my payment in full. We all have a day of reckoning!"

The hearing judge acknowledged that the issue of whether Ms. Combs authorized Ms. Smith-Scott to charge her credit card presents two separate, but related questions. First, did Ms. Combs give Ms. Smith-Scott her credit card information on February 23, 2017? Second, did Ms. Combs authorize payment in the amount of $4,986.13 on February 23, 2017? On the first question, the hearing judge found for Ms. Smith-Scott, i.e., that there lacked clear and convincing evidence to show that ****53** Ms. Smith-Scott converted Ms. Combs' credit card number. On the second question, the hearing judge found that clear and convincing evidence supported Bar Counsel's account that Ms. Combs did not authorize payment in the amount of $4,986.13.

On February 27, 2017, Ms. Combs disputed the charge with her bank, Wells Fargo. That same day, Wells Fargo returned the full amount to Ms. Combs' account and notified

Ms. Smith-Scott of the dispute. Wells Fargo conducted an investigation ***321** into the disputed charge. As part of the investigation, Ms. Smith-Scott submitted a written explanation to the bank ("Wells Fargo Letter") in which she stated that Ms. Combs gave verbal authorization over the phone to make the charge. With the Wells Fargo Letter, Ms. Smith-Scott attached Invoice #23 and Invoice #31 for support, despite knowing the inaccuracies in each invoice. Neither invoice reflected the $4,000 Ms. Combs had already paid toward the bankruptcy case. Moreover, the hearing judge credited Ms. Combs' testimony that she spoke to Ms. Smith-Scott by telephone on February 28, 2017, and expressly informed her that she did not authorize a charge in the amount of $4,986.13. After the call, Ms. Combs emailed Ms. Smith-Scott and requested an invoice "on any unpaid balance as of" February 28, 2017. Ms. Combs stated, "[i]t is still my intent and desire to come to an agreement and conclusion on this matter." (Alteration in original). On March 1, 2017, Ms. Smith-Scott emailed Ms. Combs and threatened to put her into an involuntary Chapter 7 bankruptcy proceeding so that she could get paid as a creditor. Ms. Smith-Scott failed to provide Ms. Combs with a revised invoice in response to Ms. Combs' earlier requests.

On April 12, 2017, Ms. Combs paid Ms. Smith-Scott the remaining $200 installment toward the $4,200 bankruptcy fee by money order. Ms. Combs testified that she made the final installment payment because she wanted to make a good faith attempt to fulfill her end of the contract with Ms. Smith-Scott to pay $4,200 for the bankruptcy representation. At the time Ms. Combs made the $200 payment, Wells Fargo had returned the $4,986.13 to Ms. Combs' account based on the February 27 dispute. However, after the investigation, Wells Fargo ultimately resolved the dispute in Ms. Smith-Scott's favor. Consequently, Wells Fargo removed $4,986.13 from Ms. Combs' account on May 18, 2017. On April 16, 2017, Ms. Smith-Scott sent Ms. Combs a letter acknowledging the $200 payment. In the letter, Ms. Smith-Scott advised that, while Ms. Combs did not owe any legal fees, she intended to keep the $200. In part, the letter read:

> ***322** However, due to your attempt at disputing your payment and the hardship that I had to endure, the Two Hundred Dollars will be used to cover the expense of protecting myself from your manipulative behavior.

Ms. Smith-Scott never returned the $200 to Ms. Combs.

Ms. Smith-Scott testified that, despite the inaccuracies in Invoice #23 and Invoice #31, Ms. Combs still owed at least $4,986.13 in unpaid legal fees, and that she communicated that balance to Ms. Combs. The hearing judge did not credit this testimony. In rejecting Ms. Smith-Scott's testimony, the hearing judge noted that (1) Ms. Smith-Scott did not present any documentary evidence to support her contention that Ms. Combs owed $4,986.13; (2) much of Ms. Smith-Scott's testimony regarding her billing of Ms. Combs was contradicted by other testimony, the documentary record, or her statements to Bar Counsel during its investigation; and (3) Ms. Smith-Scott admitted at the hearing that, were ****54** she to do it all over again, she would have handled the billing of Ms. Combs' account differently. Specifically, the hearing judge discussed this example:

> [Ms. Smith-Scott] testified at the hearing that Ms. Combs gave her explicit permission to charge her credit card in the amount of $4,986.13 and that Ms. Combs understood that the payment was "conditional." But there is no contemporaneous evidence indicating that [Ms. Smith-Scott] advised Ms. Combs that the $4,986.13 payment was conditional and she never advised Wells Fargo that the disputed payment was "conditional." Moreover, when given an opportunity to explain herself to Bar Counsel during its investigation, [Ms. Smith-Scott] did not make such a claim.

Bar Counsel Investigation II

Ms. Combs filed a complaint with the Commission against Ms. Smith-Scott on May 26, 2017. The focus of Ms. Combs' complaint centered on Ms. Smith-Scott's unauthorized charge of Ms. Combs' credit card. Ms. Smith-Scott responded to the complaint on July 5, 2017. Ms. Smith-Scott attached the Wells ***323** Fargo Letter to her response, which included the false representation that Ms. Combs authorized her to charge the credit card in the amount of $4,986.13. The Wells Fargo Letter did not indicate that the charge was conditional. Additionally, Ms. Smith-Scott attached Invoice #23 and Invoice #31, which she knew to be inaccurate. Ms. Smith-Scott's response to Bar Counsel likewise omitted any representation that Ms. Combs authorized her to charge the credit card in the amount of $4,986.13 or that the charge was "conditional."

Ms. Smith-Scott sought to intentionally mislead Bar Counsel into believing the charge was authorized by submitting the Wells Fargo Letter. On October 19, 2017, Ms. Smith-Scott submitted a second response to Bar Counsel wherein she intentionally gave Bar Counsel the false impression that the $4,986.13 amount was accurate and owed, despite her

knowledge that it was not an accurate figure reflecting legal fees that Ms. Combs owed. Again, Ms. Smith-Scott did not state in the second response that the $4,986.13 charge was somehow "conditional."

Representation of Angela Plater

In October 2014, foreclosure proceedings were instituted against Ms. Angela Plater in the Circuit Court for Prince George's County. *See WBGLMC v. Angela Plater*, Case No. CAEF14-27671. The foreclosure action related to Ms. Plater's home. As a result, Ms. Plater retained Ms. Smith-Scott to assist in saving the home from foreclosure. Ms. Plater and Ms. Smith-Scott did not execute a written retainer agreement.

In early 2015, Ms. Smith-Scott represented Ms. Plater at a foreclosure mediation. Ms. Smith-Scott failed to advise Ms. Plater of the basis or rate of her legal fee prior to the start of the mediation. At the conclusion of the mediation, Ms. Smith-Scott requested payment from Ms. Plater, which she promptly made. At no point during the representation in the foreclosure action did Ms. Smith-Scott advise Ms. Plater of her hourly rate. The mediation did not result in an agreement.

***324** On March 24, 2015, the circuit court entered an order permitting the foreclosure of Ms. Plater's home. The creditor subsequently scheduled the foreclosure sale for October 20, 2015. Ms. Plater received notice of the sale and contacted Ms. Smith-Scott to inform her that October 20 was her birthday. Ms. Plater asked that Ms. Smith-Scott assist in postponing the foreclosure so that it would not occur on ****55** Ms. Plater's birthday. To achieve a postponement, Ms. Smith-Scott suggested that Ms. Plater file a bankruptcy petition. Ms. Plater agreed to file for bankruptcy solely for the purpose of delaying the foreclosure sale, but advised Ms. Smith-Scott that she had no intention of pursuing the bankruptcy through to a liquidation or reorganization of her debts. Ms. Plater further agreed to pay Ms. Smith-Scott a flat fee of $1,500 to file the bankruptcy petition.

Ms. Plater met Ms. Smith-Scott at her law office to prepare the bankruptcy petition on October 19, 2015. Aware that Ms. Plater did not actually intend to pursue bankruptcy, Ms. Smith-Scott advised that she could file a "skeleton form." By "skeleton form," Ms. Smith-Scott meant that she could file the bare minimum bankruptcy petition and intentionally omit other required documentation. Ms. Smith-Scott advised Ms. Plater that without the required documentation, the Bankruptcy Court would dismiss the petition within two to three weeks. With Ms. Plater in the office, Ms. Smith-Scott prepared a Disclosure of Compensation of Attorney for Debtor form,[13] in which Ms. Smith-Scott represented that Ms. Plater agreed to pay a flat fee of $4,200 for the representation. Ms. Plater questioned Ms. Smith-Scott about the $4,200 figure because it did not comport with her understanding of the agreed upon ***325** fee arrangement. Ms. Smith-Scott responded by misrepresenting to Ms. Plater that the form must be submitted to the Bankruptcy Court in that format. On October 19, 2015, Ms. Plater paid Ms. Smith-Scott $1,500 to file the petition.

That same day, Ms. Smith-Scott filed Ms. Plater's Chapter 13 bankruptcy petition. *See In re: Angela M. Plater*, Case No. 15-24508-TJC. The bankruptcy petition was without substantial justification because Ms. Smith-Scott filed it solely for the purpose of preventing the foreclosure sale from occurring. Ms. Smith-Scott had no intention of completing the required filings to ensure that the case would move forward. Moreover, Ms. Smith-Scott filed the Disclosure of Compensation of Attorney for Debtor with a knowingly false statement that Ms. Plater agreed to pay a flat fee of $4,200.

On October 20, 2015, the Bankruptcy Court notified Ms. Smith-Scott that Ms. Plater's petition lacked several required documents. The Bankruptcy Court further explained that if the documents were not submitted by November 2, 2015, the case would be dismissed. Because Ms. Smith-Scott knew that Ms. Plater did not intend to pursue bankruptcy relief, she took no action in response to the notice and did not discuss the notice with Ms. Plater. On November 6, 2015, the Bankruptcy Court dismissed Ms. Plater's bankruptcy case for failure to file the required documents. As a result of the dismissal, the automatic stay lifted. Ms. Smith-Scott did not discuss the dismissal with Ms. Plater.

On December 9, 2015, Ms. Smith-Scott entered her appearance in Ms. Plater's pending foreclosure case. That same day, Ms. Smith-Scott filed a Motion to Stay and/or Dismiss the Foreclosure Proceedings. The circuit court denied the Motion on January 5, 2016 because it (1) failed to state a valid defense or present a meritorious ****56** argument; (2) was not submitted under oath or supported by affidavit as required by Maryland Rule ("Md. Rule") 14-211(a)(3)(A); and (3) failed to comply with Md. Rule 14-211(a)(3)(C). Ms. Plater's home sold at a foreclosure sale on January 5, 2016.

***326** Ms. Smith-Scott filed a Motion to Vacate Foreclosure Sale on February 5, 2016. Ms. Plater, acting *pro se*, filed Exceptions of Sale on February 22, 2016. The circuit court denied both motions on March 22, 2016. Ms. Plater then retained Ms. Smith-Scott to file an appeal of the circuit court's two orders to the Court of Special Appeals. Ms. Smith-Scott agreed to handle the appeal for a flat fee of $4,000. Ms. Smith-Scott advised Ms. Plater that she could pay the fee in installments, but did not provide a date by which the total fee became due. Ms. Plater and Ms. Smith-Scott did not execute a written retainer agreement for the representation.

Ms. Smith-Scott filed a Notice of Appeal and a Motion to Stay Proceedings Pending Appeal in the circuit court on April 19, 2016. For these filings, Ms. Smith-Scott charged and received an additional $500. Ms. Plater paid this amount by check on April 7, 2016. Ms. Smith-Scott filed a Civil Appeal Information Report in the Court of Special Appeals on May 2, 2016. For this filing, Ms. Smith-Scott charged and received an additional $50. Ms. Plater paid this amount by check on April 22, 2016.

On July 5, 2016, the circuit court granted Ms. Plater's Motion to Stay on the condition that she post a supersedeas bond in the amount of $25,000. Ms. Smith-Scott convinced Ms. Plater that there existed a meritorious legal argument that would obviate the need for Ms. Plater to post a bond. Accordingly, Ms. Smith-Scott argued to the circuit court that, since Ms. Plater was a bona fide purchaser, she was not required to post a bond. For this filing, Ms. Smith-Scott charged and received an additional $250. Ms. Plater paid this amount by check on July 12, 2016 when the Motion to Reconsider had been completed. Ms. Smith-Scott did not advise Ms. Plater that she had an outstanding balance or that future legal fees would accrue.

In late August 2016, one of Ms. Smith-Scott's employees contacted Ms. Plater and asked whether she wanted to pursue her appeal. Ms. Plater confirmed that she wanted to pursue the appeal. By that time, the Court of Special Appeals had ***327** notified Ms. Smith-Scott that Ms. Plater's appellate brief must be submitted by September 29, 2016. Ms. Smith-Scott's employee informed Ms. Plater about the filing deadline. On September 7, 2016, Ms. Plater paid Ms. Smith-Scott the first installment for the appeal in the amount of $1,000. Ms. Plater paid by check; the notation "toward brief" appeared in the memo line. Ms. Smith-Scott failed to deposit and maintain the funds in an attorney trust account until earned or expenses incurred. On September 22, 2016, Ms. Plater paid Ms. Smith-Scott a second installment for the appeal in the amount of $1,000. Ms. Plater again paid by check; the notation "payment toward appeal" appeared in the memo line. Ms. Smith-Scott failed to deposit and maintain the funds in an attorney trust account until earned or expenses incurred.

After Ms. Smith-Scott received Ms. Plater's funds, Ms. Smith-Scott did not perform any meaningful legal work on Ms. Plater's appeal. Ms. Smith-Scott failed to prepare or submit Ms. Plater's appellate brief by the September 29 filing deadline. Ms. Smith-Scott failed to request an extension of time. During a conversation with Ms. Smith-Scott in the first week of October 2016, after the deadline had expired, Ms. Smith-Scott intentionally misrepresented to Ms. Plater that she intended to file the appellate brief within one week. Ms. ****57** Smith-Scott failed to file the brief and intentionally concealed her inaction from Ms. Plater.

The Court of Special Appeals dismissed Ms. Plater's appeal on October 19, 2016 as a result of Ms. Smith-Scott's failure to file an appellate brief. Thereafter, for approximately six weeks, Ms. Smith-Scott concealed the dismissal order from Ms. Plater. Throughout early October, Ms. Plater attempted to contact Ms. Smith-Scott on several occasions to find out the status of the appeal, but Ms. Smith-Scott failed to respond. Ms. Plater reached out in the middle of October and scheduled a meeting with Ms. Smith-Scott for the end of the month. On the day of the meeting, Ms. Smith-Scott called Ms. Plater and cancelled. Still, in that conversation, Ms. Smith-Scott did not inform Ms. Plater that the appeal had been dismissed.

***328** Ms. Plater emailed Ms. Smith-Scott on November 14, 2016 requesting a copy of her appellate brief. Ms. Smith-Scott failed to respond. Ms. Plater emailed Ms. Smith-Scott again on November 30, 2016, again requesting a copy of her appellate brief. Ms. Smith-Scott failed to respond. By November 30, neither Ms. Smith-Scott, nor any member of her staff, had informed Ms. Plater that the appeal had been dismissed. In late November, Ms. Plater contacted the Court of Special Appeals and learned, for the first time, that her appeal had been dismissed.

Ms. Plater spoke with Ms. Smith-Scott by telephone in early December 2016. During the conversation, Ms. Smith-Scott still did not inform Ms. Plater of the dismissal. Ms. Plater scheduled a meeting with Ms. Smith-Scott for the middle of December. On the day of the appointment, Ms. Plater went to Ms. Smith-Scott's law office, yet Ms. Smith-Scott failed to appear. An employee called Ms. Smith-Scott so that she could speak with Ms. Plater. On this call, six weeks

after the dismissal of Ms. Plater's appeal, Ms. Smith-Scott informed Ms. Plater of the dismissal for the first time. Ms. Plater immediately requested that Ms. Smith-Scott return her money. Ms. Smith-Scott agreed, but explained that she would need three weeks to do so.

A few weeks later, Ms. Plater went to Ms. Smith-Scott's law office to collect her refund. Ms. Smith-Scott was not there. An employee informed Ms. Plater that Ms. Smith-Scott went to the bank to get a check. Ms. Plater waited approximately thirty minutes to an hour for Ms. Smith-Scott to return; however, Ms. Smith-Scott never arrived. In January 2017, Ms. Plater returned to Ms. Smith-Scott's office a second time to collect her refund. While Ms. Smith-Scott was present in the office, an employee presented Ms. Plater with a check in the amount of $1,025. Ms. Plater immediately disputed the amount of the check and requested a full refund of $2,000. Despite having performed no meaningful work on Ms. Plater's appeal, Ms. Smith-Scott refused to refund the full $2,000. Ms. Smith-Scott failed to describe the legal work or otherwise provide Ms. Plater with an invoice detailing the legal services purportedly ***329** rendered that justified Ms. Smith-Scott retaining $975. Ms. Plater did not deposit the $1,025 check.

Bar Counsel Investigation III

Ms. Plater filed a complaint with the Commission against Ms. Smith-Scott on November 2, 2017. Bar Counsel wrote to Ms. Smith-Scott on November 9, 2017 and requested a response to Ms. Plater's complaint. Ms. Smith-Scott, through counsel, filed a response on January 19, 2018. Ms. Smith-Scott attempted to justify her failure to refund all of Ms. Plater's funds by explaining that she had "met with Ms. Plater; identified the legal issues to pursue on appeal; prepared the Civil Information ****58** Sheet; filed a motion to stay the foreclosure pending the appeal; and filed a motion to mitigate the necessity of a supersedeas bond."

Ms. Smith-Scott concealed from Bar Counsel that she had received additional funds from Ms. Plater to prepare each of these documents. Moreover, in her response, Ms. Smith-Scott stated that she had incurred $825 in legal fees for "legal work performed for Ms. Plater while the matter was pending on appeal." With her response, Ms. Smith-Scott provided a refund check to Ms. Plater in the amount of $1,140. Ms. Plater did not deposit the check because she believed she was owed the full $2,000 she paid toward the appeal.

Representation of Furrah Deeba

Ms. Smith-Scott filed a bankruptcy petition on behalf of Ms. Furrah Deeba in the Bankruptcy Court on January 31, 2017.[14] *See In re: Furrah Deeba*, Case No: 17-11325. In the petition, Ms. Smith-Scott inadvertently used a different client's social security number. This error prompted a notice of a prior bankruptcy filing. Consequently, pursuant to the Bankruptcy Code, the automatic stay imposed only lasted thirty days.

***330** For this reason, Ms. Smith-Scott filed Debtor's Motion to Extend Automatic Stay on February 8, 2017. The Bankruptcy Court scheduled a hearing on the motion for April 17, 2017. Ms. Smith-Scott failed to appear at the hearing and failed to notify the Bankruptcy Court or the trustee that she would not appear. Therefore, on April 17, the court denied the motion and noted on the order, "failure to appear at the hearing held on April 17, 2017 and prosecute the motion." The Bankruptcy Court subsequently dismissed Ms. Deeba's case without the entry of a discharge on July 24, 2017 for failure to file the required financial management course certification.

In Ms. Smith-Scott's Answer to Bar Counsel, she admitted to the facts set forth regarding Ms. Deeba, but alleged that she would provide mitigation before the hearing judge. Ms. Smith-Scott failed to present any mitigation as it pertains to Ms. Deeba.

Representation of Benjamin Thomas, Jr.

Ms. Smith-Scott filed a Chapter 13 bankruptcy petition on behalf of Mr. Benjamin Thomas Jr., in the Bankruptcy Court on April 3, 2017. *See In re: Benjamin Thomas, Jr.*, Case No. 17-14620. The Bankruptcy Court scheduled a plan confirmation hearing in Mr. Thomas' case for August 8, 2017. Ms. Smith-Scott intentionally failed to appear at the hearing. Ms. Smith-Scott further failed to notify the court or the Chapter 13 Trustee that she would not appear. As a result, the Bankruptcy Court denied the confirmation of Mr. Thomas' Chapter 13 plan without leave to amend. Ms. Smith-Scott testified that she had Mr. Thomas' permission not to attend the hearing. Further, Ms. Smith-Scott testified that Mr. Thomas is still her client. Bar Counsel failed to present any evidence to the contrary.

Representation of John Thomas Jones, Jr.

Ms. Smith-Scott filed a Chapter 13 bankruptcy petition on behalf of Mr. John Thomas Jones, Jr., in the Bankruptcy Court on October 7, 2016. *See In re: John Thomas Jones, Jr.*, Case No. 16-23509. The Bankruptcy Court scheduled a plan ***331** confirmation hearing in Mr. Jones' case for January 31, 2017. Ms. Smith-Scott intentionally failed to appear at the hearing. ****59** Ms. Smith-Scott further failed to notify the court or the Chapter 13 Trustee that she would not appear. As a result, the Bankruptcy Court denied the confirmation of Mr. Jones' Chapter 13 plan without leave to amend. In Ms. Smith-Scott's Answer to Bar Counsel, she admitted to the facts set forth regarding Mr. Jones, but alleged that she would provide mitigation before the hearing judge.

Representation of Theresa Saunders

Ms. Smith-Scott filed a Chapter 13 bankruptcy petition on behalf of Ms. Theresa Saunders in the Bankruptcy Court on May 19, 2017. Ms. Saunders filed a *pro se* Motion/Request for Release of Attorney on December 27, 2017. In the motion, Ms. Saunders requested that the Bankruptcy Court "release" Ms. Smith-Scott as her attorney "based upon unsatisfactory actions and irreconcilable differences in miscommunication that have affected her bankruptcy process and may impact the outcome of [her] case." Ms. Saunders further alleged that Ms. Smith-Scott submitted an amended bankruptcy plan on December 12, 2017 without Ms. Saunders' review or approval.

Ms. Smith-Scott filed a Response in Support of Debtor's Motion/Request for Release of Attorney on December 29, 2017. Ms. Smith-Scott stated in her response that "it is this Legal Counsel's belief that the Debtor is no longer protected by Attorney-Client Privilege and has provided the court with e-mails that contradict statements made by the Debtor and allows the Court to get a better understanding of the actions of Legal Counsel." Ms. Smith-Scott cited no legal authority to support her position. Without obtaining Ms. Saunders' informed consent, Ms. Smith-Scott attached to the filing several confidential email communications between Ms. Smith-Scott and Ms. Saunders that occurred between August 4, 2017 and December 20, 2017. Ms. Smith-Scott did not communicate her intent to publicly disclose the emails to Ms. Saunders in advance of the filing. Moreover, Ms. Smith-Scott did not file ***332** the confidential communications under seal or take any other measures to prevent the public disclosure.

Ms. Saunders emailed Ms. Smith-Scott on January 29, 2018 and confronted her about the disclosure of the confidential emails. Ms. Smith-Scott failed to take any remedial action to have the confidential communications sealed or otherwise protected from public review.

STANDARD OF REVIEW

In an attorney discipline proceeding, this Court reviews for clear error a hearing judge's findings of fact, and reviews without deference a hearing judge's conclusions of law. *See* Md. Rule 19-741(b)(2)(B) ("The Court [of Appeals] shall give due regard to the opportunity of the hearing judge to assess the credibility of witnesses."); *Attorney Grievance Comm'n v. Chanthunya*, 446 Md. 576, 588, 133 A.3d 1034 (2016) ("[T]his Court reviews for clear error a hearing judge's findings of fact ...."); Md. Rule 19-741(b)(1) ("The Court of Appeals shall review de novo the [hearing] judge's conclusions of law."). This Court determines whether clear and convincing evidence establishes that a lawyer violated a rule of professional conduct. *See* Md. Rule 19-727(c) ("Bar Counsel has the burden of proving the averments of the petition [for disciplinary or remedial action] by clear and convincing evidence.").

[1] **[2]** Either party may file "exceptions to the findings and conclusions of the hearing judge." Md. Rule 19-728(b). If exceptions to the findings of fact are filed, the Court "shall determine whether the findings of fact have been proved by the requisite standard of proof set out in Rule 19-727(c)." ****60** Md. Rule 19-741(b)(2)(B); *see also Attorney Grievance Comm'n v. Mahone*, 435 Md. 84, 104, 76 A.3d 1198 (2013). We may confine our review to the findings of fact challenged by the exceptions, mindful though, that the hearing judge is afforded due regard to assess the credibility of witnesses. *Id.* A hearing judge's findings of fact are not clearly erroneous "where 'there is any competent evidence to support the' finding of fact." ***333** *Attorney Grievance Comm'n v. Donnelly*, 458 Md. 237, 276, 182 A.3d 743 (2018) (quoting *Attorney Grievance Comm'n v. Merkle*, 440 Md. 609, 633, 103 A.3d 679 (2014)). "If the hearing judge's factual findings are not clearly erroneous and the conclusions drawn from them are supported by the facts found, exceptions to conclusions of law will be overruled." *Attorney Grievance Comm'n v. Tanko*, 408 Md. 404, 419, 969 A.2d 1010 (2009).

DISCUSSION

Bar Counsel does not except to any of the hearing judge's findings of fact. Bar Counsel excepts only to the absence of the hearing judge's conclusion of law regarding Rule 1.15. Ms. Smith-Scott notes several exceptions to both the hearing judge's findings of fact and conclusions of law. We shall address each in turn.

A. Exceptions to the Hearing Judge's Findings of Fact

Ms. Smith-Scott excepts to the hearing judge's *failure* to make the following factual findings: (1) Ms. Smith-Scott's filings in her personal bankruptcy case were done in good faith and were not frivolous at the time of filing; (2) Ms. Smith-Scott represented Ms. Combs in five separate legal matters beginning in October 2015; (3) Ms. Smith-Scott performed a significant amount of legal work in Ms. Combs' five matters; (4) Ms. Smith-Scott performed legal work totaling $11,087.75 for Ms. Combs, yet wrote the total amount down to $7,501.13; and (5) Ms. Smith-Scott earned the full amount of legal fees paid by Ms. Combs.

[3] **[4]** A hearing judge is entitled to "a great deal of discretion in determining which evidence to rely upon." *Attorney Grievance Comm'n v. Miller*, 467 Md. 176, 195, 223 A.3d 976 (2020). Indeed, "[a]s far as what evidence a hearing judge must rely upon to reach his or her conclusions, we have said that the hearing judge 'may pick and choose what evidence to believe.' " *Attorney Grievance Comm'n v. Woolery*, 462 Md. 209, 230, 198 A.3d 835 (2018) (internal citation and some quotations omitted). "We reiterate this point in light of [Ms. Smith-Scott's] numerous exceptions to findings of facts in ***334** which [s]he suggests that the hearing [judge] *should have made* certain findings of fact ...." *Id.* (emphasis in original). Accordingly, because we decline to overrule a hearing judge's findings of fact absent clear error, we overrule Ms. Smith-Scott's "generalized exceptions as to what findings of fact the hearing [judge] failed to make." *Id.*

[5] Next, Ms. Smith-Scott excepts to five of the hearing judge's findings of fact. First, Ms. Smith-Scott contends that the hearing judge should not have found that Ms. Smith-Scott intentionally misrepresented to Bar Counsel that "[t]he Chapter 7 Trustee began to sale [sic] property by omitting facts and misrepresenting other facts, which caused the Bankruptcy Judge to rule in [the Chapter 7 Trustee's] favor which included an order of contempt and being threatened with incarceration," because Ms. Smith-Scott "sincerely and honestly believed" that she acted in good faith in contesting the seizure of her law office. Second, Ms. Smith-Scott asserts that the hearing judge should not have found that Ms. Smith-Scott willfully misrepresented ****61** to Ms. Combs that she had filed a Motion for Reconsideration in December 2016. For support, Ms. Smith-Scott suggests that her hospitalization in December of 2016 negates the willfulness of her misrepresentation to Ms. Combs.

These first two exceptions turn largely on Ms. Smith-Scott's intent in making statements to Bar Counsel and Ms. Combs. We have already said that this Court "shall give due regard to the opportunity of the hearing judge to assess the credibility of witnesses." Md. Rule 19-741(b)(2)(B). Doing just that, we determine that the hearing judge did not err in finding that Ms. Smith-Scott's statements contained in her response to Bar Counsel and Ms. Combs were knowing, intentional, and willful.

Third, Ms. Smith-Scott maintains that the hearing judge should not have found that Ms. Combs did not authorize payment in the amount of $4,986.13 on February 23, 2017. This exception necessarily urges the Court to make credibility decisions based on testimony at the hearing. We decline to do so. Ms. Combs testified at the hearing that she spoke to Ms. ***335** Smith-Scott on February 28, 2017 and informed her that she did not authorize the $4,986.13 charge. Ms. Smith-Scott testified that, despite the inaccuracies in Invoice #23 and Invoice #31, Ms. Combs owed her $4,986.13. The hearing judge explicitly stated that he credited Ms. Combs' testimony and rejected Ms. Smith-Scott's testimony. Moreover, Ms. Smith-Scott's testimony was contradicted by other testimony, the documentary record, and Ms. Smith-Scott's own statements to Bar Counsel during its investigation. The hearing judge did not clearly err in finding that Ms. Combs did not authorize the charge. Therefore, we overrule Ms. Smith-Scott's exception.

[6] Fourth, Ms. Smith-Scott avers that the hearing judge should not have found that Ms. Plater's bankruptcy filing was without substantial justification. She contends that "it can be a legitimate legal strategy to file a Chapter 13 bankruptcy with the reasonable expectation that the lenders may engage in meaningful financial negotiations." Yet, Ms. Plater's hearing testimony eviscerates this argument. Ms. Plater testified that she "didn't have any intention[ ] of going through with the

bankruptcy" and she "informed [Ms. Smith-Scott] of that." To be sure, Ms. Plater reiterated this point, testifying

> I didn't have any intention of going through with the bankruptcy, I just wanted to stop the [foreclosure] sale. [Ms. Smith-Scott] indicated that the filing would stop the sale. So that's all I intended to do. And I made it clear to her that's all I intended to do.

Indeed, this is confirmed by Ms. Smith-Scott's filing of a "skeleton form," notably missing required documents for a legitimate bankruptcy petition. The hearing judge did not err in determining that Ms. Smith-Scott filed a bankruptcy petition on behalf of Ms. Plater without substantial justification.

[7] Fifth, Ms. Smith-Scott argues that the hearing judge should not have found that Ms. Smith-Scott made a knowingly false statement that Ms. Plater agreed to pay $4,200 as the total legal fee for bankruptcy representation. At the hearing, Bar Counsel showed Ms. Plater a copy of the bankruptcy petition Ms. Smith-Scott filed on her behalf. Bar Counsel ***336** directed Ms. Plater to the portion of the petition disclosing Ms. Smith-Scott's compensation. The following exchange occurred:

> **[BAR COUNSEL]:** What is that?
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> **[MS. PLATER]:** This indicates the amount, the price which is – okay. Compensation for attorney from debtor.[15] It ****62** has on here $4,200 and it has $1,[5]00 and $2,700. But there was no discussion of me paying $4,200. I did give her the $1,[5]00 on that date.
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> * * *
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> **[MS. PLATER]:** I did question her on that date when I saw that on the document because it shocked me because it's, like, okay, where did the $4,200 come from. She indicated that that's what she had to do to submit the form, that it had to be done in this format. But I knew I wasn't paying $4,200. I gave her what she told me the $1,500 and that was it.

The form also contained a section entitled "CERTIFICATION," which reads "I certify that the foregoing is a complete statement of any agreement or arrangement for payment to me for representation of the debtor[ ] in this bankruptcy proceeding." Ms. Smith-Scott's signature appears directly below this statement. The hearing judge did not err in determining that Ms. Smith-Scott made a knowingly false statement, and we overrule this exception.

Having overruled Ms. Smith-Scott's exceptions, and having determined that those findings of fact are supported by clear and convincing evidence, we turn to the hearing judge's conclusions of law.

337** ***B. Conclusions of Law

The hearing judge concluded that Ms. Smith-Scott violated Rules 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.15, 1.16, 3.1, 3.2, 3.3, 3.4, 4.1, 8.1, 8.4, and 19-404.

Bar Counsel excepts to the hearing judge's failure to find that Ms. Smith-Scott's conduct, regarding her representation of Ms. Plater, violated Rule 1.15. Ms. Smith-Scott excepts to the hearing judge's conclusions of law that she violated the following Rules: 1.5, 1.6, 1.15, 3.3, 3.4, 4.1, 8.1, 8.4, and 19-404. Based upon our independent review of the record, we sustain Bar Counsel's exception as to Rule 1.15 and uphold the remainder of the hearing judge's conclusions of law.

1. Rule 1.1 (Competence).

[8] **[9]** **[10]** **[11]** Rule 1.1 requires that an attorney "provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." A violation of Rule 1.1 occurs when an attorney "fails to act or acts in an untimely manner, resulting in harm to his or her client." *Attorney Grievance Comm'n v. Maldonado*, 463 Md. 11, 38, 203 A.3d 841 (2019) (quoting *Attorney Grievance Comm'n v. Brown*, 426 Md. 298, 319, 44 A.3d 344 (2012)). An attorney's failure to appear on behalf of a client without explanation is an egregious violation of this Rule. *See Attorney Grievance Comm'n v. Edwards*, 462 Md. 642, 694–95, 202 A.3d 1200 (2019). "Evidence of a failure to apply the requisite thoroughness and/or preparation in representing a client is sufficient alone to support a violation of Rule 1.1." *Attorney Grievance Comm'n v. Guida*, 391 Md. 33, 54, 891 A.2d 1085 (2006). Furthermore, the "failure to maintain [client] funds in a proper trust account demonstrates incompetence." *Attorney Grievance Comm'n v. Maignan*, 390 Md. 287, 296–97, 888 A.2d 344 (2005).

[12] The hearing judge found that Ms. Smith-Scott's conduct violated Rule 1.1 in ****63** a variety of ways. In Ms. Smith-Scott's representation of Ms. Combs, she violated the Rule by: ***338** (1) failing to deposit and maintain the unearned portion of Ms. Combs' October 14, 2015 payment in an attorney trust account until earned or expenses incurred;

(2) failing to competently represent Ms. Combs before the Court of Special Appeals when she neglected to provide the clerk of that court with a signed Civil Appeal Information Report, even after being contacted to do so, thereby causing the court to dismiss Ms. Combs' appeal; (3) misinforming Ms. Combs that her November 3, 2016 Bankruptcy Court hearing had been rescheduled and that their appearance was not required when the hearing had not been rescheduled; (4) acting without the required thoroughness and preparation by filing an untimely Emergency Motion for Reconsideration six weeks after Ms. Combs requested she file the motion; and (5) refusing to provide timely or accurate billing statements to Ms. Combs.

[13] The hearing judge further found that Ms. Smith-Scott violated Rule 1.1 in her representation of Ms. Plater by: (1) failing to deposit and maintain the unearned portion of Ms. Plater's September 2016 payments in an attorney trust account until earned or expenses incurred; and (2) failing to competently represent Ms. Plater before the Court of Special Appeals by neglecting to file an appellate brief or request an extension of time, causing the court to dismiss Ms. Plater's appeal. Finally, the hearing judge concluded that Ms. Smith-Scott violated Rule 1.1 by failing to appear at hearings in the course of her representation of Ms. Deeba and Mr. Jones.

Ms. Smith-Scott does not except to these conclusions of law. Moreover, our independent review of the record confirms that clear and convincing evidence supports the hearing judge's conclusion that Ms. Smith-Scott's conduct violated Rule 1.1.

2. Rule 1.2 (Scope of Representation and Allocation of Authority).

Rule 1.2(a) provides, in pertinent part:

> [A]n attorney shall abide by a client's decisions concerning the objectives of the representation and, when appropriate, shall consult with the client as to the means by which they ***339** are to be pursued. An attorney may take such action on behalf of the client as is impliedly authorized to carry out the representation. An attorney shall abide by a client's decision whether to settle a matter.

[14] **[15]** Under this Rule, an attorney must " 'inform a client of the status of his or her case' so the client has the 'ability to make informed decisions.' " *Edwards*, 462 Md. at 697, 202 A.3d 1200 (quoting *Attorney Grievance Comm'n v. Hamilton*, 444 Md. 163, 182, 118 A.3d 958 (2015)). A Rule 1.2(a) violation may occur when an attorney fails to prosecute his or her client's case and fails to communicate the status of the case to the client. *Id.* (citing *Attorney Grievance Comm'n v. Bellamy*, 453 Md. 377, 394, 162 A.3d 848 (2017)); *see also Attorney Grievance Comm'n v. Brown*, 426 Md. 298, 320, 44 A.3d 344 (2012) (concluding that an attorney's inaction leading to the dismissal of two clients' cases—combined with the attorney's failure to communicate as much and ignorance of the clients' request for information—constituted a violation of Rule 1.2(a)).

[16] Clear and convincing evidence supports the hearing judge's conclusion that Ms. Smith-Scott violated Rule 1.2 by failing to prepare or file an appellate brief in her representation of Ms. Plater. Ms. Plater retained Ms. Smith-Scott to prosecute an appeal in her foreclosure action. Ms. Plater and Ms. Smith-Scott agreed on ****64** a flat fee of $4,000, toward which Ms. Plater made two installment payments totaling $2,000. The Court of Special Appeals imposed a filing deadline of September 29, 2016. Yet, Ms. Smith-Scott failed to prepare or file an appellate brief, or even request an extension of time to accomplish Ms. Plater's sole objective in the representation. *See Attorney Grievance Comm'n v. Ucheomumu*, 462 Md. 280, 311, 200 A.3d 282 (2018) (concluding that an attorney's failure to prepare and file appellate brief constituted "a failure to accomplish the objectives of [the] representation").

Ms. Smith-Scott does not except to the hearing judge's conclusion regarding Rule 1.2. Based on our independent ***340** review, we agree with the hearing judge that Ms. Smith-Scott violated Rule 1.2 in her representation of Ms. Plater.

3. Rule 1.3 (Diligence).

[17] **[18]** Rule 1.3 provides that "[a]n attorney shall act with reasonable diligence and promptness in representing a client." Rule 1.3 "can be violated by failing to advance the client's cause or endeavor; failing to investigate a client's matter; and repeatedly failing to return phone calls, respond to letters, or provide an accounting for earned fees[.]" *Attorney Grievance Comm'n v. Bah*, 468 Md. 179, 208–09, 226 A.3d 912 (2020) (quoting *Edwards*, 462 Md. at 699, 202 A.3d 1200 (alteration in original)). Notably, the same justifications for finding a violation of Rule 1.1 can support a Rule 1.3 violation. *Id.* at 209, 226 A.3d 912.

The hearing judge concluded that based on Ms. Smith-Scott's conduct, discussed in reference to Rule 1.1, *supra* at —— – ——, and Rule 1.4, *infra* at —— – ——, Ms. Smith-Scott

violated Rule 1.3. Ms. Smith-Scott does not except to these conclusions. Our independent review of the record reveals that Ms. Smith-Scott violated Rule 1.3.

4. 1.4 (Communication).
Rule 1.4 provides:

> (a) An attorney shall:
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> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 19-301.0 (f) (1.0), is required by these Rules;
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> (2) keep the client reasonably informed about the status of the matter;
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> (3) promptly comply with reasonable requests for information; and
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> (4) consult with the client about any relevant limitation on the attorney's conduct when the attorney knows that the client expects assistance not permitted by the Maryland Attorneys' Rules of Professional Conduct or other law.
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> ***341** (b) An attorney shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[19] **[20]** **[21]** Pursuant to Rule 1.4, an attorney is required "to communicate with their clients and keep them reasonably informed of the status of their legal matters." *Attorney Grievance Comm'n v. Planta*, 467 Md. 319, 349, 225 A.3d 19 (2020). A violation of this Rule occurs when a client repeatedly attempts to contact the attorney, but the attorney fails to respond. *Id.* Moreover, Rule 1.4 is violated "when an attorney 'fails to communicate crucial information about the status of the case,' " or where "the attorney fails to comply promptly with a client's reasonable requests for information, which may include a general status update or for documents pertaining to the case." *Id.* (quoting *Hamilton*, 444 Md. at 185, 118 A.3d 958).

****65** *Ms. Combs*

[22] The hearing judge concluded that Ms. Smith-Scott violated Rule 1.4(a)(2)–(3) and (b) by failing to provide Ms. Combs with timely or accurate billing statements, despite Ms. Combs' repeated requests. The hearing judge reasoned that Ms. Combs could not have made informed decisions regarding the representation without knowing the extent of the legal fees that had accrued.

At the meeting between Ms. Smith-Scott and Ms. Combs on February 2, 2017, Ms. Smith-Scott provided an invoice with apparent inaccuracies. Ms. Combs requested a corrected invoice, yet Ms. Smith-Scott failed to provide one. On February 22, 2017, Ms. Smith-Scott emailed Ms. Combs two more inaccurate invoices, which sought nearly $5,000 of fees Ms. Combs did not actually owe. Ms. Combs reviewed the invoices and informed Ms. Smith-Scott that the invoices contained inaccuracies and failed to account for payments already made. Again, on February 28, 2017, Ms. Combs emailed Ms. Smith-Scott and requested an invoice "on any unpaid balance" to date. Ms. Smith-Scott failed to provide a corrected invoice.

***342** Additionally, the hearing judge concluded that Ms. Smith-Scott violated Rule 1.4(a)(2) and (b) when she (1) failed to adequately communicate about the November 3, 2016 hearing; and (2) intentionally misrepresented to Ms. Combs that she had filed the Motion for Reconsideration in Ms. Combs' case before December 28, 2016.

The Bankruptcy Court set a hearing for November 3, 2016 to hear arguments on whether to lift the automatic stay pertaining to Ms. Combs' investment property. Prior to the hearing, Ms. Smith-Scott misinformed Ms. Combs that the hearing had been rescheduled and she need not appear on that date. The hearing had not been rescheduled. It occurred on November 3, and Ms. Smith-Scott and Ms. Combs failed to appear.

The Bankruptcy Court entered an order lifting the automatic stay on November 14, 2016. Ms. Combs immediately requested Ms. Smith-Scott file a Motion for Reconsideration, to which Ms. Smith-Scott agreed. Ms. Combs emailed Ms. Smith-Scott on December 12, 2016 to inquire if the court had issued a ruling. Before this date, Ms. Smith-Scott informed Ms. Combs that she had filed the motion, when in fact she had not. On December 28, 2016, more than two weeks later —six weeks after the Bankruptcy Court lifted the automatic stay—Ms. Smith-Scott filed an untimely Emergency Motion for Reconsideration.

Accordingly, we agree with the hearing judge that clear and convincing evidence supports the conclusion that Ms. Smith-

Scott violated Rule 1.4(a) and (b) in her representation of Ms. Combs.

Ms. Plater

[23] The hearing judge concluded that Ms. Smith-Scott violated Rule 1.4(a)(2)–(3) and (b) in her representation of Ms. Plater before the Court of Special Appeals.

In late August 2016, Ms. Plater confirmed her interest in pursuing an appeal related to her foreclosure action; specifically, the circuit court's denial of her Motion to Vacate Foreclosure ***343** Sale. The Court of Special Appeals established a filing deadline of September 29, 2016. To advance the appeal, Ms. Plater paid Ms. Smith-Scott $1,000 on September 7, 2016 and $1,000 on September 22, 2016. However, after agreeing to the representation and accepting Ms. Plater's payments, Ms. Smith-Scott determined that she would not file the appellate brief by its filing deadline. Yet, Ms. Smith-Scott did not inform Ms. Plater. In early October, after the filing deadline passed, Ms. Smith-Scott spoke with Ms. ****66** Plater over the phone. During that conversation, Ms. Smith-Scott neglected to inform Ms. Plater that the filing deadline passed and that she had failed to seek an extension. Instead, Ms. Smith-Scott represented that she intended to file the brief in one week. Ms. Smith-Scott did not author the appellate brief, file it within the one-week period, or inform Ms. Plater of her inaction.

The Court of Special Appeals dismissed Ms. Plater's appeal for the failure to file an appellate brief. Ms. Smith-Scott concealed the dismissal for approximately six weeks. Ms. Smith-Scott ignored several of Ms. Plater's attempts to learn about the status of the appeal. Additionally, Ms. Plater twice requested a copy of the appellate brief she believed Ms. Smith-Scott filed on her behalf. Ms. Smith-Scott failed to respond in any manner. Only in December 2016 did Ms. Smith-Scott first notify Ms. Plater that the Court of Special Appeals dismissed Ms. Plater's appeal. Therefore, we agree with the hearing judge that this conduct—failing to communicate about the status of a client's appeal and intentionally concealing the dismissal of the same—violates Rule 1.4(a) and (b).

The hearing judge further found that Ms. Smith-Scott violated Rule 1.4(a)(2) and (b) when she intentionally misrepresented to Ms. Plater that she completed additional legal work on the appeal to justify keeping a portion of the $2,000 in installment payments. Ms. Smith-Scott performed no substantive legal work on Ms. Plater's appeal. Ms. Smith-Scott failed to specify the legal services she allegedly provided and failed to provide an invoice. Accordingly, clear and convincing evidence ***344** supports the hearing judge's conclusion that Ms. Smith-Scott's conduct violated Rule 1.4(a)(2) and (b).

5. Rule 1.5 (Fees).

Rule 1.5 provides, in pertinent part:

> (a) An attorney shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
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> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
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> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment of the attorney;
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> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and the results obtained;
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> (5) the time limitations imposed by the client or by the circumstances;
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> (6) the nature and length of the professional relationship with the client;
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> (7) the experience, reputation, and ability of the attorney or attorneys performing the services; and
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> (8) whether the fee is fixed or contingent.
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> (b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the attorney will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

[24] Rule 1.5 obligates an attorney to charge a reasonable fee. "An advance fee given in anticipation of legal service that is reasonable at the time of the receipt can ****67**

become unreasonable ***345** if the attorney does not perform the agreed-upon services." *Attorney Grievance Comm'n v. Blair*, 440 Md. 387, 403, 102 A.3d 786 (2014); *see also Attorney Grievance Comm'n v. Garrett*, 427 Md. 209, 224, 46 A.3d 1169 (2012) ("The reasonableness of a fee is not measured solely by examining its value at the outset of the representation; indeed[,] an otherwise-reasonable fee can become unreasonable if the lawyer fails to earn it."). In *Garrett*, we concluded that a Rule 1.5 violation occurred where the attorney (1) failed to earn his legal fee; (2) failed to appeal at his client's court proceedings; (3) failed to pursue the interests of his clients; and (4) above all, refused to return the unearned fees to his clients. 427 Md. at 224–25, 46 A.3d 1169.

Ms. Combs

[25] The hearing judge concluded that Ms. Smith-Scott violated Rule 1.5(a) when she charged Ms. Combs' credit card in the amount of $4,986.13—some of which Ms. Combs had already paid—without Ms. Combs' authorization. The hearing judge further found that Ms. Smith-Scott violated Rule 1.5(b) when she charged Ms. Combs on an hourly basis for services Ms. Combs never agreed to pay. Ms. Smith-Scott generally excepts to the hearing judge's conclusion that she violated Rule 1.5. She asserts that her acceptance and retention of Ms. Combs' payment related to legal work already performed or performed within a "very short time" after receiving the payment.

Ms. Combs retained Ms. Smith-Scott and agreed to pay a flat fee of $4,200 to represent her in Bankruptcy Court. Ms. Combs paid $4,000 by two installment payments: $1,500 on September 12, 2016 and $2,500 on February 2, 2017. Ms. Smith-Scott emailed Ms. Combs two invoices on February 22, 2017. The first invoice, Invoice #23, contained twenty-six billing entries, most of which related to services rendered in the bankruptcy case for which Ms. Combs had already paid. Still, Ms. Smith-Scott demanded Ms. Combs pay $4,986.13 for work related to bankruptcy fees already charged and collected by Ms. Smith-Scott.

***346** On January 10, 2017, Ms. Smith-Scott appealed an order of the Bankruptcy Court to the U.S. District Court of Ms. Combs' behalf. Ms. Combs agreed to pay Ms. Smith-Scott a flat fee to pursue the appeal. However, before Ms. Smith-Scott completed any substantive work, Ms. Combs elected to forgo the appeal. Despite the flat fee agreement, Ms. Smith-Scott's second invoice, Invoice #31, contained hourly billing entries for legal work purportedly performed on the appeal. Ms. Smith-Scott did not advise Ms. Combs that she would charge on an hourly basis if she chose not to pursue the appeal. This conduct runs afoul of Rule 1.5(b). Nevertheless, Ms. Smith-Scott demanded that Ms. Combs pay for services to which she never agreed, in the amount of $3,300.

Ms. Combs emailed Ms. Smith-Scott on February 23, 2017 and raised concerns about inaccuracies in Invoice #23 and Invoice #31. Ms. Smith-Scott did not review or revise these invoices. Instead, she proceeded to charge Ms. Combs' credit card in the amount of $4, 986.13. This charge occurred without Ms. Combs' authorization. Moreover, Ms. Smith-Scott was keenly aware that Ms. Combs disputed the amount and pursued collection of the charge even after Ms. Combs disputed the same with her credit card company. Therefore, Ms. Smith-Scott collected an unreasonable fee in violation of Rule 1.5(a) when she charged Ms. Combs' credit card in the amount of $4,986.13.

****68** *Ms. Plater*

[26] The hearing judge also concluded that Ms. Smith-Scott violated Rule 1.5 as it relates to Ms. Plater. Ms. Smith-Scott excepts to the hearing judge's conclusion and makes identical arguments as those in reference to Ms. Combs' payments. Ms. Plater paid Ms. Smith-Scott $2,000 to prosecute an appeal before the Court of Special Appeals. Specifically, Ms. Smith-Scott agreed to author and file an appellate brief on Ms. Plater's behalf. However, after collecting Ms. Plater's payments, Ms. Smith-Scott failed to perform any meaningful legal work on the appeal. Ms. Smith-Scott then refused to provide Ms. Plater a full refund. Instead, Ms. Smith-Scott ***347** twice offered Ms. Plater approximately half of the amount actually due to Ms. Plater.

Ms. Smith-Scott attempted to justify her retention of Ms. Plater's payment by claiming that she provided Ms. Plater with additional legal services. Ms. Smith-Scott did not specify the legal services performed or provide Ms. Plater with an invoice. The hearing judge specifically rejected Ms. Smith-Scott's testimony that she performed additional legal services in Ms. Plater's foreclosure action—i.e., related to Ms. Plater's Motion for Reconsideration. The hearing judge did, however, credit Ms. Plater's testimony that she paid for the preparation of the Motion for Reconsideration on July 12, 2016.

We agree with the hearing judge's conclusions and overrule Ms. Smith-Scott's exception. Clear and convincing evidence demonstrates that Ms. Smith-Scott's conduct vis-à-vis Ms. Combs and Ms. Plater violated Rule 1.5.

6. Rule 1.6 (Confidentiality).
Rule 1.6 provides:

> (a) An attorney shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by section (b) of this Rule.
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> (b) An attorney may reveal information relating to the representation of a client to the extent the attorney reasonably believes necessary:
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> (5) to establish a claim or defense on behalf of the attorney in a controversy between the attorney and the client, to establish a defense to a criminal charge, civil claim, or disciplinary complaint against the attorney based upon conduct in which the client was involved or to respond to allegations in any proceeding concerning the attorney's representation of the client[.]

Comment 6 to Rule 1.6 addresses the manner in which an attorney may, to the extent necessary, disclose confidential ***348** information adverse to the client. Comment 6 provides, in pertinent part:

> Where practicable, the attorney should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the attorney reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the attorney to the fullest extent practicable.

In *Attorney Grievance Commission v. Powers*, we noted the "*broad ethical duty* not to divulge information about a client." 454 Md. 79, 94, 164 A.3d 138 (2017) (quoting Charles W. Wolfram, Modern Legal ****69** Ethics § 6.1.1, at 242 (1986) (emphasis in original)). There, we concluded that an attorney violated Rule 1.6 by disclosing confidential information without the client's informed consent in a lawsuit brought in federal court—i.e., a public forum—to recover money the attorney believed the client owed. *Id.*

[27] The hearing judge concluded that Ms. Smith-Scott violated Rule 1.6 when she intentionally attached, as exhibits, confidential email communications exchanged with Ms. Saunders in a motion filed with the Bankruptcy Court. Ms. Smith-Scott neither attempted to obtain Ms. Saunders' permission to disclose these confidential communications nor take any preventative measures to limit the disclosure, such as filing the motion under seal. Ms. Smith-Scott excepts to this conclusion and argues that under Rule 1.6(b) generally, and (b)(5) in this case, an attorney is not required to obtain informed consent or place a confidential disclosure under seal.

Ms. Saunders filed a *pro se* Motion/Request for Release of Attorney requesting that the Bankruptcy Court "release" Ms. Smith-Scott as her attorney "based upon unsatisfactory actions and irreconcilable differences in miscommunication that ***349** may have affected [Ms. Saunders'] bankruptcy process and may impact the outcome of [her] case." Ms. Smith-Scott filed a Response in Support of Debtor's Motion/Request for Release of Attorney. With this filing, Ms. Smith-Scott attached confidential email exchanges with Ms. Saunders that occurred between August 4, 2017 and December 20, 2017. Even after confronted by Ms. Saunders about the disclosure of confidential material, Ms. Smith-Scott failed to take any remedial action.

We overrule Ms. Smith-Scott's exception based on a plain reading of Rule 1.6(b)(5). We pause to emphasize that Ms. Smith-Scott *supported* Ms. Saunders' motion to remove Ms. Smith-Scott as counsel. Clearly then, Ms. Smith-Scott did not disclose the communications "to establish a claim or defense on behalf of the attorney." Rule 1.6(b)(5). Indeed, Ms. Smith-Scott herself indicated the reason for the disclosure: to "allow[ ] the Court to get a better understanding of the actions of Legal Counsel." Rule 1.6(b) does not permit an attorney to indiscriminately disclose confidential communications simply for context—especially where an attorney disregards the protective measures contemplated in the comments to Rule 1.6 in the event a disclosure is necessary. Therefore, we agree with the hearing judge that clear and convincing evidence demonstrates that Ms. Smith-Scott violated Rule 1.6 during her representation of Ms. Saunders.

7. Rule 1.15 (Safekeeping Property) & Rule 19-404 (Trust Account—Required Deposits).

[28] **[29]** Rule 1.15 provides, in pertinent part:

> (a) An attorney shall hold property of clients or third persons that is in an attorney's possession in connection with a representation separate from the attorney's own property. Funds shall be kept in a separate account maintained pursuant to Title 19, Chapter 400 of the Maryland Rules, and records shall be created and maintained in ***350** accordance with the Rules in that Chapter.[16]
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> ****70**
> ***
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> (c) Unless the client gives informed consent, confirmed in writing, to a different arrangement, an attorney shall deposit legal fees and expenses that have been paid in advance into a client trust account and may withdraw those funds for the attorney's own benefit only as fees are earned or expenses incurred.

Simply put, when an attorney is entrusted with a client's money, "[s]uch funds are to be placed in an attorney trust account in accordance with Maryland Rule 19-404." *Attorney Grievance Comm'n v. Singh*, 464 Md. 645, 673, 212 A.3d 888 (2019). An attorney violates Rule 1.15 "when the attorney 'does not deposit trust funds into an attorney trust account and does not obtain the client's informed consent to do otherwise.' " *Planta*, 467 Md. at 352, 225 A.3d 19 (quoting *Hamilton*, 444 Md. at 189–90, 118 A.3d 958). An attorney may also violate this Rule by depositing a client's money into his or her personal or operating account before the money is earned. *Guida*, 391 Md. at 53, 891 A.2d 1085.

[30] The hearing judge concluded that Ms. Smith-Scott violated Rule 1.15 and Rule 19-404 by failing to deposit and maintain the unearned portion of Ms. Combs' $2,500 payment on October 14, 2015 in an attorney trust account until earned as fees or used for expenses. Ms. Smith-Scott did not obtain Ms. Combs' informed consent in writing to deposit the funds in a non-attorney trust account.

***351** In its conclusions of law, the hearing judge noted "Bar Counsel represented ... that it was withdrawing, among other things, its allegations pursuant to [Rule] 1.15 ... with respect to Ms. Plater. Accordingly, the Court does not find that [Ms. Smith-Scott] violated [Rule 1.15] as to Ms. Plater." Bar Counsel excepts to the hearing judge's failure to conclude that Ms. Smith-Scott violated Rule 1.15 with respect to Ms. Plater's property. Bar Counsel argues that it withdrew the Rule 1.15 charge in connection with Ms. Plater's payments *before* July 2016 and not *after* July 2016. Moreover, the hearing judge found that Ms. Smith-Scott failed to deposit and maintain Ms. Plater's two September 2016 installment payments of $1,000 each in an attorney trust account until earned.

Ms. Smith-Scott excepts to the hearing judge's conclusion that she violated Rule 1.15 and Rule 19-404. She reiterates the same argument she asserted in relation to Rule 1.5 and adds that "her failure to correctly deposit the fees was not intentional misappropriation of fees; rather[,] it was negligent management." However, a violation of Rule 1.15 does not turn on an attorney's intent. A violation of this Rule plainly occurs when an attorney fails to deposit a client's funds into an attorney trust account.

Ms. Combs paid Ms. Smith-Scott $2,500 on October 14, 2015. Of this lump sum, Ms. Combs paid $1,000 for legal services already provided; the remaining $1,500 constituted a retainer against which Ms. Smith-Scott would bill future legal services. Ms. Smith-Scott did not deposit the unearned portion—$1,500—in an attorney trust account. Ms. Plater paid two $1,000 installments to Ms. Smith-Scott on September 7, 2016 and September 22, 2016 to advance an appeal before the Court of Special Appeals. Ms. Smith-Scott failed to ****71** deposit and maintain Ms. Plater's checks in an attorney trust account.

Based on our independent review, we sustain Bar Counsel's exception and overrule Ms. Smith-Scott's exception. Clear and convincing evidence demonstrates that Ms. Smith-Scott violated Rule 1.15 with respect to both Ms. Combs and Ms. Plater.

***352** *8. Rule 1.16 (Declining or Terminating Representation).*

[31] Rule 1.16 provides, in pertinent part:

> (d) Upon termination of representation, an attorney shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of another attorney, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The attorney

> may retain papers relating to the client to the extent permitted by other law.

"The failure to return unearned fees and documents regarding the representative matter violates this Rule." *Planta*, 467 Md. at 354, 225 A.3d 19 (citing *Hamilton*, 444 Md. at 191, 118 A.3d 958).

[32] The hearing judge concluded that Ms. Smith-Scott violated Rule 1.16 by (1) failing to refund to Ms. Combs the unearned portion of the $4,986.13 charge on February 23, 2017, some or most of which Ms. Combs did not owe; (2) failing to refund Ms. Combs the $200 payment made on April 12, 2017 that Ms. Smith-Scott conceded Ms. Combs did not owe; and (3) failing to refund Ms. Plater unearned legal fees totaling $2,000.

Ms. Smith-Scott does not except to this conclusion. Our independent review of the record confirms that clear and convincing evidence supports the hearing judge's conclusion that Ms. Smith-Scott's conduct violated Rule 1.16.

9. Rule 3.1 (Meritorious Claims and Contentions).

Rule 3.1 provides:

> An attorney shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes, for example, a good faith argument for an extension, modification or reversal of existing law. An attorney may nevertheless so defend the proceeding as to require that every element of the moving party's case be established.

***353** Comment 2 to Rule 3.1 states that an "action is frivolous ... if the attorney is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law." In *Attorney Grievance Commission v. Kane*, we recognized a violation of Rule 3.1 in connection to an attorney's serial bankruptcy filings, which were all designed to delay the proceedings and frustrate the creditors. 465 Md. 667, 716–17, 215 A.3d 242 (2019).

[33] The hearing judge concluded that Ms. Smith-Scott violated Rule 3.1 when she filed numerous baseless pleadings, motions and appeals in her personal bankruptcy action. Moreover, the hearing judge found that Ms. Smith-Scott's "sole objective in her bankruptcy case after April 8, 2015—the date the Chapter 7 Trustee was appointed—was to obstruct, delay and frustrate the Chapter 7 Trustee's ability to administer the estate in a timely and orderly fashion." Ms. Smith-Scott's actions over the two-year bankruptcy action were not supported by law or fact, and in most instances, were not legally permitted.

****72** Evidence of Ms. Smith-Scott's frivolous litigation includes: (1) several motions and appeals in her federal lawsuit against U.S. Bank, including two appeals to the U.S. Court of Appeals for the Fourth Circuit, despite the Trustee's admonishment that she lacked standing; (2) motions to alter or amend in the Bankruptcy Court when that court had no jurisdiction to adjudicate the matters because of Ms. Smith-Scott's own actions; (3) motions to re-appeal Bankruptcy Court orders that had already been affirmed on appeal; (4) filings that opposed the Trustee's attempts to sell real property despite a lack of standing; (5) the filing of appeals and other pleadings and then intentionally failing to prosecute the matters; (6) the filing of untimely appeals and motions; (7) the continuous advancement of arguments that were meritless; and (8) the numerous unfounded allegations of misconduct against all involved parties, including the court, that Ms. Smith-Scott knew, or should have known, to be false.

***354** Ms. Smith-Scott does not except to this conclusion. The hearing judge's conclusion that Ms. Smith-Scott violated Rule 3.1 is abundantly supported by clear and convincing evidence.

10. Rule 3.2 (Expediting Litigation).

[34] Rule 3.2 provides that "[a]n attorney shall make reasonable efforts to expedite litigation consistent with the interests of the client." Rule 3.2 applies with equal force to an attorney who represents himself or herself. *See Attorney Grievance Comm'n v. Trye*, 444 Md. 201, 216–17, 118 A.3d 980 (2015) (concluding that the language of Rule 3.2 "does not except attorneys who represent themselves from the obligation to make reasonable efforts to expedite litigation"). This Court has noted that "[a]n attorney violates this rule by delaying to take fundamental litigation steps in pursuit of the client's interest." *Garrett*, 427 Md. at 226, 46 A.3d 1169. Indeed, we have found a violation of this Rule when an attorney fails to file an appellate brief and appendix, causing a significant delay in the resolution of an appeal. *See Attorney Grievance Comm'n v. Allenbaugh*, 450 Md. 250, 271, 148 A.3d 300 (2016).

[35] The hearing judge concluded that Ms. Smith-Scott violated Rule 3.2 when she (1) failed to file Ms. Plater's appellate brief by the filing deadline or otherwise prosecute

Ms. Plater's appeal; and (2) intentionally hindered—for two years—the Chapter 7 Trustee's ability to administer her bankruptcy case in a timely fashion.

Ms. Smith-Scott does not except to this conclusion. Based on our independent review of the record, we agree with the hearing judge that Ms. Smith-Scott's conduct violated Rule 3.2.

11. Rule 3.3 (Candor Toward the Tribunal).

[36] **[37]** Rule 3.3 provides, in pertinent part:

> (a) An attorney shall not knowingly:
>
> ***355** (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the attorney;
>
> (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client[.]

We have observed that "the requirement of candor towards the tribunal ... requires every attorney to be fully honest and forthright." *Attorney Grievance Comm'n v. Dore*, 433 Md. 685, 703, 73 A.3d 161 (2013) (quoting *In re Discipline of Wilka*, 638 N.W.2d 245, 249 (S.D. 2001)). This is because "[e]very court ... has the right to rely upon an attorney to assist it ****73** in ascertaining the truth of the case before it. Therefore, candor and fairness should characterize the conduct of an attorney at the beginning, during, and at the close of litigation." *Id.* (quoting *In re Discipline of Wilka*, 638 N.W.2d at 249.) Accordingly, an attorney violates Rule 3.3(a)(1) "when he or she knowingly provides the court with false information ... or fails to correct any false information previously provided." *Attorney Grievance Comm'n v. Steinhorn*, 462 Md. 184, 195, 198 A.3d 821 (2018) (citations omitted).

[38] The hearing judge concluded that Ms. Smith-Scott violated Rule 3.3 when she (1) indicated that Ms. Plater agreed to pay a flat fee of $4,200 on a Disclosure of Compensation of Attorney for Debtor, yet Ms. Plater actually agreed to pay a flat fee of $1,500; and (2) knowingly made numerous false statements of fact in motions and appeals before the Bankruptcy Court and U.S. District Court throughout the course of her personal bankruptcy action. Ms. Smith-Scott generally excepts to this conclusion. As best we can tell, she argues that she had "competency and diligence issues caused by personal involvement and inexperience, but the record does not support a conclusion that Ms. Smith-Scott was knowingly and intentionally dishonest."

However, as to the misrepresentation made on the Disclosure of Compensation of Attorney for Debtor, Ms. Smith-Scott knew the statement to be false at the time she filed the ***356** disclosure. Ms. Plater even challenged Ms. Smith-Scott's decision to list $4,200 as the agreed upon fee, because that did not comport with their agreement. Nonetheless, Ms. Smith-Scott filed the petition fully aware of the misrepresentation.

As to Ms. Smith-Scott's false statements in her personal bankruptcy action, Ms. Smith-Scott knowingly made false statements of fact in motions and appeals before the Bankruptcy Court and U.S. District Court. Specifically, she falsely alleged that Mr. Shively engaged in criminal conduct when he acted to secure 367 Main Street and had committed perjury at the May 16, 2017 contempt hearing.

Consequently, we agree with the hearing judge and overrule Ms. Smith-Scott's exceptions. Clear and convincing evidence demonstrates that Ms. Smith-Scott violated Rule 3.3.

12. Rule 3.4 (Fairness to Opposing Party and Attorney).

"An attorney shall not ... knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." Rule 3.4(c). On this point, *Attorney Grievance Commission v. Byrd* is particularly instructive. 408 Md. 449, 970 A.2d 870 (2009). In *Byrd*, we concluded that a Rule 3.4(c) violation occurred where the attorney "contravened the bankruptcy court's order ... after already having been found in contempt for violating" a prior order of the court. *Id.* at 469, 970 A.2d 870. We found an additional violation of the Rule in Byrd's failure to vacate his property, as ordered by the bankruptcy court. We recognized then, and because of its applicability here we reiterate today, "that we will not 'go behind' the bankruptcy court's finding of contempt" and we accept the hearing judge's "findings concerning those rulings." *Id.* at 482, 970 A.2d 870.

[39] The hearing judge concluded that Ms. Smith-Scott violated Rule 3.4 when she (1) knowingly and intentionally disobeyed several orders of the Bankruptcy Court; and (2) failed to disclose to the Bankruptcy Court the receipt of additional fees related to her representation of Ms. Combs in violation of Bankruptcy Rule 2016(b). Again, Ms. Smith-Scott ***357** generally excepts without offering any degree of

**74 specificity as to why the hearing judge's conclusion is erroneous.

Ms. Smith-Scott intentionally defied the following: (1) the October 29 Order prohibiting Ms. Smith-Scott's use of cash collateral—which resulted in a contempt finding; (2) the September 24 Order compelling Ms. Smith-Scott to attend the § 341 meeting of creditors; (3) the Bankruptcy Court's September 29, 2015 Order compelling Ms. Smith-Scott to turn over documentation related to her tenancies, security deposits, and taxes; and (4) the Bankruptcy Court's May 16, 2016 Order directing that Ms. Smith-Scott pay the Trustee sanctions as a result of her contempt. Most egregious of all, Ms. Smith-Scott openly defied the Bankruptcy Court's March 22, 2016 Order compelling her to vacate 367 Main Street, which resulted in a second contempt finding. Indeed, Ms. Smith-Scott only vacated the premises after U.S. Marshals accompanied Mr. Shively to 367 Main Street and explained to Ms. Smith-Scott's employees that they would be handcuffed if they did not vacate the property.

We overrule Ms. Smith-Scott's exception. Clear and convincing evidence supports the hearing judge's conclusion that Ms. Smith-Scott's conduct violated Rule 3.4.

13. Rule 4.1 (Truthfulness in Statements to Others).

[40] Rule 4.1 provides, in pertinent part:

> (a) In the course of representing a client an attorney shall not knowingly:
>
> (1) make a false statement of material fact or law to a third person; or
>
> (2) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

This Rule is exceedingly straightforward. The hearing judge concluded that Ms. Smith-Scott violated Rule 4.1 when she falsely stated in her August 3, 2015 letter to the tenants of her Laurel Properties that Patapsco Bank did not have a court order to collect rents. On June 25, the Bankruptcy Court **358 issued orders permitting Patapsco Bank to foreclose on the properties and collect rent. Ms. Smith-Scott intentionally concealed the existence of these orders so that the tenants would continue to pay rent to her directly. Ms. Smith-Scott generally excepts to this conclusion. We shall overrule it because we agree with the hearing judge; clear and convincing evidence exists to support its conclusion that Ms. Smith-Scott violated Rule 4.1.

14. Rule 8.1 (Bar Admission and Disciplinary Matters).

[41] Rule 8.1 provides, in pertinent part:

> An applicant for admission or reinstatement to the bar, or an attorney in connection with a bar admission application or in connection with a disciplinary matter, shall not:
>
> (a) knowingly make a false statement of material fact; or
>
> (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 19-301.6 (1.6).

"Rule 8.1(b) compels attorneys to demonstrate candor and cooperation with the disciplinary authorities of the Bar." *Planta*, 467 Md. at 356, 225 A.3d 19. A violation of Rule 8.1(b) occurs if an attorney "does not 'answer timely requests from the Attorney **75 Grievance Commission regarding a complaint in a potential disciplinary matter.' " *Id.* (quoting *Hamilton*, 444 Md. at 192, 118 A.3d 958).

[42] The hearing judge concluded that Ms. Smith-Scott violated Rule 8.1 when she (1) attached a knowingly false statement, originally made to Wells Fargo, in her response to Bar Counsel regarding the $4,986.13 charge to Ms. Combs' credit card; (2) intentionally misrepresented to Bar Counsel that she justifiably withheld fees in Ms. Plater's representation, when in fact she intentionally concealed the fact that Ms. Plater had paid separately for that legal work; (3) knowingly misrepresented to Bar Counsel that the Chapter 7 Trustee *359 intentionally omitted and misrepresented facts to the Bankruptcy Court; and (4) failed to timely and completely respond to Bar Counsel's inquiries. Ms. Smith-Scott generally excepts to these conclusions.

Ms. Combs filed a complaint against Ms. Smith-Scott with the Commission in relation to the unauthorized $4,986.13 credit card charge. Ms. Smith-Scott submitted a response to the complaint and attached (1) the written submission she sent to Wells Fargo during its independent investigation and (2) two invoices Ms. Smith-Scott knew to be inaccurate. The written statement included false representations concerning Ms. Combs' authorization. Ms. Smith-Scott thereby intentionally gave Bar Counsel the false impression that Ms. Combs owed

the $4,986.13 amount, despite knowing that it was not an accurate figure. Ms. Smith-Scott relied on her knowingly false statements in the Wells Fargo statement to intentionally mislead Bar Counsel into believing the invoices were accurate and the charge was authorized. Ms. Smith-Scott submitted a second response to Bar Counsel intentionally misrepresenting that Invoice #23 and Invoice #31 were accurate, despite knowing full well that they were not.

Ms. Plater also filed a complaint against Ms. Smith-Scott with the Commission. Ms. Smith-Scott's response intentionally misrepresented that she earned $825 for legal work performed during the pendency of Ms. Plater's appeal. The response further claimed that Ms. Smith-Scott "met with Ms. Plater; identified legal issues to pursue on appeal; prepared a Civil Information Sheet; filed a motion to stay the foreclosure pending the appeal; and filed a motion to mitigate the necessity of a supersedeas bond." Ms. Smith-Scott intentionally concealed from Bar Counsel that Ms. Plater paid separately for those fillings.

We therefore agree with the hearing judge that clear and convincing evidence supports a conclusion that Ms. Smith-Scott violated Rule 8.1. We overrule Ms. Smith-Scott's exception.

***360** *15. Rule 8.4 (Misconduct).*

[43] **[44]** **[45]** Rule 8.4 provides, in pertinent part:

> It is professional misconduct for an attorney to:
>
> (a) violate or attempt to violate the Maryland Attorneys' Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> (b) commit a criminal act that reflects adversely on the attorney's honesty, trustworthiness or fitness as an attorney in other respects;
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> (d) engage in conduct that is prejudicial to the administration of justice[.]

An attorney violates Rule 8.4(a) when he or she violates other Rules of Professional Conduct. *See* ****76** *Attorney Grievance Comm'n v. Foltz*, 411 Md. 359, 395, 983 A.2d 434 (2009). Regarding the criminal act in Rule 8.4(b), "[i]t is well established that a conviction is not required to find a violation." *Attorney Grievance Comm'n v. Agbaje*, 438 Md. 695, 729, 93 A.3d 262 (2014). Instead, in determining if an attorney violated Rule 8.4(b), we consider "whether an attorney's criminal act reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." *Id.* at 729–30, 93 A.3d 262 (quoting *Attorney Grievance Comm'n v. Thompson*, 367 Md. 315, 324, 786 A.2d 763 (2001) (internal quotation marks omitted)). Rule 8.4(c) encompasses a "broad universe of mis-behavior." *Attorney Grievance Comm'n v. McDonald*, 437 Md. 1, 39, 85 A.3d 117 (2014). The Rule "is violated by making misrepresentations to the client, which includes the concealment of material information from the client." *Attorney Grievance Comm'n v. Rand*, 445 Md. 581, 640, 128 A.3d 107 (2015); *see Brown*, 426 Md. at 324, 44 A.3d 344 (finding a violation of Rule 8.4(c) where an attorney concealed the dismissal of client's case by misrepresenting status as pending); *Attorney Grievance Comm'n v. Bleecker*, 414 Md. 147, 168, 994 A.2d 928 (2010) (finding a violation of Rule 8.4(c) where an attorney ***361** failed to disclose that the court dismissed client's case with prejudice).

[46] **[47]** "[C]onduct prejudicial to the administration of justice" is that which "reflects negatively on the legal profession and sets a bad example for the public at large." *Attorney Grievance Comm'n v. Goff*, 399 Md. 1, 22, 922 A.2d 554 (2007). An attorney's failure "to appear in court at a hearing on behalf of his or her client constitutes conduct prejudicial to the administration of justice." *Attorney Grievance Comm'n v. Thomas*, 440 Md. 523, 556, 103 A.3d 629 (2014). Indeed, this is because "[a]n attorney plays such an integral role in the judicial process that without his [or her] presence the wheels of justice must, necessarily, grind to a halt." *Id.* (quoting *Attorney Grievance Comm'n v. Walker-Turner*, 428 Md. 214, 232, 51 A.3d 553 (2012)). Furthermore, we have said that

> [an attorney's] failure to promptly, completely and truthfully respond to Bar Counsel's requests for information, to keep his client advised of the status of the representation and to diligently represent the complainant constitutes conduct which tends to bring the legal profession into disrepute and is therefore prejudicial to the administration of justice.

Brown, 426 Md. at 324–25, 44 A.3d 344 (quoting *Attorney Grievance Comm'n v. Rose*, 391 Md. 101, 111, 892 A.2d 469 (2006)).

The hearing judge concluded that Ms. Smith-Scott violated Rule 8.4 in a plethora of ways:

- Ms. Smith-Scott violated Rule 8.4(b) and (c) when she charged Ms. Combs' credit card in the amount of $4,986.13 without Ms. Combs' authorization and with knowledge that Ms. Combs disputed the balance.

- Ms. Smith-Scott violated Rule 8.4(c) when she refused to provide Ms. Combs with accurate billing statements and then intentionally misappropriated Ms. Combs' fees that were not yet earned.

- Ms. Smith-Scott violated Rule 8.4(c) when she misrepresented to Ms. Combs that she had filed the Motion for Reconsideration in the Bankruptcy Court.

***362** - Ms. Smith-Scott violated Rule 8.4(c) when she accepted Ms. Plater's payments, did not complete any substantive work toward Ms. Plater's appeal, and misappropriated a portion of Ms. ****77** Plater's funds for her personal use and benefit.

- Ms. Smith-Scott violated Rule 8.4(c) and (d) when she made several knowing and intentional misrepresentations to Bar Counsel discussed in relation to Rule 8.1.

- Ms. Smith-Scott violated Rule 8.4(c) when she knowingly and intentionally disobeyed court orders in her personal bankruptcy case and interfered with Patapsco Bank's efforts to collect rent from the tenants of the Laurel Properties.

- Ms. Smith-Scott violated Rule 8.4(c) when she repeatedly and intentionally made arguments in bad faith and filed documents without substantial justification in her personal bankruptcy case for the sole purpose of retaining her property and obscuring her creditors' rights to collect on debts owed to them.

- Ms. Smith-Scott violated Rule 8.4(c) when she intentionally misrepresented to the Bankruptcy Court that Mr. Shively (1) engaged in criminal activity while taking possession of 367 Main Street; and (2) perjured himself at the May 16, 2016 contempt hearing.

- Ms. Smith-Scott violated Rule 8.4(c) when she was dishonest in her communications with Bar Counsel.

- Ms. Smith-Scott violated Rule 8.4(d) because her conduct, taken as a whole, brings the legal profession into disrepute, and is therefore prejudicial to the administration of justice.

- Ms. Smith-Scott violated Rule 8.4(d) when she filed several actions or motions on behalf of Ms. Combs, Ms. Plater, and Ms. Deeba and then intentionally failed to prosecute the matters.

***363** - Ms. Smith-Scott violated Rule 8.4(d) when she failed to attend court hearings on behalf of Ms. Combs, Ms. Deeba, Mr. Jones, and herself in her personal bankruptcy case.

- Ms. Smith-Scott violated Rule 8.4(d) when she engaged in a vexatious and harassing litigation strategy in her personal bankruptcy case with the objective of frustrating and obstructing the orderly resolution of the case; specifically, Ms. Smith-Scott (1) filed bad faith pleadings, motions and appeals; and (2) failed to appear at several hearings, defied and ignored several court orders, and was held in civil contempt on two occasions.

- Ms. Smith-Scott violated Rule 8.4(a) because she violated Rules 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.15, 1.16, 3.1, 3.2, 3.3, 3.4, 4.1, 8.1, 8.4, and 19-404.

Ms. Smith-Scott generally excepts to the hearing judge's conclusion that she violated Rule 8.4. Based on our independent review, a majority of which has already been discussed in relation to other rule violations, we agree with the hearing judge. We overrule her exception because clear and convincing evidence exists to support violations of Rule 8.4(a), (b), (c) and (d).

SANCTION

[48] **[49]** As we have often stated, the purpose of attorney disciplinary proceedings is to protect the public and deter other lawyers from engaging in misconduct rather than simply to punish the lawyer. *Attorney Grievance Comm'n v. Mollock*, 450 Md. 133, 158, 146 A.3d 1117 (2016). The public is protected when sanctions are "commensurate with the nature and gravity of the violations and the intent with which they were committed." *Attorney Grievance Comm'n v. Pennington*, 387 Md. 565, 596, 876 A.2d 642 (2005) (citing *Attorney Grievance Comm'n v. Ellison*, 384 Md. 688, 714, 867 A.2d 259 (2005)).

****78** Bar Counsel recommended that we disbar Ms. Smith-Scott for her "persistent course of dishonest and deceitful conduct with her clients, the courts, her tenants, and bar Counsel." Ms. Smith-Scott, instead, argues that a reprimand is

a more ***364** appropriate sanction because she has no "prior record of discipline" and there is "no evidence of improper motive."

[50] "In fashioning an appropriate sanction in attorney disciplinary proceedings, '[w]e determine the appropriate sanction by considering the facts of the case, as well as balancing any aggravating or mitigating factors.' " *Attorney Grievance Comm'n v. Sanderson*, 465 Md. 1, 67, 213 A.3d 122 (2019) (quoting *Attorney Grievance Comm'n v. Kremer*, 432 Md. 325, 337, 68 A.3d 862 (2013)). An attorney bears the burden of proving evidence of mitigation by a preponderance of the evidence. *See* Md. Rule 19-727(c).

We have noted that "[a]ggravating factors[17] militate in favor of a more severe sanction[.]" *Sanderson*, 465 Md. at 67, 213 A.3d 122 (alterations in original) (quoting *Kremer*, 432 Md. at 337, 68 A.3d 862). The hearing judge found the following aggravating factors: (1) a dishonest or selfish motive; (2) a pattern of misconduct; (3) multiple violations of the MLRPC and MARPC; (4) submission of false evidence, false statements, or other deceptive practices during the attorney discipline proceeding; and (5) an indifference to making restitution or rectifying the misconduct's consequences.

Ms. Smith-Scott contends that the hearing judge should not have found a dishonest or selfish motive, submission of false evidence, or an indifference to making restitution. The record, however, belies Ms. Smith-Scott's arguments. Mindful of Ms. ***365** Smith-Scott's cursory arguments as to why we should part ways with these factors found by the hearing judge, we decline to do so. We believe Bar Counsel proved the existence of these factors in accord with the standards of Md. Rule 19-727(c).

[51] Unlike aggravating factors, "the existence of mitigating factors[18] tends to ****79** lessen or reduce the sanction an attorney may face." *Id.* at 70, 213 A.3d 122 (citing *Kremer*, 432 Md. at 338, 68 A.3d 862). The hearing judge found the following mitigating factors: (1) the absence of prior attorney discipline; (2) personal or emotional problems; (3) inexperience in the practice of law; (4) remorse; and (5) the unlikelihood of repetition of the misconduct.

Ms. Smith-Scott asserts that the hearing judge should have found the following additional mitigating factors: (1) the absence of a dishonest or selfish motive; (2) timely good faith efforts to make restitution or to rectify the misconduct's consequences; (3) a cooperative attitude toward the attorney discipline proceeding; and (4) character or reputation. Ms. Smith-Scott failed to establish the existence of these mitigating factors by a preponderance of evidence. *See* Md. Rule 19-727(c). Aside from excerpts of witness testimony regarding ***366** her character, Ms. Smith-Scott does not, and cannot, point to evidence contained in the record to show the existence of these mitigating factors.

In *Attorney Grievance Commission v. Vanderlinde*, we stated that

> in cases of intentional dishonesty, misappropriation cases, fraud, stealing, serious criminal conduct and the like, we will not accept, as "compelling extenuating circumstances," anything less than the most serious and utterly debilitating mental or physical health conditions, arising from any source that is the "root cause" of the misconduct *and* that also result in an attorney's utter inability to conform his or her conduct in accordance with the law and with the [Rules of Professional Conduct.] Only if the circumstances are that compelling, will we even consider imposing less than the most severe sanction of disbarment in cases of stealing, dishonesty, fraudulent conduct, the intentional misappropriation of funds or other serious criminal conduct, whether occurring in the practice of law, or otherwise.

364 Md. 376, 413–14, 773 A.2d 463 (2001). We further explained that disbarment is often the appropriate sanction in these types of cases because "[u]nlike matters relating to competency, diligence and the like, intentional dishonest conduct is closely entwined with the most important matters of basic character to such a degree as to make intentional dishonest conduct by a lawyer almost beyond excuse." *Id.* at 418, 773 A.2d 463.

[52] **[53]** We have also held that "the misappropriation of entrusted funds 'is an act infected with deceit and dishonesty, and, in the absence of compelling extenuating circumstances justifying a lesser sanction, will result in disbarment.' " *Attorney Grievance Comm'n v. Cherry-Mahoi*, 388 Md. 124, 161, 879 A.2d 58 (2005) (quoting *Attorney Grievance Comm'n v. James*, 385 Md. 637, 666, 870 A.2d 229 (2005)). "Fiduciaries in general, and attorneys in particular, must remember that the entrustment to them of the money and property of others involves a responsibility of the highest order." ***367** *Attorney Grievance Comm'n v. Owrutsky*, 322 Md. 334, 345, 587 A.2d 511 (1991). An attorney "must carefully administer and account for those funds. Appropriating any part of those funds to their own use and

benefit without clear authority to do so cannot be tolerated." *Id.*

[54] In this case, we have concluded that Ms. Smith-Scott engaged in intentional dishonest conduct *and* that she misappropriated client funds entrusted to her. While this conduct is troubling in its own ****80** right, the magnitude of Ms. Smith-Scott's misconduct is exacerbated by the fact that she violated *sixteen* different rules of professional conduct, often numerous times and across the representation of multiple clients. Ms. Smith-Scott's conduct in her personal bankruptcy case further compounds the problematic nature of this case. Ms. Smith-Scott willfully disregarded lawful orders of the Bankruptcy Court and U.S. District Court and was found in civil contempt by those courts.

One order of the Bankruptcy Court fittingly describes much of the vexatious, three-year bankruptcy proceeding: allegations replete with "unsupported, irrational, [and] highly tenuous speculation." Or, another by the U.S. District Court, describing one of Ms. Smith-Scott's motions, devoid of factual predicate, as "rely[ing] upon the sheer audacity of her [own] allegations." Surely, this misuse of the judicial system and misconduct of this sort is that which "casts our noble profession in a most unfavorable light." *Attorney Grievance Comm'n v. Collins*, — Md. —, —, — A.3d —, 2020 WL 3046292 (2020). It follows, then, that a reprimand or suspension would not be sufficient to protect the public or serve as a deterrent to other attorneys.

CONCLUSION

Based on our assessment of Ms. Smith-Scott's wide-ranging misconduct, the existence of aggravating factors, and the limited mitigating factors present here, we agree with Bar Counsel and hold that the appropriate sanction is disbarment. For the above reasons, we disbarred Ms. Smith-Scott and ***368** awarded costs against her by per curiam order dated January 10, 2020.

All Citations

469 Md. 281, 230 A.3d 30

Footnotes

1 This Court has had occasion to discuss this adage, often attributed to President Abraham Lincoln, in a previous attorney discipline case. *See Attorney Grievance Comm'n v. Trye*, 444 Md. 201, 205, 118 A.3d 980 (2015); *see also* Marshall H. Tanick & Phillip J. Trobaugh, *Lincoln's Minnesota Legacy*, 66 Bench & B. Minn. 25, 28 (Feb. 2009).

2 Effective July 1, 2016, the MLRPC were renamed the Maryland Attorneys' Rules of Professional Conduct and recodified in Title 19 of the Maryland Rules. Since Ms. Smith-Scott's misconduct occurred before and after the effective date of the recodification of the rules of professional conduct, she committed violations of the same rules of professional conduct under both the MLRPC and the MARPC. For simplicity, and because there is no substantive difference in the two codifications of the rules, we shall use the shorter designations of the MLRPC, e.g., "Rule 1.1."

3 The hearing judge did not make any determination as to whether Ms. Smith-Scott violated Rule 19-403. Bar Counsel did not except to the absence of the hearing judge's determination on this alleged violation, so we shall not consider it in the discussion that follows.

4 The Honorable James F. Schneider served as an Associate Judge (1982–2001; 2005–2017) and Chief Judge (2001–2005) of the United States Bankruptcy Court for the District of Maryland.

5 In 2015, Howard Bancorp acquired Patapsco Bancorp. *Howard Bankcorp, Inc. Completes Acquisition of Patapsco Bancorp, Inc.*, Howard Bank https://www.howardbank.com/maryland-banking-blog/Howard-Bancorp-Inc-Completes-Acquisition-of-Patapsco-Bancorp-Inc (last visited June 26, 2020), archived at https://perma.cc/K354-9YEC. Therefore, while we begin by discussing mortgages held by Patapsco Bank, we shall reference Howard Bank, as successor-in-interest to Patapsco Bank, beginning with events that occurred in September 2015.

6 In *Hoang v. Lowery*, this Court explained the protections of the automatic stay imposed at the filing of a bankruptcy petition:

> The filing of a petition operates as a stay ... of actions against the debtor. *See* 11 U.S.C. § 362(a). The automatic stay applies to several types of actions, including "the commencement or continuation" of an action "to recover a claim

against the debtor"; enforcement against the debtor or property of the bankruptcy estate of a judgment obtained pre-filing; and any act to obtain possession of property of the bankruptcy estate or from the estate or to exercise control over the property of the estate. 11 U.S.C. § 362(a)(1)–(3).

—— Md. ——, ——, —— A.3d ——, 2020 WL 3023263 (2020).

7 *See* Federal Rules of Bankruptcy Procedure ("Fed. R. Bankr. Proc.") 2015(a).

8 11 U.S.C. § 341 requires that the Trustee "convene and preside at a meeting of creditors" in the debtor's case. The debtor's attendance is required. *See* 11 U.S.C. § 343(a) ("The debtor shall appear and submit to examination under oath at the meeting of creditors under section 341(a) of this title.").

9 The hearing judge's findings of fact indicate a "June 23" order, but the circuit court entered its order permitting Patapsco Bank to foreclose on June 22, 2015—i.e., the June 22 Order.

10 Ms. Smith-Scott continued to assert this second argument despite the U.S. District Court's ruling to the contrary. *See supra* at ——.

11 "Schedules" in a bankruptcy petition indicate all assets, liabilities, and other information about a debtor for an accounting of what will become the bankruptcy estate. In 2015, at the time Ms. Smith-Scott filed her petition, Schedule E required debtors to list "Creditors Holding Unsecured Priority Claims," and Schedule G required debtors to list "Executory Contracts and Unexpired Leases." *See* Administrative Office of the U.S. Courts, *Schedule E - Creditors Holding Unsecured Priority Claims (Superseded)*, https://www.uscourts.gov/forms/bankruptcy-forms/schedule-e-creditors-holding-unsecured-priority-claims (last visited June 26, 2020) archived at https://perma.cc/4QSF-VPSX; Administrative Office of the U.S. Courts, *Schedule G - Executory Contracts and Unexpired Leases (Superseded),* https://www.uscourts.gov/forms/bankruptcy-forms/schedule-g-executory-contracts-and-unexpired-leases (last visited June 26, 2020) archived at https://perma.cc/Y8EY-X29M. Schedule E/F ("Creditors Who Have Unsecured Claims") replaced the superseded Schedules E and G on December 1, 2015. *See* Administrative Office of the U.S. Courts, *Schedule E/F: Creditors Who Have Unsecured Claims (Individuals)*, https://www.uscourts.gov/forms/individual-debtors/schedule-ef-creditors-who-have-unsecured-claims-individuals (last visited June 26, 2020) archived at https://perma.cc/LFN8-ZWPU.

12 "Square" is a credit card processing service.

13 The Disclosure of Compensation of Attorney for Debtor is filed contemporaneously with a bankruptcy petition. In completing the form, an attorney certifies the "compensation paid ... within one year before the filing of the petition in bankruptcy, or agreed to be paid ..., for services rendered or to be rendered on behalf of the debtor." *See* Administrative Office of the U.S. Courts, *Disclosure of Compensation of Attorney for Debtor*, https://www.uscourts.gov/forms/bankruptcy-forms/disclosure-compensation-attorney-debtor-0 (last visited June 26, 2020) archived at https://perma.cc/636P-YZCG.

14 The hearing judge's findings of fact indicate that Ms. Deeba's petition was filed on December 31, 2017; however, the record reveals a filing date of January 31, 2017.

15 The Disclosure of Compensation of Attorney for Debtor reads:

For legal services, I have agreed to accept:	$4,200.00
Prior to the filing of this statement I have received:	$1,500.00
Balance Due:	$2,700.00

16 Rule 19-404 provides:

Except as otherwise permitted by rule or other law, all funds, including cash, received and accepted by an attorney or law firm in this State from a client or third person to be delivered in whole or in part to a client or third person, unless received as payment of fees owed the attorney by the client or in reimbursement for expenses properly advanced on behalf of the client, shall be deposited in an attorney trust account in an approved financial institution. This Rule does not apply to an instrument received by an attorney or law firm that is made payable solely to a client or third person and is transmitted directly to the client or third person.

17 Aggravating factors include:

> (1) prior attorney discipline; (2) a dishonest or selfish motive; (3) a pattern of misconduct; (4) multiple violations of the [rules of professional conduct]; (5) bad faith obstruction of the attorney discipline proceeding by intentionally failing to comply with rules or orders of the disciplinary agency; (6) submission of false evidence, false statements, or other deceptive practices during the attorney discipline proceeding; (7) a refusal to acknowledge the misconduct's wrongful nature; (8) the victim's vulnerability; (9) substantial experience in the practice of law; (10) indifference to making restitution or rectifying the misconduct's consequences; (11) illegal conduct, including that involving the use of controlled substances; and (12) likelihood of repetition of the misconduct.

Allenbaugh, 450 Md. at 277, 148 A.3d 300.

18 Mitigating factors include:

> (1) the absence of prior attorney discipline; (2) the absence of a dishonest or selfish motive; (3) personal or emotional problems; (4) timely good faith efforts to make restitution or to rectify the misconduct's consequences; (5) full and free disclosure to Bar Counsel or a cooperative attitude toward the attorney discipline proceeding; (6) inexperience in the practice of law; (7) character or reputation; (8) a physical disability; (9) a mental disability or chemical dependency, including alcoholism or drug abuse, where: (a) there is medical evidence that the lawyer is affected by a chemical dependency or mental disability; (b) the chemical dependency or mental disability caused the misconduct; (c) the lawyer's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and (d) the recovery arrested the misconduct, and the misconduct's recurrence is unlikely; (10) delay in the attorney discipline proceeding; (11) the imposition of other penalties or sanctions; (12) remorse; (13) remoteness of prior violations of the [rules of professional conduct]; and (14) unlikelihood of repetition of the misconduct.

Allenbaugh, 450 Md. at 277–78, 148 A.3d 300.

35 F.4th 149
United States Court of Appeals, Third Circuit.

IN RE: BOY SCOUTS OF AMERICA, a/k/a BSA; Delaware BSA, LLC, Debtors
Century Indemnity Company, as successor to CCI Insurance Company, as successor to Insurance Company of North America and Indemnity Insurance Company of North America, Appellants

No. 21-2035
|
Argued on March 2, 2022
|
(Opinion filed: May 24, 2022)

Synopsis

Background: Chapter 11 debtors filed application seeking to retain law firm as counsel. Debtors' liability insurer, whose affiliate had issued multiple insurance policies to debtors which were now assets of the bankruptcy estate and, for a time, had retained firm's insurance and financial services group in connection with two reinsurance disputes to which debtors were not a party, but which involved claims affiliate paid or in the future would pay under the insurance policies, objected, asserting that firm had a conflict of interest. The United States Bankruptcy Court for the District of Delaware, Laurie Selber Silverstein, J., overruled objection and authorized debtors to retain firm as their attorneys, nunc pro tunc to the petition date. Insurer appealed, and the United States District Court for the District of Delaware, Richard G. Andrews, J., 630 B.R. 122, affirmed. Insurer appealed again.

Holdings: The Court of Appeals, Ambro, Circuit Judge, held that:

[1] insurer was "person aggrieved" with standing to appeal Bankruptcy Court's order authorizing debtors to retain firm as their counsel;

[2] proceeding was not moot on appeal even though firm no longer had an active role in the underlying bankruptcy case;

[3] Bankruptcy Court did not abuse its discretion in authorizing debtors' retention of firm;

[4] Bankruptcy Court did not abuse its discretion in determining that drastic remedy of disqualification of debtors' counsel was not appropriate; and

[5] insurer forfeited request on appeal for disgorgement of fees as alternatives to disqualification.

Affirmed.

West Headnotes (31)

[1] Bankruptcy Scope of review in general

To determine whether the district court erred in reviewing a bankruptcy court's decision, the Court of Appeals reviews the bankruptcy court's findings by the standards the district court should have employed.

[2] Bankruptcy Discretion

Court of Appeals reviews for abuse of discretion a bankruptcy court's decision to approve debtor's application to retain law firm as counsel.

[3] Bankruptcy Discretion

"Abuse of discretion" exists where bankruptcy court's decision rests upon clearly erroneous finding of fact, errant conclusion of law, or improper application of law to fact.

[4] Bankruptcy Conclusions of law; de novo review

Bankruptcy Clear error

Court of Appeals gives fresh, or plenary, review to bankruptcy court's legal determinations and reviews factual findings for clear error.

[5] **Federal Courts** Want of Actual Controversy; Mootness and Ripeness

If an active case or controversy does not continue, Court of Appeals lacks authority under Article III to consider merits of appeal. U.S. Const. art. 3, § 2, cl. 1.

[6] **Federal Courts** Mootness

When the requirements necessary for standing at the start of a case disappear, it becomes moot and no longer satisfies case-or-controversy requirement of Article III, unless the defendant voluntarily ceased the challenged conduct in response to litigation or the injury is likely to recur while evading review. U.S. Const. art. 3, § 2, cl. 1.

[7] **Bankruptcy** Right of review and persons entitled; parties; waiver or estoppel

Prudential requirement in bankruptcy appeals for standing is limited to "persons aggrieved" by order of bankruptcy court.

[8] **Bankruptcy** Right of review and persons entitled; parties; waiver or estoppel

Potential appellants are "persons aggrieved" by bankruptcy court's order with standing to appeal only if they can show that the order diminishes their property, increases their burdens, or impairs their rights.

[9] **Bankruptcy** Right of review and persons entitled; parties; waiver or estoppel

Chapter 11 debtors' liability insurer, whose affiliate had issued multiple insurance policies to debtors which were now assets of the bankruptcy estate and, for a time, had retained law firm's insurance and financial services group in connection with two reinsurance disputes to which debtors were not a party, but which involved claims affiliate paid or in the future would pay under the insurance policies, was "person aggrieved" with standing to appeal Bankruptcy Court's order authorizing debtors to retain firm as their counsel. U.S. Const. art. 3, § 2, cl. 1.

[10] **Bankruptcy** Right of review and persons entitled; parties; waiver or estoppel

When considering appeal from bankruptcy court order approving retention of counsel, Court of Appeals need not scrutinize appellant's injury in as much detail, for purposes of determining prudential and Article III standing to appeal; retention of counsel implicates the integrity of the bankruptcy court proceeding as a whole, hence, it is extremely important to resolve those disputes, and absent immediate appeals, meaningful review of potentially serious ethical issues might never occur. U.S. Const. art. 3, § 2, cl. 1.

[11] **Bankruptcy** Moot questions

Proceeding whereby Chapter 11 debtors' liability insurer, whose affiliate had issued multiple insurance policies to debtors which were now assets of the bankruptcy estate and, for a time, had retained law firm's insurance and financial services group in connection with two reinsurance disputes to which debtors were not a party, but which involved claims affiliate paid or in the future would pay under the insurance policies, objected to debtors' application to retain firm as their counsel was not moot on appeal from Bankruptcy Court's order overruling objection and authorizing debtors to retain firm, even though firm no longer had an active role in the underlying bankruptcy case; the possibility remained that the appellate court could order the disgorgement of firm's fees, and therefore the outcome of the retention dispute had continuing implications for the bankruptcy estate and creditors.

[12] **Bankruptcy** Employment of Professional Persons or Debtor's Officers

Although two prongs for debtor to retain professionals with court approval, i.e., not

holding an adverse interest and being disinterested, are formally distinct, in many cases they effectively collapse into a single test. 11 U.S.C.A. § 327.

[13] **Bankruptcy** Employment of Professional Persons or Debtor's Officers

Conflicts under bankruptcy statute governing employment of professional persons can be sorted into three subcategories: (1) actual conflicts of interest, (2) potential conflicts of interest, and (3) appearances of conflict. 11 U.S.C.A. § 327.

[14] **Attorneys and Legal Services** Bankruptcy and debt collection

Bankruptcy Attorneys

Attorneys with actual conflicts face per se disqualification as Chapter 11 debtor's counsel, but disqualification is at court's discretion for attorneys with potential conflicts. 11 U.S.C.A. § 327.

[15] **Attorneys and Legal Services** Bankruptcy and debt collection

Bankruptcy Attorneys

Court may not disqualify attorney as Chapter 11 debtor's counsel on appearance of conflict alone. 11 U.S.C.A. § 327.

[16] **Bankruptcy** Employment of Professional Persons or Debtor's Officers

Though not unfettered, bankruptcy courts have considerable discretion in evaluating whether professionals suffer from conflicts. 11 U.S.C.A. § 327.

[17] **Bankruptcy** Employment of Professional Persons or Debtor's Officers

Actual conflicts of interests in the context of the section of the Bankruptcy Code governing the employment of professional persons do not have a strict definition; courts thus proceed case-by-case. 11 U.S.C.A. § 327.

[18] **Bankruptcy** Employment of Professional Persons or Debtor's Officers

Conflict is actual, under Bankruptcy Code section governing employment of professional persons, when the specific facts before the court suggest that it is likely that a professional will be placed in a position permitting it to favor one interest over an impermissibly conflicting interest. 11 U.S.C.A. § 327.

[19] **Bankruptcy** Employment of Professional Persons or Debtor's Officers

While Bankruptcy Code section governing employment of professional persons and rules of professional conduct impose independent obligations, professional conduct rules may be relevant and consulted when they are compatible with federal law and policy. 11 U.S.C.A. § 327.

[20] **Bankruptcy** Employment of Professional Persons or Debtor's Officers

Bankruptcy Code section governing employment of professional persons is written in the present tense, barring the retention of professionals who "hold or represent" adverse interests; it only allows disqualifications for adverse interests that exist at the time of retention. 11 U.S.C.A. § 327.

[21] **Bankruptcy** Employment of Professional Persons or Debtor's Officers

In considering whether bankruptcy professional has interest materially adverse to the interest of the estate, court may consider whether a possible conflict implicates the economic interests of the estate and might lessen its value. 11 U.S.C.A. § 327.

[22] **Attorneys and Legal Services** Bankruptcy and debt collection

Bankruptcy Attorneys

Bankruptcy Court did not abuse its discretion in authorizing Chapter 11 debtors' retention of law firm as restructuring counsel, despite conflict-of-interest objection by debtors' liability insurer whose affiliate had issued multiple insurance policies to debtors which were now assets of the bankruptcy estate and, for a time, had retained firm's insurance and financial services group in connection with two reinsurance disputes to which debtors were not a party, but which involved claims affiliate paid or in the future would pay under the insurance policies; firm's representation of debtor excluded insurance issues, and because firm's relationship to affiliate did not affect its ability to advocate on behalf of debtor, it was not an "actual conflict" under Bankruptcy Code provision governing employment of professionals even if insurer had legitimate concerns about firm's compliance with the applicable rules of professional conduct. 11 U.S.C.A. § 327.

[23] **Attorneys and Legal Services** Inherent power or jurisdiction

Court may use its inherent disciplinary power over advocates appearing before it to disqualify attorney.

[24] **Attorneys and Legal Services** Standards of professional conduct; enforcement; discipline

Conduct of attorneys practicing in federal court is governed by local rules of court.

[25] **Attorneys and Legal Services** Discretion of court

Because the power to disqualify stems from a court's authority to supervise the attorneys appearing before it, a decision about whether to use that power is discretionary and never is automatic.

[26] **Attorneys and Legal Services** Conflicts as grounds for disqualification

Even when an ethical conflict exists, or is assumed to exist, court may conclude based on the facts before it that disqualification of attorney is not an appropriate remedy.

[27] **Attorneys and Legal Services** Factors and Considerations in General

Relevant factors to determine whether disqualification of attorney is appropriate based on ethical conflict depend on the specifics of the case, but generally include the ability of litigants to retain loyal counsel of their choice, the ability of attorneys to practice without undue restriction, preventing the use of disqualification as a litigation strategy, preserving the integrity of legal proceedings, and preventing unfair prejudice.

[28] **Attorneys and Legal Services** Factors and Considerations in General

In determining whether disqualification of attorney is appropriate, sometimes disqualification is more disruptive than helpful even though an attorney may not have satisfied his or her professional obligations.

[29] **Attorneys and Legal Services** Bankruptcy and debt collection

Bankruptcy Attorneys

Bankruptcy Court did not abuse its discretion in determining that drastic remedy of disqualification of Chapter 11 debtors' restructuring counsel was not appropriate regardless of any violation of professional responsibility conflict-of-interest rules, based on debtors' liability insurer whose affiliate had issued multiple insurance policies to debtors which were now assets of the bankruptcy estate and, for a time, had retained firm's insurance and financial services group in connection

with two reinsurance disputes to which debtors were not a party, but which involved claims affiliate paid or in the future would pay under the insurance policies; insurer could not have been adversely affected because firm's bankruptcy team did not receive any confidential or privileged information from the attorneys working on its reinsurance matters, whereas debtor would have been adversely affected if the firm were disqualified.

[30] **Bankruptcy** Presentation of grounds for review

Chapter 11 debtors' liability insurer, whose affiliate had issued multiple insurance policies to debtors which were now assets of the bankruptcy estate and, for a time, had retained law firm's insurance and financial services group in connection with two reinsurance disputes to which debtors were not a party, but which involved claims affiliate paid or in the future would pay under the insurance policies, forfeited request on appeal from Bankruptcy Court's order overruling insurer's objection and authorizing debtors' retention of firm as counsel for disgorgement of fees as alternatives to disqualification, since insurer argued only for disqualification before the Bankruptcy Court.

[31] **Attorneys and Legal Services** Effect of Conflicts

Under "hot potato" doctrine, courts apply more stringent standards of rules of professional conduct governing conflicts of interest even though representation has formally ended in order to discourage firms from dropping client for self-interested reasons.

***153** Appeal from the United States District Court for the District of Delaware (D.C. Civil Action No. 1-20-cv-00798), District Judge: Honorable Richard G. Andrews

Attorneys and Law Firms

Jonathan D. Hacker (Argued), Andrew R. Hellman, O'Melveny & Myers, 1625 Eye Street, N.W., Washington, DC 20006, Tancred V. Schiavoni, O'Melveny & Myers, 7 Times Square, Time Square Tower, 33rd Floor, New York, NY 10036, Counsel for Appellants

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Robert N. Hochman (Argued), James W. Ducayet, Sidley Austin, One South Dearborn Street, Chicago, IL 60603, Counsel for Appellee Sidley Austin

Before: McKEE, AMBRO, and SMITH, Circuit Judges

OPINION OF THE COURT

AMBRO, Circuit Judge

***154** Sidley Austin LLP represented insurer affiliates of Chubb Ltd.—Century Indemnity Co., Westchester Fire Insurance Co., and Westchester Surplus Lines Insurance Co. (collectively, "Century")—in obtaining backup coverage from reinsurers of Century's policies. Sidley also represented the Boy Scouts of America and Delaware BSA, LLC (collectively, "BSA") in its restructuring efforts under the Bankruptcy Code following myriad molesting claims of scouts. Though BSA made coverage claims under Century's policies, it did so while represented by another firm—Haynes and Boone LLP. And Sidley's reinsurance services for Century were limited to claims made against the reinsurers (and not BSA).

Century, however, came to feel jilted and claimed a conflict concerning Sidley's representation of it and BSA. It objected when Sidley filed a retention request in BSA's bankruptcy case. Century's objection only concerned the ability of Sidley to represent BSA, and the Bankruptcy Court determined that Sidley could do so effectively, thus approving its retention. The District Court affirmed, and now Century appeals to

us. We agree with those Courts and hence affirm Sidley's retention as bankruptcy counsel to BSA.

I. BACKGROUND

Century issued insurance to BSA, and those insurance policies are now assets of the BSA estate. To help cover its obligations to BSA in the event of claims, Century purchased reinsurance—think of it as insurance for insurance companies—and, after BSA made claims related to sexual-abuse litigation, Century sought to collect on those policies. On October 5, 2018, Century hired Sidley's Insurance and Financial Services Group to represent it in ensuing reinsurance disputes. That representation did not extend to the underlying direct insurance issued by Century to BSA. It (BSA) was not a party to the reinsurance disputes, and the matters did not pertain to whether Century would pay BSA under the direct insurance contracts.

At roughly the same time, starting on September 26, 2018, BSA retained Sidley to explore restructuring options. The engagement letter for Sidley specified that it would not "advis[e] [BSA] on insurance coverage issues." J.A. at 1199. BSA had already retained, without objection, Haynes and Boone to serve as insurance counsel. Sidley filed BSA's bankruptcy petition on February 18, 2020, and subsequently filed a retention application on March 17.[1] Century objected.

By this time the attorney-client relationship between Century and Sidley had unraveled. Century appears to have first learned that Sidley was representing BSA when *The Wall Street Journal* published an article on December 13, 2018, identifying Sidley as BSA's counsel. But Century did not object—at least formally—to Sidley's representation of BSA until the autumn of 2019. In the interim, BSA engaged in substantive discussions with its insurers, including Century. While Haynes and Boone was the sole insurance counsel, Sidley attorneys were present at some meetings. Century did not object at the time. But in late October 2019, Century told Sidley that its representation of BSA created a conflict. On November 3, Century's ***155** counsel objected to a mediation related to BSA's restructuring because of Sidley's presence. Sidley responded the next day by putting a formal ethics screen into place between its restructuring team and its reinsurance team.

Sidley and Century could not reach an agreement. The former continued to maintain there was no conflict, but on January 3, 2020, Century sent a letter explaining that it could not provide a conflict waiver for Sidley to represent BSA or consent to Sidley's withdrawal of Century's representation. Indeed, Century never gave Sidley a waiver for any claimed conflict. In response to Sidley's suggestion that Century was using the threat of disqualification as a litigation tactic, Century asserted that it was "shocking and offensive that Sidley would suggest that Chubb has an improper motive in trying to address the conflict issue." J.A. at 1391. Sidley then provided written notice to Century on January 16 that it was withdrawing due to a breakdown in the attorney-client relationship. The Bankruptcy Court found Sidley finished withdrawing on either February 20 or 24, 2020.

Fast forward to September 2020, when the Sidley attorneys working for BSA moved to a new firm, taking with them BSA as a client. Sidley is thus no longer actively working on BSA's bankruptcy. Century is separately pursuing its grievances about the representation it received from Sidley in arbitration as provided in their governing retention agreement.

The parties dispute what information Century provided to Sidley and the significance of it. The Bankruptcy Court found that Sidley's representation of Century "could be 'substantially related' to at least some aspects of [BSA's] bankruptcy case." J.A. at 38. But it also concluded that while Sidley may have received confidential information in the reinsurance matter relevant to BSA's bankruptcy, no privileged or confidential information was shared between the two legal teams at Sidley. *Id.* at 40.

The Bankruptcy Court, in a well reasoned ruling, approved Sidley's retention *nunc pro tunc* to the February 18 petition date. It concluded that Sidley's retention did not run afoul of the pertinent provision in the Bankruptcy Code— § 327[2]—because Sidley's representation of Century did not render it unable to represent BSA effectively. The Court then considered the potentially applicable Rules of Professional Conduct—Rules 1.7 and 1.9[3]—and noted that, even if certain legal positions taken in the bankruptcy case regarding the BSA/Century insurance policies "could be harmful to Century's efforts to collect on its [re]insurance," *id.*, disqualification was unnecessary because BSA had special insurance counsel and Sidley had put an ethics screen into place, *id.* at 38–40.

***156** Century appealed to the District Court, which affirmed in a thorough opinion. The Court observed that the relevant facts were not in dispute. It separately considered § 327(a) and

the Rules of Professional Conduct (though with no decision on the latter). As had the Bankruptcy Court, the District Court discerned no actual conflict for § 327 purposes because, at the time of its retention, Sidley held no interest adverse to BSA. Even assuming a professional rule violation, it held the Bankruptcy Court exercised its discretion appropriately in deciding disqualification was even then not a fitting remedy in this context. By proceeding in this way, the Court held for Sidley without deciding the merits of the alleged violations of Rules 1.7 and 1.9.

On appeal to us, Century asserts that § 327 "does not operate in a vacuum but rather incorporates ethical rules from state law—here, the Rules of Professional Conduct." Century's Op. Br. at 27. By their declining to determine whether Sidley violated Rules of Professional Conduct 1.7 and 1.9 and in failing to find an actual conflict under § 327—the latter requiring *per se* disqualification—Century alleges the Bankruptcy Court erred as did the District Court in affirming that judgment.

II. JURISDICTION AND STANDARD OF REVIEW

This is a core proceeding under 28 U.S.C. § 157(b)(2). The Bankruptcy Court had jurisdiction under 28 U.S.C. §§ 157 and 1334. The District Court had jurisdiction under 28 U.S.C. § 158(a)(1) over the appeal of the Bankruptcy Court's decision, a final order. *See In re Congoleum Corp.*, 426 F.3d 675, 684– 85 (3d Cir. 2005). We have jurisdiction under 28 U.S.C. § 1291.

[1] **[2]** **[3]** **[4]** The District Court acted as an appellate court, and we review both its factual and legal determinations. *Id.* at 685. "[T]o determine whether the District Court erred, we review the [B]ankruptcy [C]ourt's findings by the standards the District Court should have employed." *Id.* That means we review for abuse of discretion the decision to approve Sidley's application for retention as BSA's bankruptcy counsel. *In re Marvel Ent. Grp., Inc.*, 140 F.3d 463, 470 (3d Cir. 1998); *United States v. Miller*, 624 F.2d 1198, 1201 (3d Cir. 1980). "An abuse of discretion exists where the ... decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact." *Marvel*, 140 F.3d at 470 (quoting *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1476 (3d Cir.1996) (*en banc*)). We give fresh, or plenary, review to legal determinations and review factual findings for clear error. *Id.*

III. ANALYSIS

Before turning to the merits, we detour to consider whether this appeal has become moot.

A. Standing and Mootness

[5] **[6]** As a threshold issue, does an active case or controversy continue? If no, we lack authority under Article III of the Constitution to consider the merits of Century's appeal. *See Hamilton v. Bromley*, 862 F.3d 329, 334–35 (3d Cir. 2017). When the requirements necessary for standing at the start of a case disappear, it becomes moot and no longer satisfies Article III's case-or-controversy requirement (unless the defendant voluntarily ceased the challenged conduct in response to litigation or the injury is likely to recur while evading review). *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189–91, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000).

[7] **[8]** There is an additional prudential (that is, not-constitutional) requirement in ***157** bankruptcy appeals for standing: it is limited to "persons aggrieved" by an order of the Bankruptcy Court. *See In re Combustion Eng'g, Inc.*, 391 F.3d 190, 214 (3d Cir. 2004). Potential appellants are "persons aggrieved" only if they can show that "the order of the bankruptcy court 'diminishes their property, increases their burdens, or impairs their rights.' " *Id.* (quoting *In re PWS Holding Corp.*, 228 F.3d 224, 249 (3d Cir. 2000)); *see also PWS Holding*, 228 F.3d at 249 ("[O]nly those whose rights or interests are directly and adversely affected pecuniarily by an order of the bankruptcy court may bring an appeal." (internal quotation marks and citation omitted)).

[9] **[10]** But when considering appeals from an order approving the retention of counsel, we need not scrutinize the appellant's injury in as much detail. Retention of counsel "implicate[s] the integrity of the bankruptcy court proceeding as a whole"; hence it is "extremely important to resolve" those disputes. *Congoleum*, 426 F.3d at 685. Absent immediate appeals, meaningful review of potentially serious ethical issues might never occur. *Id.* *Congoleum* involved whether insurers had standing to appeal the Bankruptcy Court's approval of a retention request. Only the insurers there had reason to challenge the retention order, and holding they lacked standing would have impeded self-regulation of

the profession. *Id.* at 686–87. These same considerations apply here. Accordingly, the Bankruptcy Court's order affects interests of Century sufficiently for it to be a "person aggrieved."

[11] Additionally, even though Sidley no longer has an active role in the underlying bankruptcy case, the possibility remains that we could order the disgorgement of its fees. Thus, the outcome of this retention dispute has continuing implications for the BSA estate and its creditors. For these reasons, we conclude Century continues to have standing to bring this appeal and the matter is not moot.

B. Section 327

Section 327(a) of the Bankruptcy Code is the starting point for retaining a debtor's professionals. It authorizes the trustee (and, under § 1107(a) of the Code, a debtor in possession), with court approval, to employ professionals, including lawyers, if they (1) "do not hold or represent an interest adverse to the estate" and are (2) "disinterested persons." 11 U.S.C. § 327(a); *see also In re BH & P, Inc.*, 949 F.2d 1300, 1314 (3d Cir. 1991). The latter are defined, in relevant part, as those who do "not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason." 11 U.S.C. § 101(14)(C). Save the "any other reason" catchall, the focus dead ends at the debtor and especially its estate.

[12] We recognize these two prongs (*i.e.*, not holding an adverse interest and being disinterested) as formally distinct. *BH & P*, 949 F.2d at 1314. That said, in many cases—including this one—they effectively collapse into a single test. *See* 1 Collier on Bankruptcy ¶ 8.03[9] (16th ed. 2022) (noting that "[t]hese two tests invoke the same consideration of whether the professional holds or represents an adverse interest to the interests of the debtor and its estate"); *see also BH & P*, 949 F.2d at 1314 ("There is, indisputably, some overlap between the [§] 327(a) standard and [§] 101(14)[C] disinterest requirement.").

[13] **[14]** **[15]** Section 327 conflicts can be sorted into three subcategories: (1) actual conflicts of interest, (2) potential conflicts of interest, and (3) appearances of conflict. *Marvel*, 140 F.3d at 476. The implications ***158** of an apparent conflict depend on which category it fits. Attorneys with actual conflicts face *per se* disqualification, but disqualification is at the court's discretion for attorneys with potential conflicts. *Id.* And a court "may not disqualify an attorney on the appearance of conflict alone." *Id.*

[16] **[17]** **[18]** Though not unfettered, bankruptcy courts have "considerable discretion in evaluating whether professionals suffer from conflicts." *In re Pillowtex, Inc.*, 304 F.3d 246, 254 (3d Cir. 2002). Indeed, actual conflicts of interests in the § 327 context do not have a strict definition. *Id.* at 251. Courts thus proceed "case-by-case." *Id.* (quoting *BH&P*, 949 F.2d at 1315). Pragmatically, a conflict is actual when the specific facts before the bankruptcy court suggest that "it is likely that a professional will be placed in a position permitting it to favor one interest over an impermissibly conflicting interest." *Id.*

[19] Century asks us to adopt a new rule and hold that courts must always consider the applicable Rules of Professional Conduct before reaching a conclusion on § 327. We decline to do so. Section 327 and the Rules of Professional Conduct impose independent obligations. *Cf. Congoleum*, 426 F.3d at 687–92 (analyzing separately the applicable Rules of Professional Conduct and § 327); *see also* 1 Collier on Bankruptcy § 8.03[2] ("[A]ttorneys have an independent duty, apart from the particular requirements of the Bankruptcy Code or rules, to conform their activities to [the local rules governing professional conduct]."). Professional conduct rules may be relevant and "consulted when they are compatible with federal law and policy ...." *Congoleum*, 426 F.3d at 687.[4]

[20] Yet, depending on the facts, the Bankruptcy Court may not need to examine the relevant professional rules to decide a § 327 retention. Such was the case here. The provision makes clear that its purview is focused primarily on the interests of the estate. When professionals "hold or represent an interest *adverse to the estate*," they cannot be retained. 11 U.S.C. § 327(a) (emphasis added). This focus is reiterated in § 327(a)'s second prong: professionals must be "disinterested"—most relevant, they cannot have an "interest materially *adverse to the interest of the estate*." *Id.* § 101(14)(c).[5]

[21] The relevant issue in our case is thus whether a possible conflict implicates the economic interests of the estate and might lessen its value. *See In re First Jersey Sec., Inc.*, 180 F.3d 504, 509 (3d Cir. 1999) ("A Court may consider an interest adverse to the estate when counsel has 'a ***159** competing economic interest tending to diminish

estate values or to create a potential or actual dispute in which the estate is a rival claimant.' "); *accord In re Am. Int'l Refinery, Inc.*, 676 F.3d 455, 461 (5th Cir. 2012) (providing, *inter alia*, the same definition for "interest[s] adverse"); *In re AFI Holding, Inc.*, 530 F.3d 832, 845 (9th Cir. 2008) (same); *AroChem*, 176 F.3d at 623 (same); *In re Crivello*, 134 F.3d 831, 835 (7th Cir. 1998) (same); *In re Prince*, 40 F.3d 356, 361 (11th Cir. 1994) (same).

[22] In this context, the conflict alleged by Century was outside the scope of § 327(a). The Bankruptcy Court explained it was "in no way convinced that Sidley generally cannot effectively represent BSA. This is not a situation where the [C]ourt is concerned that proposed counsel has a bias in favor of a non-debtor entity such as a parent or significant creditor." J.A. at 33. Century has not meaningfully challenged the Bankruptcy Court's factual finding that Sidley did not have an interest adverse to the estate. Century asserts that Sidley had a conflict because it was violating Rule 1.7 but does not explain why this violation, if it indeed occurred, impeded Sidley's effective representation of BSA for purposes of § 327(a). This is unsurprising, as Haynes and Boone served as BSA's dedicated insurance counsel at all relevant times, and BSA was not a party to the reinsurance matters Sidley worked on for Century. Nor has Century explained why its positions in the reinsurance disputes are opposed to BSA's interests during its reorganization. On these facts, the Bankruptcy Court did not abuse its discretion in ruling there was no actual conflict under § 327.

Still, the Rules of Professional Conduct may be informative in some cases. For example, in *Congoleum*, 426 F.3d at 679, we held that Congoleum's counsel—Gilbert, Heinz & Randolph LLP—violated the Rules of Professional Conduct and § 327 for the same reason. But Century draws the wrong conclusion from that case. We never stated that violations of the Rules of Professional Conduct are themselves sufficient to create a § 327 conflict. Rather, we explained that the same facts showing Gilbert had violated its professional obligations under the Rules also meant it was not disinterested for purposes of § 327. *Congoleum*'s facts were markedly different than those before us: while Gilbert was representing Congoleum, it was also assisting claimants in settlement negotiations with that entity. That arrangement directly implicated its loyalty to Congoleum. Here, by contrast, Sidley represented Century in reinsurance matters in which BSA was not a party, and Sidley's representation of BSA excluded insurance issues. Because Sidley's relationship to Century did not affect its ability to advocate on behalf of BSA, it was not an "actual conflict" under § 327 even if Century had legitimate concerns about Sidley's compliance with the applicable Rules of Professional Conduct. Accordingly, the Bankruptcy Court reasonably ruled that Sidley's retention did not require disqualification under § 327.

C. Rules of Professional Conduct

[23] **[24]** A court may use its inherent disciplinary power over the advocates appearing before it to disqualify an attorney. *In re Corn Derivatives Antitrust Litig.*, 748 F.2d 157, 160 (3d Cir. 1984). The conduct of attorneys practicing in federal court is governed by the local rules of the court. *See Congoleum*, 426 F.3d at 687. Local Rule 9010-1(f) for the United States Bankruptcy Court for the District of Delaware provides that "all attorneys admitted or authorized to practice before this Court ... shall ... be governed by the Model ***160** Rules of Professional Conduct of the American Bar Association, as may be amended from time to time."

As noted, Century asked the Bankruptcy Court to disqualify Sidley from representing BSA because (in Century's view) Sidley violated at least one of two Model Rules of Professional Conduct that regulate the attorney-client relationship: Rules 1.7 and 1.9. The first governs obligations to current clients and states that, unless certain listed exceptions apply, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." Model Rules of Pro. Conduct r. 1.7 (Am. Bar. Ass'n 1983). This occurs when "(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." *Id.* The second governs obligations to former clients. It states that, absent consent, "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client." Model Rules of Pro. Conduct r. 1.9; *see also* Model Rules of Pro. Conduct r. 1.10 (Am. Bar Ass'n 1983) (extending the obligations of Rules 1.7 and 1.9 to all attorneys within the same firm).

[25] **[26]** **[27]** **[28]** Because the power to disqualify stems from a court's authority to supervise the attorneys

appearing before it, a decision about whether to use that power is discretionary and "never is automatic." *Miller*, 624 F.2d at 1201. Even when an ethical conflict exists (or is assumed to exist), a court may conclude based on the facts before it that disqualification is not an appropriate remedy. Relevant factors depend on the specifics of the case, but generally include the ability of litigants to retain loyal counsel of their choice, the ability of attorneys to practice without undue restriction, preventing the use of disqualification as a litigation strategy, preserving the integrity of legal proceedings, and preventing unfair prejudice. *See Corn Derivatives*, 748 F.2d at 162; *see also TQ Delta, LLC v. 2Wire, Inc.*, No. 13-1835, 2016 WL 5402180, at *6 (D. Del. Sept. 26, 2016) (identifying these and other possible considerations). Sometimes disqualification is more disruptive than helpful even though an attorney may not have satisfied his or her professional obligations. And, indeed, courts in our Circuit often deny disqualification even when finding or assuming conflicts under the professional conduct rules. *See, e.g., TQ Delta*, 2016 WL 5402180, at *6–7 (denying motion for disqualification despite violation of Rule 1.9); *Bos. Sci. Corp. v. Johnson & Johnson Inc.*, 647 F. Supp. 2d 369, 374 (D. Del. 2009) ("[Counsel's] violation of Model Rule 1.7 notwithstanding, the court concludes that disqualification is not the appropriate remedy under the circumstances."); *Wyeth v. Abbott Lab'ys*, 692 F. Supp. 2d 453, 458–59 (D.N.J. 2010) (denying motion for disqualification even though there was "no dispute" that counsel violated Rule 1.7); *Elonex I.P. Holdings, Ltd. v. Apple Comput., Inc.*, 142 F. Supp. 2d 579, 583 (D. Del. 2001) (even were Rule 1.7 violated, disqualification would not have been warranted).

[29] **[30]** Here, the Bankruptcy Court followed this practice. Though it did not definitively decide whether Sidley had violated any professional responsibility rules, it determined that disqualification was inappropriate regardless. Century could not have been adversely affected, the Court found, because Sidley's bankruptcy team did not receive any confidential or privileged information from the attorneys ***161** working on Century's reinsurance matters. In contrast, BSA, the Bankruptcy Court also found, would have been adversely affected if the firm were disqualified.[6] These factual findings were well supported, and Century does not directly challenge them. *Cf.* Century's Op. Br. at 47–48 (arguing that Sidley must have been aware of privileged information from the reinsurance matters but not suggesting that any such information was passed to the team handling BSA's reorganization). Because Sidley's representation of BSA did not prejudice Century, but disqualifying it would have been a significant detriment to BSA, it was well within the Court's discretion to determine that the drastic remedy of disqualification was unnecessary.[7]

[31] In the alternative, Century asks us to hold at least that courts should apply Rule of Professional Conduct 1.7 in cases (including, according to Century, this one) where a law firm dropped an existing client to avoid conflicts that would prevent it from taking on a more lucrative client. Under this concept— known as the "hot potato" doctrine—courts apply the more stringent Rule 1.7 standards even though representation has formally ended to discourage firms from dropping a client (like a hot potato) for self-interested reasons. *See, e.g., Merck Eprova AG v. ProThera, Inc.*, 670 F. Supp. 2d 201, 209 (S.D.N.Y. 2009). There are not enough facts to put that principle into play in our case. Accordingly, we save consideration of it for the future.

* * * * *

In holding that the Bankruptcy Court permissibly allowed BSA to retain Sidley as its restructuring counsel, our concern is primarily whether it could effectively represent BSA in its bankruptcy case. Whether it did so in Century's reinsurance matters is a separate question that Century can independently challenge in its arbitration proceeding with Sidley. But as to the issue before us, § 327 is the test the Bankruptcy Code requires. Though a court's decision on retention may be informed by counsel's conduct implicating the Rules of Professional Conduct, the facts before us do not require that this be done. The Bankruptcy Court properly focused on § 327 and took Century's concerns seriously. It also did not hastily jump to a conclusion; it looked carefully at the specific facts before it and reasonably approved BSA's retention of Sidley. This is nowhere close to an abuse of discretion. We thus affirm the approval of its judgment by the District Court.

All Citations

35 F.4th 149, 71 Bankr.Ct.Dec. 156

Footnotes

1 There is a tentative settlement proposal between BSA and Century. The proposal specifically excludes Century's claims against Sidley, and it is included in the proposed reorganization plan still pending before the Bankruptcy Court. *See generally In re Boy Scouts of America*, No. 20-10343-LSS (Bankr. D. Del. filed Feb. 18, 2020).

2 Section 327(a) of the Bankruptcy Code (Title 11 of the U.S. Code) provides that "the trustee, with the court's approval, may employ one or more attorneys ... that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title." Section 327(c) adds that "a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest."

3 The Delaware Bankruptcy Court has adopted the American Bar Association's Model Rules of Professional Conduct. *See* Bankr. D. Del. Ct. R. 9010-1(f). Rule 1.7 governs concurrent conflicts of interest, and Rule 1.9 concerns obligations to former clients. Each is set out in Section III.C below.

4 Also, in an analogous situation, violating those rules in soliciting creditors' committee members tainted a firm's eligibility for retention as committee counsel. *See In re Universal Bldg. Prods.*, 486 B.R. 650, 658–61 (Bankr. D. Del. 2010).

5 We also note that § 327(a) is written in the present tense: it bars the retention of professionals who "hold or represent" adverse interests. It only allows disqualifications for adverse interests that exist at the time of retention. *Accord In re AroChem Corp.*, 176 F.3d 610, 623 (2d Cir. 1999) ("[C]ounsel will be disqualified under section 327(a) only if it presently 'hold[s] or represent[s] an interest adverse to the estate,' notwithstanding any interests it may have held or represented in the past." (alterations in original)); *see also United States v. Wilson*, 503 U.S. 329, 333, 112 S.Ct. 1351, 117 L.Ed.2d 593 (1992) ("Congress' use of a verb tense is significant in construing statutes."). While any conflict here has now ceased, Century argues that there was an actual, concurrent conflict that continued between at least Sidley's retention application on February 18, 2020, and when Sidley dropped Century as a client on February 20 or 24. But we do not need to explore this timing question because, as explained below, the putative conflict was outside the purview of § 327(a).

6 Because Sidley is no longer actively involved in the case, Century argues that disqualification would no longer prejudice BSA. But this is of no moment. We review the Bankruptcy Court's decision based on the record before it at the time of its decision. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) (explaining that a factual finding is "clearly erroneous" only when implausible "in light of the record").

7 Century now requests other remedies (*e.g.*, disgorgement of fees) as alternatives to disqualification. But it argued only for disqualification before the Bankruptcy Court, and so it has forfeited any request for other remedies. *See In re Handel*, 570 F.3d 140, 143 (3d Cir. 2009). Moreover, it is within the Bankruptcy Court's discretion to weigh the same considerations when imposing alternative remedies in lieu of disqualification as when imposing disqualification itself.

592 B.R. 698
United States Bankruptcy Appellate
Panel of the Ninth Circuit.

IN RE: Gil Alberto DE
JESUS GOMEZ, III, Debtor.
Gil Alberto De Jesus Gomez, III;
Francisco Javier Aldana, Appellants,
v.
Ronald E. Stadtmueller,
Chapter 7 Trustee, Appellee.

BAP No. SC-18-1089-FLS
|
Bk. No. 16-07502-LT7
|
Submitted without oral argument on October 25, 2018
|
Filed – November 9, 2018
|
Ordered Published - November 20, 2018

Synopsis

Background: Following entry of order sustaining Chapter 7 trustee's objection to amended claim of exemption in debtor's motor vehicle, after trustee created equity by avoiding security interest in that vehicle voluntarily granted by debtor, trustee sought award of sanctions against debtor or debtor's attorney for claiming exemption in bad faith. The United States Bankruptcy Court for the Southern District of California, Laura S. Taylor, J., entered order awarding sanctions against attorney, and appeal was taken. Trustee moved for award of frivolous appeal sanctions.

Holdings: The Bankruptcy Appellate Panel, Faris, J., held that:

[1] bankruptcy court did not abuse its discretion in sanctioning Chapter 7 debtor's attorney for amending debtor's exemption schedule in bad faith in order to claim exemption in motor vehicle, and

[2] filing of notice of appeal that Chapter 7 debtor's counsel should have recognized was frivolous from even a cursory review of language of bankruptcy statute and of relevant case law was such as to warrant award of trustee's attorney fees and double costs.

Affirmed; motion granted.

West Headnotes (16)

[1] **Bankruptcy** Evidence; witnesses

On appeal from sanctions order entered against Chapter 7 debtor's attorney for bad faith in claiming an exemption in voluntarily transferred property recovered by trustee, the Bankruptcy Appellate Panel could take judicial notice of fact that, even after sanctions order was entered, debtor and his attorney continued to claim exemption. Fed. R. Evid. 201.

[2] **Bankruptcy** Discretion

Bankruptcy Appellate Panel reviews for abuse of discretion a bankruptcy court's sanctions order.

[3] **Bankruptcy** Discretion

Bankruptcy court's choice of sanction is reviewed for abuse of discretion.

[4] **Bankruptcy** Discretion

Under "abuse of discretion" standard of review, the Bankruptcy Appellate Panel will reverse only when bankruptcy court applied incorrect legal rule, or when its application of the law to the facts was illogical, implausible, or without support in inferences that may be drawn from record.

[5] **Bankruptcy** Frivolity or bad faith; sanctions

Bankruptcy court did not abuse its discretion in sanctioning Chapter 7 debtor's attorney for amending debtor's exemption schedule in bad faith in order to claim exemption in motor vehicle, after trustee had avoided a security interest voluntarily granted by

debtor and perfected by motor vehicle lender after bankruptcy petition was filed; attorney's argument that debtor was entitled to amend schedules at any time before case closed in order to claim exemption, and to prevent trustee from accessing equity that he had created by avoiding security interest voluntarily granted by debtor, was reckless and frivolous, contrary to plain language of bankruptcy statute, and supported award of sanctions in exercise of court's inherent authority. 11 U.S.C.A. § 522(g).

[6] **Bankruptcy** Power and Authority

Bankruptcy Frivolity or bad faith; sanctions

Bankruptcy court has inherent authority to impose sanctions for "bad faith," which includes a broad range of willful improper conduct.

[7] **Bankruptcy** Power and Authority

Bankruptcy Frivolity or bad faith; sanctions

Before bankruptcy court imposes sanctions under its inherent authority, it must first find bad faith, conduct tantamount to bad faith, or recklessness with an additional factor such as frivolousness, harassment, or improper purpose.

[8] **Bankruptcy** Frivolity or bad faith; sanctions

Bankruptcy court's finding of bad faith, conduct tantamount to bad faith, or similar misconduct supporting an award of sanctions in exercise of its inherent authority must be explicit.

[9] **Bankruptcy** Avoided transfers

Debtor may exempt property recovered by trustee in exercise of his avoidance powers only if the transfer of property was involuntary and the property was not concealed by debtor; if debtor voluntarily transferred the property or concealed the property, then no exemption may be claimed. 11 U.S.C.A. § 522(g).

[10] **Bankruptcy** Avoided transfers

Mere fact that the voluntary transfer avoided by trustee was not the voluntary transfer of motor vehicle itself, but of purchase money security interest in motor vehicle perfected by creditor after debtor's Chapter 7 petition was filed, did not alter the fact that, because this security interest was voluntarily granted, debtor could not claim exemption in motor vehicle after trustee avoided creditor's security interest and created equity potentially available for distribution on creditor claims. 11 U.S.C.A. § 522(g).

[11] **Bankruptcy** Construction and Operation

Perfection of security interest in debtor's property is a "transfer," as that term is used in the Bankruptcy Code. 11 U.S.C.A. § 101(54)(D).

[12] **Bankruptcy** Power and Authority

Bankruptcy Frivolity or bad faith; sanctions

Award of sanctions in exercise of bankruptcy court's inherent authority requires more than recklessness alone.

1 Cases that cite this headnote

[13] **Bankruptcy** Frivolity or bad faith; sanctions

Filing of notice of appeal that Chapter 7 debtor's counsel should have recognized was frivolous from even a cursory review of language of bankruptcy statute and of relevant case law was such as to warrant award of trustee's attorney fees and double costs against counsel. Fed. R. Bankr. P. 8020.

[14] **Bankruptcy** Frivolity or bad faith; sanctions

"Frivolous appeal," the filing of which may be sanctioned, is one where the result is obvious, or

where appellant's arguments are wholly without merit. Fed. R. Bankr. P. 8020.

1 Cases that cite this headnote

[15] **Bankruptcy** Frivolity or bad faith; sanctions

Bankruptcy Appellate Panel may impose sanctions for the filing of frivolous appeal in order to penalize appellant or attorney who pursues a frivolous appeal and to compensate appellee for delay and expense of defending the appeal. Fed. R. Bankr. P. 8020.

[16] **Bankruptcy** Frivolity or bad faith; sanctions

Subjective, good faith belief by debtor's attorney in his course of conduct did not insulate him from sanctions for filing frivolous appeal; Bankruptcy Rule authorizing the imposition of such sanctions was not susceptible to a "pure heart, empty head" defense. Fed. R. Bankr. P. 8020.

***700** Appeal from the United States Bankruptcy Court for the Southern District of California, Honorable Laura S. Taylor, Bankruptcy Judge, Presiding

Attorneys and Law Firms

Appellant Francisco Javier Aldana on the brief pro se and on behalf of appellant Gil Alberto De Jesus Gomez, III; Ronald E. Stadtmueller, pro se, on the brief.

Before: FARIS, LAFFERTY, and SPRAKER, Bankruptcy Judges.

OPINION

FARIS, Bankruptcy Judge:

INTRODUCTION

This appeal illustrates what can happen when a debtor's lawyer asserts an exemption claim without performing adequate legal analysis. Because counsel claimed a baseless exemption and stubbornly refused to admit his error, counsel has incurred sanctions well in excess of the value of the property claimed exempt.

Chapter 7[1] debtor Gil Alberto de Jesus Gomez, III and his attorney, Francisco Javier Aldana (collectively, "Appellants"), appeal from the bankruptcy court's order sanctioning Mr. Aldana for improperly claiming an exemption on behalf of Mr. Gomez in a vehicle after appellee Ronald E. Stadtmueller, Chapter 7 Trustee (the "Trustee") avoided a lien and recovered the vehicle. The Appellants argue that they can exempt property at any time during a bankruptcy case and that they did not act in bad faith.

The Appellants misstate the statutory framework and a Supreme Court case. Their inaction and dilatoriness before the bankruptcy court give the lie to their claim of good faith. Their arguments are unsupported and frivolous. We AFFIRM.

The Trustee also filed a separate motion requesting sanctions against the Appellants for filing a frivolous appeal. We GRANT the request for fees and double costs as to Mr. Aldana.

We publish to explain how § 522(g) limits a debtor's right to claim exemptions in property after a trustee uses the avoiding powers to recover an interest in that property and that the Supreme Court's decision in *Law v. Siegel*, 571 U.S. 415, 134 S.Ct. 1188, 188 L.Ed.2d 146 (2014), is inapplicable.

FACTUAL BACKGROUND[2]

A. Mr. Gomez's bankruptcy case

On December 10, 2016, Mr. Gomez, through his counsel, Mr. Aldana, filed a chapter 7 petition. He scheduled a 2001 Ford Focus automobile as his personal vehicle and claimed an exemption for the full value of the car. He failed to disclose his ownership of a 2012 Chevrolet Malibu, which he allegedly purchased approximately two months earlier.

After remaining silent about the Malibu at two § 341(a) meetings of creditors, Mr. ***701** Gomez amended his Schedule A/B to include the Malibu, which he valued at $4,500. He listed Anayas Auto Sales as holding a $2,700 claim secured by the Malibu. He did not amend his Schedule

C to claim the Malibu as exempt. The bankruptcy court granted Mr. Gomez his discharge.

The Trustee discovered that Anayas Auto failed to perfect its lien on the Malibu until after the petition date.[3] The Trustee requested that Anayas Auto release its lien, but it did not do so. As a result, the Trustee initiated an adversary proceeding against Anayas Auto for avoidance and recovery of a postpetition transfer under § 549. Anayas Auto did not answer the complaint, and the Trustee obtained default judgment and a release of the lien.

The Trustee e-mailed Mr. Aldana to inform him of the default judgment against Anayas Auto and request that Mr. Gomez either surrender the Malibu to the Trustee's auctioneer or offer to purchase the vehicle. Mr. Aldana did not respond.

The Trustee also went to Mr. Gomez's residence to inquire about the Malibu. Mr. Gomez was not home, but a woman at the residence told the Trustee that she would tell Mr. Gomez to contact the Trustee about turning over the Malibu. Mr. Gomez did not contact the Trustee.

B. The motion to compel cooperation and turnover

The Trustee filed a motion to compel turnover of the Malibu ("Motion to Compel"). He stated that he had used his avoidance power under § 549 to obtain a release of Anayas Auto's lien, but despite repeated requests for Mr. Gomez to surrender the Malibu, Mr. Gomez had failed to do so. He requested that the court order immediate turnover of the Malibu.

On January 10, 2018, the bankruptcy court issued its tentative ruling stating its inclination to grant the Motion to Compel.

Later that day, Mr. Aldana contacted the Trustee to inform him that he had "just read" the Motion to Compel (even though the Trustee had filed and served the Motion to Compel six weeks earlier) and was puzzled by the court's ruling, because the Malibu was exempted. The Trustee left Mr. Aldana a voicemail informing him that Mr. Gomez did not exempt the Malibu and that the avoidance of a lien by the estate does not restore the property to the debtor. Mr. Aldana did not respond.

Still later that same day, Mr. Gomez filed an amended Schedule C, wherein he exempted the full value of both the Focus and Malibu under both California Code of Civil Procedure ("CCP") sections 703.140(b)(2) (special bankruptcy exemption) and 704.010 (regular exemption).[4] However, he did not oppose the Motion to Compel.

The bankruptcy court, noting that no one filed an opposition, granted the Motion ***702** to Compel and ordered Mr. Gomez to turn over the Malibu.

C. The Trustee's objection to claimed exemption

The Trustee filed an objection to Mr. Gomez's claimed exemptions in the Focus and Malibu ("Objection"). He argued that Mr. Gomez had not claimed the Malibu exempt prior to the Trustee's avoidance of Anayas Auto's lien, so Mr. Gomez could not claim the recovered property as exempt under § 522(g)(1). He also asserted that Mr. Gomez is only entitled to seek an exemption under either CCP section 703.140(b)(2) or section 704.010, but not both. Finally, he argued that Mr. Gomez amended Schedule C in bad faith because "[d]espite all of these pleadings, requests and explanation, filed over the course of many months, Attorney Aldana now files a tardy, improper and clearly objectionable amendment to further delay the administration of this estate." The Trustee requested that the bankruptcy court award him his fees and costs.

Mr. Gomez did not file an opposition to the Objection.

Both Mr. Aldana and the Trustee appeared at the telephonic hearing on the Trustee's Objection. The court sustained the Objection as to the Focus and Malibu and denied both exemptions. It continued the hearing on the issue of sanctions and stated that it "will consider granting compensatory sanction[s], for Trustee's expenses incurred in connection to the opposition to exemption, and coercive sanction[s] under [its] inherent authority ...." It allowed Mr. Aldana to file a response arguing against sanctions by February 22 and allowed the Trustee to respond by March 1.

Mr. Aldana did not file a timely response to the sanctions query. The Trustee filed his brief on February 27 and requested sanctions because: (1) Mr. Aldana should have known that the lien avoidance action was for the benefit of the bankruptcy estate; (2) the Appellants refused to turn over the Malibu for liquidation; (3) prior to filing the Objection, the Trustee provided Mr. Aldana with legal authority supporting return of the Malibu to the estate and explaining why Mr. Gomez could not claim an exemption; (4) Mr. Aldana nevertheless amended Schedule C to claim the Malibu exempt; (5) Mr. Aldana improperly claimed the Malibu exempt under both CCP sections 703.140 and

704.010; (6) the Appellants did not oppose the Objection; and (7) Mr. Aldana did not bother to defend himself and respond to the court's inquiry regarding sanctions. Additionally, the Trustee sought coercive sanctions because "Mr. Aldana has repeatedly ignored and disregarded legal authority provided to him ... [and] did not even acknowledge any need to respond to this Court's request for explanation as to why sanctions should not be assigned."

Later that same day, Mr. Aldana filed a tardy declaration in response to the Trustee's filing. He stated that he did not act in bad faith because he relied on the advice of a former chapter 7 trustee, Vincent Gorski, and *Law v. Siegel*, 571 U.S. 415, 134 S.Ct. 1188, 188 L.Ed.2d 146 (2014), which he claimed stands for the proposition that "any property can be exempted up until the date of closing." He stated that he merely disagreed with the Trustee's interpretation of the law, which is not indicative of bad faith.

Mr. Aldana offered the declaration of Mr. Gorski, whom he had allegedly consulted regarding the exemption. Mr. Gorski stated that he advised Mr. Aldana that "the Debtor could modify his exemptions on property as claimed on Schedule C until the close of the bankruptcy case, including an exemption on the vehicle currently at ***703** issue." In particular, he testified that *Law* does not curtail a debtor's ability to claim an exemption if he did not participate in activities explicitly listed in § 522.

Prior to the continued hearing on the issue of sanctions, the bankruptcy court issued a tentative ruling stating that it was inclined to grant the request for sanctions based on its inherent powers. At the hearing, the court explained to Mr. Aldana (who admitted that he had not read the court's tentative ruling) that Mr. Gomez did not engage in sanctionable conduct, but that it would sanction Mr. Aldana under its inherent sanction authority. It noted that "I have to find that you have done so in bad faith, which can be found where I have reckless conduct coupled with improper purpose." It stated that Mr. Aldana did not dispute that he received the Trustee's various filings but failed to oppose them, and, "[i]nstead, after the Trustee has gone to the time and effort of setting aside the lien and doing the different things he's done, he's trying to get possession of this car, he's making demands, you filed exemptions that are problematic for two reasons." The court pointed out that Mr. Aldana had cited two inconsistent statutory bases for the exemption, but, more importantly, that he ignored "hornbook bankruptcy law" when claiming the exemption after the Trustee avoided the lien.

Ultimately, the court adhered to its tentative ruling and sanctioned Mr. Aldana $1,475, the amount of the Trustee's fees and costs for opposing the Objection. It stated:

> I'm finding on your count recklessness, which means you didn't properly look at the law the way an attorney in your position should have. You didn't take warnings about the law the way an attorney in your position should have.
>
> And it rises above the level of recklessness, because your positions are frivolous and because you also did so in a manner that, in a small-dollar estate, has huge impact. This is the sort of behavior that the court can't countenance.

[1] The bankruptcy court entered the order ("Sanctions Order") adopting its tentative ruling in its entirety and sanctioning Mr. Aldana:

> Mr. Aldana does not dispute that he received the Trustee's documents. He failed to oppose anything. Instead, he did an end run around his default and sought exemption as to the Malibu on the basis of two seriously flawed arguments. He attempts to avoid censure by relying on another attorney's opinion – an opinion that is worthless given that Mr. Aldana apparently failed to disclose the most relevant facts. Mr. Aldana frequently appears in this Court, a claim that he is a bankruptcy neophyte is not a defense. And in the face of this serious situation, he again failed to file a timely response. Here his conduct appears, at best, reckless, and this recklessness appears coupled with frivolous arguments and actions and disregard of this Court's scheduling requirements. Bad faith appears to exist.

The court further ordered Mr. Aldana to report the sanction to the California bar.[5]

***704** The Appellants filed a timely notice of appeal from the Sanctions Order. Mr. Aldana represents that he has paid the sanction.

JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (B). We have jurisdiction under 28 U.S.C. § 158.

ISSUES

(1) Whether the bankruptcy court abused its discretion in sanctioning Mr. Aldana for asserting a meritless claim of exemption in the Malibu.

(2) Whether the Trustee is entitled to his fees and costs for the Appellants' frivolous appeal.

STANDARD OF REVIEW

[2] **[3]** **[4]** We review a sanctions order for abuse of discretion. *See Miller v. Cardinale (In re DeVille)*, 361 F.3d 539, 547 (9th Cir. 2004) (citation omitted). Similarly, the bankruptcy court's choice of sanction is reviewed for abuse of discretion. *See In re Nguyen*, 447 B.R. 268, 276 (9th Cir. BAP 2011) (citations omitted). Accordingly, we reverse only where the bankruptcy court applied an incorrect legal rule or where its application of the law to the facts was illogical, implausible, or without support in inferences that may be drawn from the record. *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc).

DISCUSSION

A. The bankruptcy court did not abuse its discretion in sanctioning Mr. Aldana for bad faith.

[5] The basic issue on appeal is whether the bankruptcy court erred in sanctioning Mr. Aldana for recklessly and frivolously pursuing the exemption in the Malibu, in addition to repeatedly failing to respond to the court's inquiries and the Trustee's filings. The bankruptcy court exercised its inherent power to sanction Mr. Aldana for "recklessness ... coupled with frivolous arguments and actions and disregard of this Court's scheduling requirements."

[6] **[7]** **[8]** A bankruptcy court "has the inherent authority to impose sanctions for bad faith, which includes a broad range of willful improper conduct." *Fink v. Gomez*, 239 F.3d 989, 992 (9th Cir. 2001); *see Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1196 (9th Cir. 2003); *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.)*, 77 F.3d 278, 284 (9th Cir. 1996). Before the bankruptcy court imposes sanctions under its inherent authority, it must find either bad faith, conduct tantamount to bad faith, or recklessness with an "additional factor such as frivolousness, harassment, or an improper purpose." *Fink*, 239 F.3d at 994. The bankruptcy court "must make an explicit finding ...." *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 648 (9th Cir. 1997).

On appeal, the Appellants offer two pages of argument that merely repeat the ***705** same arguments presented to the bankruptcy court. They do not explain their superficial contentions or support them with any legal authority, other than their steadfast reliance on *Law v. Siegel*. This appeal is both frivolous and meritless. The bankruptcy court did not err.

1. The Appellants' arguments that ignore § 522(g)(1) are frivolous and reckless, not a mere "difference of opinion."

The Appellants insist that the law allows Mr. Gomez to exempt the Malibu at any time prior to the closing of the bankruptcy case. They say that the dispute in this case is really only a difference in interpretation of the law, which does not give rise to bad faith.

[9] The Appellants are wrong, and the law on this point is not ambiguous or open to interpretation. As the Trustee explained repeatedly, if he recovers certain property prior to the debtor claiming an exemption, that property cannot be exempted. Section 522(g) provides:

> (g) Notwithstanding sections 550 and 551 of this title, **the debtor may exempt under subsection (b) of this section property that the trustee recovers under section** 510(c)(2), 542, 543, **550**, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, **if –**
>
> (1)(A) **such transfer was not a voluntary transfer of such property by the debtor**; and
>
> (B) the debtor did not conceal such property; or
>
> (2) the debtor could have avoided such transfer under subsection (f)(1)(B) of this section.

§ 522(g) (emphases added). In other words, § 522(g)(1) "allows the debtor to exempt property that the trustee recovers under [various sections of the Bankruptcy Code] as long as the transfer was **involuntary** and the property was **not concealed** by the debtor." 4 Collier on Bankruptcy ¶ 522.12[1] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed.)(emphases in original). Conversely, a debtor may not exempt property that the trustee recovers under one of the enumerated provisions if

the debtor voluntarily transferred or concealed the property. *See Guthrie v. Stadtmueller (In re Guthrie)*, BAP No. SC-15-1390-FYJu, 2017 WL 431398, at *4 (9th Cir. BAP Jan. 31, 2017).

Our case law clearly states that a debtor cannot exempt property that the trustee recovers using his avoidance power. In *Hitt v. Glass (In re Glass)*, 164 B.R. 759 (9th Cir. BAP 1994), *aff'd*, 60 F.3d 565 (9th Cir. 1995), we explained the contours of § 522(g):

> Section 522(g), however, limits the ability of a debtor to claim an exemption where the trustee has recovered property for the benefit of the estate. Under § 522(g)(1), a debtor may claim an exemption where the trustee has recovered property pursuant to §§ 510(c)(2), 542, 543, 550, 551 or 553 only if the property was involuntarily transferred and the debtor did not conceal the transfer or an interest in the property.... **Thus, under § 522(g)(1), a debtor may not exempt recovered property if the debtor voluntarily transferred such property** or concealed the transfer or an interest in such property.

164 B.R. at 761-62 (emphasis added) (citations omitted). After examining the language of the statute, we reiterated:

> Accordingly, we hold that **where a debtor voluntarily transfers property in a manner that triggers the trustee's *706 avoidance powers** or the debtor knowingly conceals a prepetition transfer or an interest in property, and **such property is returned to the estate as a result of the trustee's actions** directed toward either the debtor or the transferee, **the debtor is not entitled to claim an exemption under § 522(g)(1).**

Id. at 764-65 (emphases added).

[10] It matters not that the transfer in this case was the perfection of a lien rather than a transfer of ownership. In *Wharton v. Schwartzer (In re Wharton)*, 563 B.R. 289 (9th Cir. BAP 2017), we considered a similar situation where the trustee avoided a creditor's security interest in a vehicle and objected to a later attempt to exempt the vehicle. In that case, the debtors scheduled their 1965 Corvette, in which the debtor-husband's brother held a nonpurchase money security interest to secure a debt in excess of the vehicle's value. The trustee then sought turnover of the vehicle because the security interest was not perfected under Nevada law. The debtors amended their schedules to claim an exemption in the Corvette, but the trustee objected. The court agreed with the trustee and sustained the trustee's objection under § 522(g)(1)(A). It determined that there was a transfer of a security interest and that the trustee had recovered the vehicle under §§ 544 and 550 for the benefit of the estate when the brother released the lien.

On appeal, we first considered whether there was a "voluntary transfer" under § 522(g)(1). We applied Nevada law and concluded that the debtors had transferred a security interest in the Corvette.

Second, we considered whether the trustee had avoided the security interest and recovered it for the estate. We noted that the brother did not perfect his interest in the Corvette under state law. The trustee's motion and threat of avoidance powers constituted "some action" that caused the brother to release the lien.

In the present case, the bankruptcy court did not err in holding that the Trustee satisfied the two prongs of § 522(g)(1)(A).

[11] First, there was a "transfer" of estate property. The perfection of a security interest is a "transfer" within the meaning of § 101(54)(D). *See Daigle v. Kennedy (In re Daigle)*, No. 08CV0256-LAB (AJB), 2008 WL 11337933, at *5 (S.D. Cal. July 14, 2008) (citing § 101(54)(D) and stating that "[i]t is well established that, under bankruptcy law, perfection of an interest in property is considered a transfer separate and apart from the transfer of title" (citation omitted)); *Hawkins v. Lister (In re Lister)*, No. 08-13738-B-7, 2011 WL 10642780, at *5 (Bankr. E.D. Cal. Mar. 30, 2011) (stating that, under § 101(54)(D), "[a] transfer of property is made at the time the transfer is perfected against a bona fide purchaser under applicable state law").

Second, it is also undisputed that the Trustee recovered estate property. Anayas Auto failed to perfect its lien prepetition.[6] ***707** The Trustee avoided the lien perfection as a postpetition transfer under § 549(a) and recovered the interest in the Malibu under § 550.

Therefore, because the Trustee avoided the voluntary transfer under § 550, Mr. Gomez could not claim an exemption in the Malibu under § 522(g)(1)(A).[7]

In contrast to our specific holdings discussing § 522(g)(1), the Appellants steadfastly rely on *Law v. Siegel* for the proposition that Mr. Gomez could amend his exemptions at any time prior to discharge. *Law* stands for the more general proposition that a bankruptcy court cannot deny an exemption that is otherwise allowed by statute. *See Law*, 571 U.S. at 424,

134 S.Ct. 1188. The bankruptcy court never suggested that the exemption should be denied because it was untimely or for any extra-statutory reason. Instead, it relied on the relevant statute that specifically prohibited Mr. Gomez from claiming an exemption in the Malibu. *Law* is inapplicable.

2. The bankruptcy court did not err in considering the totality of factors concerning the surrender of the Malibu.

The Appellants argue that the bankruptcy court erroneously considered the facts in finding bad faith. They argue that the Trustee saw the Malibu at Mr. Gomez's house and chose not to retrieve the vehicle.

The bankruptcy court did not err. There is no evidence in the record that the Trustee saw the Malibu at Mr. Gomez's house. Rather, the Trustee's declaration did not mention the Malibu and only states that Mr. Gomez was not home.

The Appellants also assert that the Trustee never told Mr. Gomez where to surrender the Malibu. But the Trustee told the Appellants to surrender the Malibu to the Trustee's auctioneer. They cannot claim that they did not know how to surrender the vehicle.

3. The bankruptcy court did not err in considering Mr. Gorski's declaration.

The Appellants argue that the bankruptcy court abused its discretion by improperly discounting Mr. Gorski's declaration because he did not state that he was aware that the Trustee had avoided the lien.

The bankruptcy court did not err. It considered Mr. Gorski's declaration, but simply found that his opinion was inapplicable because he did not address the fact that the Trustee had recovered the Malibu using his avoidance powers. Moreover, a third party's interpretation of the law is not binding on a court. The bankruptcy court's findings were not illogical, implausible, or without support in the record.

4. The bankruptcy court applied the correct standard.

The Appellants argue that the bankruptcy court "called the actions reckless, but ***708** that is not sufficient to sanction one's belief in the law."

[12] The Appellants are correct that the award of sanctions requires more than recklessness alone. The Ninth Circuit has stated that "[s]anctions are available for a variety of types of willful actions, including recklessness when combined with an additional factor such as frivolousness, harassment, or an improper purpose." *Fink*, 239 F.3d at 994.

The Appellants ignore the bankruptcy court's ruling. The court held multiple times that Mr. Aldana was reckless, but it also held that his positions were frivolous. It stated at the hearing, "And it rises **above the level of recklessness**, because your positions are frivolous and because you also did so in a manner that, in a small-dollar estate, has huge impact." (Emphasis added.) The Sanctions Order confirms: "Here his conduct appears, at best, reckless, and **this recklessness appears coupled with frivolous arguments** and actions and disregard of this Court's scheduling requirements." (Emphasis added.) The bankruptcy court did not err.

B. The Trustee is entitled to recover his fees and double costs from Mr. Aldana for this frivolous appeal.

[13] The Trustee requested by separate motion that we sanction the Appellants for filing a frivolous appeal, not following the appellate rules, and offering a "fluctuating and erratic presentation of the issues on appeal." In keeping with their usual pattern, the Appellants filed an untimely opposition. We GRANT the request for fees and double costs against Mr. Aldana only.

[14] **[15]** Rule 8020, which conforms to the language of Federal Rule of Appellate Procedure ("FRAP") 38, provides that: "If the district court or BAP determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." Rule 8020(a). Under FRAP 38, "a frivolous appeal is one where the result is obvious or the appellant's arguments are wholly without merit." *First Fed. Bank of Cal. v. Weinstein (In re Weinstein)*, 227 B.R. 284, 297 (9th Cir. BAP 1998) (citations omitted). We may impose sanctions to penalize an appellant or attorney who pursues a frivolous appeal and to compensate the appellee for the delay and expense of defending the appeal. 10 Collier on Bankruptcy ¶ 8020.03; *see Burlington N.R. Co. v. Woods*, 480 U.S. 1, 7, 107 S.Ct. 967, 94 L.Ed.2d 1 (1987).

Even a cursory review of § 522(g)(1) and the relevant case law would have told the Appellants that they could not claim an exemption in the Malibu after the Trustee had recovered it

from Anayas Auto.[8] The Trustee explained this to Mr. Aldana, and the bankruptcy court clearly stated the rationale behind its ruling. Furthermore, the Appellants did not bother to respond to the Motion to Compel or the court's threat of sanctions, yet they took the same incorrect position on appeal and submitted an opening brief with only two pages of argument that was largely devoid of legal authority or analysis. They did not address § 522(g)(1) or the relevant case law. Nor did they bother to oppose the motion for sanctions on appeal within the seven days provided by Rule 8013(a)(3)(A).

[16] They argue that Mr. Aldana's "subjective good faith belief in his course ***709** of conduct should insulate him from punishment." But Rule 8020(a) is not susceptible to a "pure heart, empty head" defense. *See United States v. Nelson (In re Becraft)*, 885 F.2d 547, 549 (9th Cir. 1989) (stating that "a finding of bad faith is not necessary to impose sanctions under [FRAP] 38 ...."); *Hermosilla v. Hermosilla*, 447 B.R. 661, 668 (D. Mass. 2011) (stating that "the court may impose sanctions if the appellant raises issues that are contradicted by long-established precedent"); *Maloni v. Fairway Wholesale Corp. (In re Maloni)*, 282 B.R. 727, 734 (1st Cir. BAP 2002) (stating that, on appeal, that panel "will consider whether appellant's argument: addresses the issues on appeal properly; fails to support the issues on appeal; fails to cite any authority; cites inapplicable authority; makes unsubstantiated factual assertions; makes bare legal conclusions; or, misrepresents the record").

Mr. Aldana laments that he has already paid over $9,500 in sanctions, which is far more than the value of the Malibu. Even if this is true, it is irrelevant. The sanctions represent attorneys' fees that the Trustee had to incur in order to overcome Mr. Aldana's baseless contentions. Mr. Aldana is solely responsible for his predicament.

As we discuss above, the Appellants' appeal from the Sanctions Order is frivolous and lacks any merit. We conclude that the Trustee is entitled to the imposition of sanctions against Mr. Aldana, who is responsible for advocating the frivolous legal arguments and positions on appeal. We exercise our discretion and award the Trustee his fees and double costs.

The Trustee is ORDERED to file a declaration attesting to his fees and costs incurred in this appeal, supported by appropriate documentation, on or before **Tuesday, December 4, 2018**. Mr. Aldana may respond no later than **Tuesday, December 11, 2018**. Upon our review of these filings, the amount of the award shall be established by a separate order. *Taylor v. Sentry Life Ins. Co.*, 729 F.2d 652, 657 (9th Cir. 1984).

CONCLUSION

The bankruptcy court did not err. We AFFIRM and GRANT the Trustee's motion for sanctions against Mr. Aldana.

All Citations

592 B.R. 698, Bankr. L. Rep. P 83,330, 20 Cal. Daily Op. Serv. 11,070, 2018 Daily Journal D.A.R. 11,065

Footnotes

1 Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure.

2 The Appellants' excerpts of record fail to include many important documents. We rely on the Trustee's excerpts and exercise our discretion to review the bankruptcy court's docket, as appropriate. *See Woods & Erickson, LLP v. Leonard (In re AVI, Inc.)*, 389 B.R. 721, 725 n.2 (9th Cir. BAP 2008).

3 The Trustee alleged that Mr. Gomez purchased the Malibu on September 30, 2016. Although the Department of Motor Vehicles' ("DMV") records identify Anayas Auto as the lienholder on the Malibu, the DMV did not receive registration fees until almost two months after the petition date.

4 CCP section 703.140(b)(2) provides for an exemption in motor vehicles in bankruptcy cases: "The debtor's interest, not to exceed four thousand eight hundred dollars ($4,800) in value, in one or more motor vehicles." Cal. Civ. Proc. Code § 703.140(b)(2). In all other cases, section 704.010 allows an exemption of up to $2,300 in "[t]he aggregate equity in

motor vehicles." Cal. Civ. Proc. Code § 704.010(1). A debtor may choose only one of the exemption schemes. *Farrar v. McKown (In re McKown)*, 203 F.3d 1188, 1189 (9th Cir. 2000); Cal. Civ. Proc. Code § 703.140(a).

5 We take judicial notice that, even after the Sanctions Order, the Appellants continued to exempt the entire value of the Malibu. On March 13, 2018, the Trustee requested that Mr. Gomez surrender the vehicles for liquidation. Mr. Gomez instead filed a second amended Schedule C wherein he claimed an exemption in the Focus under CCP section 703.140(b)(2) (motor vehicle) and again exempted the entire value of the Malibu under section 703.140(b)(5) (wild card). The Trustee filed an objection to the amended exemption. Mr. Gomez amended Schedule C yet again and omitted the Malibu.

The bankruptcy court stated that Mr. Aldana's argument that he did not need to turn over the Malibu was "nonsensical." It sustained the Trustee's objection and awarded the Trustee $1,592.20 in fees and costs. The bankruptcy court also granted a Rule 9011 motion brought by the Trustee and ordered Mr. Aldana to pay the Trustee $3,408.33.

The Trustee filed a motion for contempt against Mr. Gomez for failure to turn over the Malibu. The bankruptcy court granted the motion and ordered Mr. Gomez to pay the Trustee $2,000.

He also commenced an adversary proceeding for revocation of discharge for failure to turn over of the Malibu. This case is still pending.

The Trustee finally sold the Malibu at auction in late August 2018 for $2,500.

6 Section 6300 of the California Vehicle Code provides:

> no security interest in any vehicle registered under this code, irrespective of whether the registration was effected prior or subsequent to the creation of the security interest, is perfected until the secured party or his or her successor or assignee has deposited, ... with the department, ... a properly endorsed certificate of ownership to the vehicle subject to the security interest showing the secured party as legal owner ....

Cal. Veh. Code § 6300. Similarly, section 6301 states: "When the secured party... has deposited ... with the department a properly endorsed certificate of ownership showing the secured party as legal owner ... the deposit constitutes perfection of the security interest ...." Cal. Veh. Code § 6301.

Although Mr. Gomez purchased the Malibu prepetition, the Trustee alleged that Anayas Auto only attempted to perfect its lien two months after Mr. Gomez filed his petition. As such, the perfection of the lien constituted a postpetition transfer.

7 Mr. Gomez valued the Malibu at $4,500. He sought to exempt 100 percent of that value, which necessarily included the $2,700 encumbered by Anayas Auto's lien. The lien, however, was only $2,700, leaving $1,800 in equity (assuming that Mr. Gomez's scheduled value was correct). Mr. Gomez never sought to limit his exemption to the equity in the Malibu and never mentioned this point on appeal. Therefore, we need not discuss whether the Trustee's avoidance of the $2,700 lien precluded Mr. Gomez from exempting the value (if any) of the Malibu in excess of the avoided lien under § 522(g)(1).

8 The Appellants appear to fault the Trustee for not telling Mr. Gomez to exempt the Malibu or explaining the relevant law to Mr. Aldana. But there is no basis for the proposition that a trustee must provide legal advice to debtors or their counsel.

888 F.3d 930
United States Court of Appeals, Eighth Circuit.

IN RE: Evette Nicole REED, Debtor
Critique Services, LLC, Ross Harry Briggs, Appellant
v.
Evette Nicole Reed, Seth A. Albin, Trustee
Honorable Charles E. Rendlen, III, Interested party–Appellee
United States Bankruptcy Court, Interested party
In re: Ross H. Briggs, Petitioner

No. 17-1143, No. 18-1169
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Submitted: January 9, 2018
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Filed: April 25, 2018
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Rehearing and Rehearing En Banc Denied June 1, 2018

Synopsis

Background: Order to show cause was issued by the United States Bankruptcy Court for the Eastern District of Missouri why sanctions should not be imposed on attorney for bankruptcy services company for his noncompliance with turnover order previously issued by court and for his alleged deliberate misrepresentations to court. The Bankruptcy Court awarded sanctions and suspended attorney from practicing before court, and attorney appealed. The District Court, Ronnie L. White, J., 2017 WL 44645, affirmed, and appeal was taken.

Holdings: The Court of Appeals, Benton, Circuit Judge, held that:

[1] bankruptcy court did not abuse its discretion in imposing contempt sanction on attorney not based on attorney's failure to turnover documents of bankruptcy-services business for which he worked, and whose disclosure he allegedly did not control, but based on attorney's lack of effort in not making any serious effort to obtain documents;

[2] before it relied on attorney's apparently false or misleading representations to court as alternate basis for imposing contempt sanctions against him for his deliberate falsehoods, bankruptcy court should have conducted evidentiary hearing;

[3] bankruptcy court's error, in failing to hold evidentiary hearing, did not compel remand; and

[4] attorney should have sought reinstatement from judge who entered suspension order.

Affirmed.

West Headnotes (14)

[1] **Bankruptcy** Conclusions of law; de novo review

Whether bankruptcy court, as non-Article-III court, had constitutional authority to sanction attorney for his alleged contempt of court in not complying with turnover order and for allegedly misleading court was legal issue, which the Court of Appeals would review de novo. U.S. Const. art. 3, § 1 et seq.

3 Cases that cite this headnote

[2] **Bankruptcy** Particular proceedings or issues

Bankruptcy Bankruptcy judges

Bankruptcy court, even as non-Article-III court, had constitutional authority to sanction attorney for his alleged contempt of court, in not complying with turnover order issued in core proceeding regarding need for disgorgement of fees, and for allegedly misleading court. U.S. Const. art. 3, § 1 et seq.

2 Cases that cite this headnote

[3] **Contempt** Disobedience to Mandate, Order, or Judgment

Contempt Service on or knowledge of party or other person

Party commits contempt when he violates a definite and specific order of court, requiring him to perform or refrain from performing a particular act or acts, with knowledge of the court's order.

6 Cases that cite this headnote

[4] **Contempt** Weight and sufficiency

Contempt finding requires clear and convincing evidence.

1 Cases that cite this headnote

[5] **Contempt** Review

Court of Appeals reviews contempt findings for abuse of discretion.

2 Cases that cite this headnote

[6] **Bankruptcy** Contempt

Bankruptcy Production of documents

Bankruptcy court did not abuse its discretion in imposing contempt sanction on attorney not based on attorney's failure to turnover documents of bankruptcy-services business for which he worked, and whose disclosure he allegedly did not control, but based on attorney's failure to make any serious effort to obtain documents from business, despite being given repeated opportunities to do so.

[7] **Bankruptcy** Conclusions of law; de novo review

Whether bankruptcy court denied attorney due process by not providing him with evidentiary hearing before imposing contempt sanctions was legal issue, which the Court of Appeals would review de novo. U.S. Const. Amend. 5.

1 Cases that cite this headnote

[8] **Constitutional Law** Penalties, fines, and sanctions in general

Before district court may impose sanctions, individual has due process right to receive notice that sanctions against her are being considered and an opportunity to be heard; however, this opportunity to be heard does not necessarily entitle the subject of motion for sanctions to evidentiary hearing. U.S. Const. Amend. 5.

3 Cases that cite this headnote

[9] **Constitutional Law** Penalties, fines, and sanctions in general

Evidentiary hearing is not required as matter of due process prior to imposition of sanctions when there is no disputed question of fact, or when sanctions are based entirely on an established record. U.S. Const. Amend. 5.

2 Cases that cite this headnote

[10] **Bankruptcy** Contempt

Before it relied on attorney's apparently false or misleading representations to court as alternate basis for imposing contempt sanctions against him for his deliberate falsehoods, bankruptcy court should have conducted evidentiary hearing, given that attorney was disputing whether he had in fact made any false or misleading statements to court.

1 Cases that cite this headnote

[11] **Bankruptcy** Remand

Bankruptcy court's error, in failing to hold evidentiary hearing to resolve disputed question of whether attorney had in fact made any deliberate misrepresentations to court before it relied on such misrepresentations as alternative basis for contempt sanction, did not compel remand, where bankruptcy court had sufficient basis for imposing sanctions based on attorney's noncompliance with court order despite being given multiple opportunities to do so.

6 Cases that cite this headnote

[12] **Attorneys and Legal Services** Reference

Bankruptcy Contempt

Constitutional Law Conduct and discipline

Local disciplinary-enforcement rule providing that "judge may refer [a disciplinary] matter to counsel appointed under Rule X for investigation and prosecution of a formal disciplinary proceeding" was permissive in nature and did not obligate bankruptcy court, following issuance of order to show cause why attorney should not be sanctioned for declining to comply with its order, to make such a referral; bankruptcy judge's exercise of his discretion in declining to refer did not rise to level of due process violation. U.S. Const. Amend. 5; U.S.Dist.Ct.Rules E.D.Mo. DER, Rule 5.

[13] **Attorneys and Legal Services** Power to reinstate; jurisdiction

Attorney who had been suspended from practicing before the Bankruptcy Court for the Eastern District of Missouri based on his contempt in declining to comply with court order should have sought reinstatement from judge who entered suspension order and not from Chief Judge of the district. U.S.Dist.Ct.Rules E.D.Mo. DER, Rule 7; U.S.Bankr.Ct.Rules E.D. Mo. Bankr., L.R. 2094(B).

2 Cases that cite this headnote

[14] **Federal Courts** In general; necessity

Argument not developed in district court was abandoned for purposes of appeal.

West Codenotes

Limited on Constitutional Grounds
28 U.S.C.A. § 157(b)(2)(C)

***932** Appeals from United States District Court for the Eastern District of Missouri—St. Louis

Attorneys and Law Firms

In case no. 17-1143, counsel who filed the brief and presented argument on behalf of the appellant was Jerome Dobson, of Saint Louis, MO. The following attorney(s) appeared on the appellant brief; Susan Nell Rowe, of Saint Louis, MO.

Counsel who presented who filed the brief and presented argument on behalf of the appellee was Joshua Michael Jones, AUSA, of Saint Louis, MO.

Before WOLLMAN, COLLOTON, and BENTON, Circuit Judges.

Opinion

BENTON, Circuit Judge.

***931** ***933** The bankruptcy court[1] sanctioned Ross H. Briggs for contempt of an order and for misleading the court. The district court[2] affirmed. Having jurisdiction under 28 U.S.C. §§ 158(d)(1) and 1291, this court affirms.

I.

Critique Services LLC was a bankruptcy-services business run by Beverly Holmes Diltz. Working with Critique were attorneys Briggs and James C. Robinson. In June 2014, the bankruptcy court suspended Robinson from practicing in the United States Bankruptcy Court for the Eastern District of Missouri. This court affirmed. ***Robinson v. Steward (In re Steward)***, 828 F.3d 672 (8th Cir. 2016).

Briggs agreed to represent about 100 of Robinson's clients who had bankruptcy cases pending in the Eastern District. In late 2014, the bankruptcy court ordered Robinson to show cause why it should not order disgorgement of his attorney's fees in some of those cases. The bankruptcy court also ordered the trustees in these cases to provide the court with specific information about the fees.

To comply with the order, the trustees sent a letter to Critique, Robinson, and Briggs asking for documents and information. Briggs responded: "all of my legal services rendered on behalf of the debtors in question were afforded free of charge and no fee was paid to or shared with me in these cases. Accordingly, there are no checks, ledgers or account statements that relate to such non-existent fees." He added: "I ... do not possess

any document of [Critique]" or "any documents which are encompassed within [the trustees'] request to Mr. Robinson."

The trustees moved to compel Critique, Robinson, and Briggs to turn over the requested documents and information. On January 13, 2015, the bankruptcy court held a hearing on the motion. Arguing about the motion, Briggs discussed his relationship with Critique and Diltz, eventually agreeing to help obtain the documents and information. On January 23, the bankruptcy court ordered Critique, Robinson, and Briggs to turn over to the trustees specific fee-related documents and information. The bankruptcy court noted that to comply with the order, Briggs might need to seek the documents and information from third parties or "mak[e] inquiries" with Critique or Robinson.

On July 6, the bankruptcy court issued an order finding that Critique, Robinson, and Briggs "had failed to comply with the Order Compelling Turnover." The bankruptcy court explained that it was "considering ***934** the imposition of monetary sanctions and/or nonmonetary sanctions or the taking of any other appropriate action for non-compliance." The order gave Critique, Robinson, and Briggs seven days to either comply with the order compelling turnover or file a brief addressing why sanctions should not be imposed. Briggs filed a brief opposing sanctions. On July 22, the bankruptcy court ordered Briggs to show cause why he should not be sanctioned. Briggs responded by questioning the bankruptcy court's authority, also arguing that sanctions were not warranted.

On April 20, 2016, the bankruptcy court sanctioned Briggs. It reviewed at length the disciplinary records of several people associated with Critique, including Briggs. *See* ***Briggs. v. Labarge (In re Phillips)***, 433 F.3d 1068, 1071 (8th Cir. 2006) (holding Briggs violated Fed. R. Bankr. P. 9011, but vacating sanctions); ***In re Wigfall***, No. 02-32059, slip op. at 2 (Bankr. S.D. Ill. August 15, 2002) (suspending Briggs "from filing any new cases in the United States Bankruptcy Court for the Southern District of Illinois for a period of three (3) months.") It found "Briggs to be in contempt of the Order Compelling Turnover," and that he "deliberately and with deceptive intent made misleading representations to the Court regarding the true nature of his relationship with the Critique Services Business and Diltz." With some exceptions, the order banned Briggs for six months from representing new bankruptcy clients, practicing before U.S. Bankruptcy Court for the Eastern District of Missouri, and using that court's electronic-filing system. It also required him to take 12 hours of continuing legal education in professional ethics, and permanently prohibited him "from being financially or professionally involved with or connected to, whether formally or informally or otherwise," Critique, Diltz, Robinson, and other individuals and entities affiliated with Critique.

Briggs appeals. While the appeal was pending, Briggs requested reinstatement to practice before the United States Bankruptcy Court for the Eastern District of Missouri. He directed his request first to the chief bankruptcy judge, then to the chief district judge. Both ruled that Briggs's request was improper. Briggs also appeals the chief district judge's judgment.

II.

[1] Briggs says that as an Article I court, the bankruptcy court did not have constitutional authority to sanction him under these circumstances. This is a legal issue that this court reviews de novo. *See* ***Walton v. LaBarge (In re Clark)***, 223 F.3d 859, 862, 864 (8th Cir. 2000).

[2] Briggs focuses on *Stern v. Marshall*, 564 U.S. 462, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011). There, the bankruptcy court, in an adversary proceeding, entered summary judgment on a counterclaim for tortious interference. ***Stern***, 564 U.S. at 470-71, 131 S.Ct. 2594. The Court explained that the bankruptcy court had statutory authority to enter final judgment on the counterclaim under 28 U.S.C. § 157(b)(2)(C). ***Id.*** at 482, 131 S.Ct. 2594. As to statute's constitutionality, the Court said: "When a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,' and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts." ***Id.*** at 484, 131 S.Ct. 2594, *quoting* ***Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.***, 458 U.S. 50, 90, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) (Rehnquist, J., concurring in judgment).

935** The *Stern* counterclaim met that standard—and could only be heard by an Article III court—because it involved "the most prototypical exercise of judicial power: the entry of a final, binding judgment *by a court* with broad substantive jurisdiction, on *a common law cause of action*, when the action *neither derives from nor depends upon any agency regulatory regime*." ***Id. at 494, 131 S.Ct. 2594 (emphasis

added on last two phrases). Even if a counterclaim is statutorily authorized, "Congress may not bypass Article III simply because a proceeding may have *some* bearing on a bankruptcy case; the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." ***Id.*** at 499, 131 S.Ct. 2594. The Court concluded that the bankruptcy court "lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim." ***Id.*** at 503, 131 S.Ct. 2594.

Briggs tries to equate the sanctions order with the counterclaim in *Stern*. According to Briggs, the bankruptcy court here conducted only "a contempt action against a third-party in an attorney ethics investigation" that "implicate[d] only state law issues [under the Missouri Rules of Professional Responsibility] not encompassed in the claims allowance process" or "the restructuring of debtor-creditor relations."

This case does not involve an "attorney ethics investigation" or issues reserved for an Article III court. Under 28 U.S.C. § 157(a): "Each district court may provide that any or all cases under title 11 [bankruptcy] and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." The Eastern District of Missouri has implemented the full scope of § 157(a). **E.D.Mo. R. 81–9.01(B)**. By 28 U.S.C. § 157(b)(1): "Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title."

The show-cause orders issued in late 2014 addressed whether it was necessary to disgorge, under 11 U.S.C. § 329, Robinson's unearned attorney's fees for representing several clients in bankruptcies in the Eastern District. As for the order compelling turnover, the bankruptcy court entered it under 11 U.S.C. § 542(e) to help determine whether disgorgement was necessary. The bankruptcy court based the sanctions order on events that occurred while trying to enforce the show-cause orders to Robinson and the order compelling turnover. All the orders here are matters "arising in" a case under title 11. *See* ***Stoe v. Flaherty***, 436 F.3d 209, 216 (3d Cir. 2006) ("The category of proceedings 'arising in' bankruptcy cases includes such things as administrative matters, orders to turn over property of the estate and determinations of the validity, extent, or priority of liens.") (citation and internal quotation marks omitted); ***In re Williams***, 256 B.R. 885, 891 (8th Cir. BAP 2001) ("The phrase 'arising in' generally refers to administrative matters that, although not expressly created by title 11, would have no existence but for the fact that a bankruptcy case was filed.").

Even so, Briggs asserts that the orders are—like the *Stern* counterclaim—only statutorily, not constitutionally, authorized. But unlike the *Stern* counterclaim, the orders here "stem[ ] from the bankruptcy itself" and do not implicate a common-law claim. *See* ***936** ***Stern***, 564 U.S. at 499, 131 S.Ct. 2594. Nor do they implicate a fraudulent-conveyance claim like in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989), which Briggs discusses. The *Stern* case "affect[s] only ... one small part of the bankruptcy judges' authority." ***In re AFY, Inc.***, 461 B.R. 541, 547 (8th Cir. BAP 2012); *see also* ***Stern***, 564 U.S. at 502, 131 S.Ct. 2594 ("the question presented here is a 'narrow' one.").

Here, the bankruptcy court had authority to enter sanctions for events that occurred while trying to enforce the order compelling turnover and the show-cause orders. *See* ***Law v. Siegel***, 571 U.S. 415, 134 S.Ct. 1188, 1194, 188 L.Ed.2d 146 (2014) (bankruptcy courts "possess 'inherent power ... to sanction abusive litigation practices.' "), *quoting* ***Marrama v. Citizens Bank of Mass.***, 549 U.S. 365, 375-76, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007); ***Robinson***, 828 F.3d at 686 ("Bankruptcy courts have the authority to sanction persons appearing before them, and this authority includes the right to control admission to their bar.") (citations and internal quotation marks omitted).

III.

[3] **[4]** **[5]** Briggs believes that "the record does not support the contempt finding of the bankruptcy court, because there is no evidence that Briggs ... failed to comply with the Turnover Order." "A party commits contempt when he violates a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order." ***Hornbeck Offshore Servs., L.L.C. v. Salazar***, 713 F.3d 787, 792 (5th Cir. 2013) (citation omitted). A contempt finding requires "clear and convincing evidence." ***Chicago Truck Drivers v. Brotherhood Labor Leasing***, 207 F.3d 500, 505 (8th Cir. 2000). This court reviews contempt findings for abuse of

discretion. *See* ***id.*** at 504; ***Waste Mgmt. of Washington, Inc. v. Kattler***, 776 F.3d 336, 339 (5th Cir. 2015) ("We review contempt findings for abuse of discretion, but review is not perfunctory. Facts will be accepted as true unless clearly erroneous, but questions of law concerning the contempt order are reviewed de novo.") (citation and internal quotation marks and footnotes omitted).

[6] Briggs argues he had no access to the documents and information subject to the order compelling turnover. He concludes he could not turn over anything and thus could not be held in contempt of the order. This argument ignores that the order required Briggs to *seek* the documents and information from Critique, Robinson, and third parties:

> [I]t is proper to order that Briggs, in his capacity as counsel for certain of the Debtors, turn over all documents and information, as set forth in the turnover directive.... This directive may require him to seek documents and information from third parties—even if it places him in the (presumably) undesirable position of making inquiries to Robinson and Critique Services L.L.C. If Briggs gets "stonewalled" ... then he can file a credible and specific affidavit detailing his efforts.

The bankruptcy court did not, as Briggs suggests, hold him in contempt for failing to turn over documents and information. It held him in contempt because he "made no real effort to obtain the information for his clients so that he could turn it over." It explained:

> Had Briggs made serious, sincere efforts to obtain the Request Information, but was unable to obtain the information because he was stonewalled, then that would be one thing. Under those circumstances, Briggs would have made a good faith effort to comply with the Order ***937** Compelling Turnover. He would have fulfilled his promise and he would not be in trouble with the Court. However, those are not the circumstances here.... His failure to turn over any responsive information is not due to the fact that he is not in possession of the documents; it is due to the fact that he took no actions that would allow him to comply with the turnover directive.

Briggs believes he did enough. At oral argument in this court, he emphasized a lunch meeting with Diltz on January 13, and a letter he sent Robinson and Critique on January 24 (the day after the bankruptcy court entered the order compelling turnover). The bankruptcy court found that the lunch meeting "did nothing to 'facilitate' compliance with the Court's directives." In the letter, Briggs requested that Robinson and Critique "produce all documents encompassed within the above Order to the Trustees by January 30, 2015 at 12:00PM (Central) as required by the Order of the Court." The bankruptcy court ruled that the letter did not satisfy Briggs's obligation under the order compelling turnover, noting "[t]he letter was devoid of any sense of sincere advocacy. It was nothing more than another attempt by Briggs to *appear* to be doing something helpful, without *actually doing* something helpful."

The bankruptcy court also ruled that the letter was "followed by nothing else of any substance." On February 4, the bankruptcy court held a status conference to establish that no one had turned over the documents and information. On July 6, the bankruptcy court notified Critique, Robinson, and Briggs—all with disciplinary histories—that they had seven days to either comply with the order compelling turnover or file a brief addressing why sanctions should not be imposed. Briggs filed a brief on July 13. The brief did not detail any efforts to secure compliance from Critique and Robinson. Rather, it focused on how neither Briggs nor his clients had access to the documents and information. In response to yet another show-cause order, Briggs filed a brief on July 31, mentioning the lunch meeting for the first time.

The order compelling turnover required Briggs to make "efforts" to obtain the documents and information for his clients. But between sending the letter on January 24 and filing his brief on July 31, the record does not show that Briggs made any effort to seek compliance from Critique or Robinson—despite knowing they had not complied with the order. Briggs never filed "a credible and specific affidavit detailing his efforts" to secure compliance from Critique and Robinson—an option in the order compelling turnover.

The bankruptcy court gave Briggs multiple opportunities to comply with the order compelling turnover, specifically outlining methods of compliance. Briggs did not comply. The bankruptcy court did not abuse its discretion in holding Briggs in contempt. *See* ***United States v. Baker***, 721 F.2d 647, 650 (8th Cir. 1983) ("Appellant was not held in contempt for refusing to answer questions on cross-examination, but rather for refusing to comply with a previous order of the district court enforcing an IRS summons against him.").

IV.

Briggs says that "the record does not support the contempt finding ... because there is no evidence that Briggs ... made any misleading statements." The bankruptcy court did not make a "contempt finding" on this issue. It did find that "Briggs deliberately and with deceptive intent made misleading representations to the Court regarding the true nature of his relationship with the Critique Services Business and Diltz." It then concluded that ***938** it was "proper to sanction Briggs ... for his making of misleading statements to the Court." This court assumes Briggs is arguing that it was improper to sanction him because there is no evidence of misleading statements.

The bankruptcy court relied on statements Briggs made at the January 13 hearing. Briggs tried to distance himself from Critique. The bankruptcy court cited several examples. Asked how he could help obtain documents and information from Critique, Briggs said, "I have no leverage. I have no knowledge." Also, "Briggs even claimed he had no personal knowledge of whom he could ask at the Critique Services Business for documents." In an exchange between Briggs and the bankruptcy court, the bankruptcy court asked, to Briggs's knowledge, "who owns and controls" Critique. Briggs answered: "Mr. Robinson may well be [the owner]. It may—it may be Beverly Diltz." The bankruptcy court asked, "What do you mean 'may be?' " Briggs answered: "That's what the Missouri Secretary of State says. I assume it's correct."

The bankruptcy court found these representations misleading because "Briggs has a long history of being closely involved with the Critique Services Business." The bankruptcy court noted that Briggs has (1) been both Diltz's profit-sharing partner and her employee, (2) employed ex-Critique employees, (3) represented Critique clients at section 341 meetings, and (3) done business as "Critique Services." The bankruptcy court concluded that "Briggs deliberately misled the Court" and "deliberately lacked candor when characterizing his relationship with the Critique Services Business and Diltz." In the bankruptcy court's view, Briggs "did whatever he could to create the façade that he was not part of the Critique Services Business. Even his physical deportment—his expressions, his blinking, his lack of eye contract—betrayed his lack of candor."

[7] **[8]** **[9]** The misrepresentation issue is interrelated with a separate issue—whether the bankruptcy court denied Briggs due process by not providing an evidentiary hearing before imposing sanctions. Briggs's due-process argument is a legal issue this court reviews de novo. ***In re Morgan***, 573 F.3d 615, 623 (8th Cir. 2009). "[B]efore a district court may impose sanctions, the individual must receive notice that sanctions against her are being considered and an opportunity to be heard." ***Plaintiffs' Baycol Steering Comm. v. Bayer Corp.***, 419 F.3d 794, 802 (8th Cir. 2005). But "the opportunity to be heard does not necessarily entitle the subject of a motion for sanctions to an evidentiary hearing." ***Schlaifer Nance & Co. v. Estate of Warhol***, 194 F.3d 323, 335 (2d Cir. 1999). "An evidentiary hearing serves as a forum for finding facts; as such, its need can be obviated when there is no disputed question of fact or when sanctions are based entirely on an established record." ***Id.***

[10] On July 22, the bankruptcy court issued a show-cause order giving notice "to Briggs that it is considering imposing sanctions, issuing directives, and/or making referrals to the proper authorities to address his apparently false or misleading representations to the Court regarding his relationship with Critique Services L.L.C. and Diltz." The order detailed the "apparently false or misleading representations" Briggs made, focusing on those made at the January 13 hearing. Whether Briggs made false or misleading representations is a question of fact. Briggs's July 31 response to the show-cause order argued that there was "no basis for imposing any sanction." He noted that under the show-cause order, "one of the bases for the proposed [sanctions] is 'Briggs's claim that ***939** he cannot identify who owns Critique Services, LLC.' " Briggs argued that he "never made such a 'claim' or representation," quoted the exchange on the Critique-ownership question, and asserted that his answer was accurate.

In the sanctions order, the bankruptcy court addressed Briggs's response: "Briggs first claimed that he has dealt honestly with the Court." In other words, the bankruptcy court interpreted Briggs's arguments to mean that he was factually disputing the bankruptcy court's assertion in the show-cause order that Briggs made "apparently false or misleading representations." The bankruptcy court concluded that the accuracy of Briggs's answer "is not a reason that Briggs should not be sanctioned" because "[h]e purposely mislead [sic] the Court about his personal knowledge of the fact that Diltz is the owner—in an effort to make himself look clueless and far-removed from the Critique Services business."

The bankruptcy court made this factual determination without an evidentiary hearing, despite recognizing that

Briggs was disputing whether he made false or misleading representations. The bankruptcy court erred in sanctioning Briggs for "deliberately misle[ading] the Court" because it based that conclusion on disputed questions of fact without holding an evidentiary hearing. *See Schlaifer*, 194 F.3d at 335.

[11] But the bankruptcy court's error does not compel remand. It had two independent bases for sanctioning Briggs: "it is proper to sanction Briggs for his contempt of the Order Compelling Turnover *and* for his making of misleading statements to the Court." (Emphasis added.) This court ruled above that the bankruptcy court did not abuse its discretion in finding Briggs in contempt of the order compelling turnover. Briggs's contempt is a sufficient basis for the sanctions. *See* ***Weisman v. Alleco, Inc.***, 925 F.2d 77, 80 (4th Cir. 1991) ("The district court based its decision to impose sanctions on several grounds.... We believe any one of these grounds would, standing alone, justify the imposition of Rule 11 sanctions.").

V.

By Rule V of the district court's disciplinary-enforcement rules, a "judge may refer [a disciplinary] matter to counsel appointed under Rule X for investigation and prosecution of a formal disciplinary proceeding or the formulation of such other recommendation as may be appropriate." **E.D.Mo. Discip. Enf't R. V.** Briggs says that the bankruptcy court was "obliged" to follow Rule V and refer the matter to appointed counsel. He believes that the bankruptcy court violated his due-process rights by not doing so.

[12] Rule V is permissive. *See* ***Robinson***, 828 F.3d at 687 n.10 ("Though Robinson and Walton attempt to rely on Rule V of the Rules of Disciplinary Enforcement, that rule simply states that a judge *may refer* disciplinary matters to counsel appointed by the district court if such a referral is warranted."). The bankruptcy court had discretion not to invoke Rule V. Briggs has not shown it was "obliged" to do so. Not invoking Rule V is not a due-process violation. *See* ***id.***

VI.

[13] Briggs appeals the district court's[3] judgment denying reinstatement of full privileges to practice before the ***940** bankruptcy court. The bankruptcy court's sanctions order noted: "Briggs is invited to file, on October 1, 2016 or any time thereafter, a motion for reinstatement to the privilege of practicing before the Court after October 15, 2016. Evidence of completion of the required CLE should be attached to any such motion." The order does not explicitly state with whom Briggs should file for reinstatement. Briggs did not file his motion with the bankruptcy judge who imposed sanctions.

Instead, Briggs first requested reinstatement from the bankruptcy court's chief judge.[4] He argued she had two bases to hear his motion. First, the bankruptcy court's Local Rule 2094(A) says that an attorney who is disbarred or suspended by a court besides the bankruptcy court is automatically disbarred or suspended in the bankruptcy court for the same length of time as the discipline imposed by the other court. Local Rule 2094(B) says that the bankruptcy court's chief judge presides over a reinstatement proceeding for an attorney disbarred or suspended under subsection A. The chief judge ruled that Briggs "was not suspended by another court but rather was suspended by this Court. Therefore, Local Rule 2094(B) does not apply under these circumstances."

Second, Briggs believed that Rule VII of the district court's disciplinary-enforcement rules "provides that this Motion for Reinstatement shall be assigned to the Chief Judge of this Court, and shall not be referred to the judge upon whose complaint the disciplinary proceeding was predicated." But Rule VII says that attorneys who are disbarred or suspended by *the district court* must file a petition for reinstatement with the *district court's chief judge*. The chief judge explained that Rule VII "does not apply in this case" because Briggs "was not suspended by the U.S. District Court for the Eastern District of Missouri, nor did he file his request for reinstatement with the Chief Judge of" that court. The chief judge denied Briggs's motion because there was no procedural "basis for the relief requested."

Briggs then sought reinstatement from the district court's chief judge, relying on Rule VII and the district court's "inherent power." That chief judge denied Briggs's motion because he "ha[d] not exhausted the proper judicial channels." Instead of seeking relief in the district court, the chief judge explained, "Briggs should seek reinstatement from Judge Rendlen directly. Judge Rendlen provided specific guidance in the sanctions order regarding the filing of a motion for reinstatement."

[14] Neither Local Rule 2094(B) nor Rule VII provide a basis for the bankruptcy court's chief judge to hear Briggs's reinstatement motion. Rule VII does not allow the district

court's chief judge to resolve that motion. Briggs abandoned his argument that the chief judge's "inherent power" lets him hear the motion because Briggs did not develop it in the district court. Briggs may file his motion with Judge Rendlen. If Judge Rendlen denies the motion, then Briggs may appeal.[5] *See* **28 U.S.C. § 158**.

***941**

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The judgments are affirmed.

All Citations

888 F.3d 930, 65 Bankr.Ct.Dec. 144

Footnotes

1 The Honorable Charles E. Rendlen, III, United States Bankruptcy Judge for the Eastern District of Missouri.

2 The Honorable Ronnie L. White, United States District Judge for the Eastern District of Missouri.

3 The Honorable Rodney W. Sippel, Chief Judge, United States District Court for the Eastern District of Missouri.

4 The Honorable Kathy Surratt-States, Chief Judge, United States Bankruptcy Court for the Eastern District of Missouri.

5 While his initial appeal was pending, Briggs moved to disqualify Judge Rendlen on remand. This court has the authority when remanding to "direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." **28 U.S.C. § 2106**; *see also* ***United States v. Tucker***, 78 F.3d 1313, 1323-24 (8th Cir. 1996) (explaining that § 2106's remand clause empowers this court to reassign a case when "in the language of 28 U.S.C. § 455(a), the district judge's 'impartiality might reasonably be questioned.' "). Because this court is not remanding, § 2106 is inapplicable and his motion is moot.

616 B.R. 332
United States Bankruptcy Court,
N.D. Texas, Dallas Division.

IN RE: Cynthia SANTOS, Purported Debtor.

CASE NO. 19-33256-SGJ13
|
Signed March 17, 2020

Synopsis

Background: After bankruptcy attorney filed unauthorized Chapter 13 petition and related schedules and statements in former name of client's ex-wife because client, a serial bankruptcy filer, was then subject to a 180-day refiling bar and faced imminent foreclosure on his house, trustee filed motion for show cause order, asserting that ex-wife, the purported debtor, neither filed nor authorized filing of petition. Trustee also filed motion to dismiss case, and bankruptcy attorney filed motion to expunge. Following denial of expungement motion and dismissal of case, order to show cause was issued requiring attorney and client to appear and show cause why they should not be sanctioned for their conduct.

Holdings: The Bankruptcy Court, Stacey G. C. Jernigan, J., held that:

[1] attorney violated the sections of the Bankruptcy Code governing debt relief agencies;

[2] attorney violated the bankruptcy rule requiring that petitions and accompanying papers be verified or contain an unsworn declaration;

[3] attorney violated the bankruptcy rule governing signing and verification of papers;

[4] attorney violated the Texas Disciplinary Rules of Professional Conduct (TDRPC);

[5] the appropriate sanctions to be imposed on attorney included an indefinite suspension, disgorgement of his $3,500 fee, and court-ordered ethics training; and

[6] the appropriate sanctions to be imposed on attorney's client, the ex-husband of purported debtor, were a ten-year bar on filing bankruptcy, as well as a criminal referral to the United States Attorney.

Ordered accordingly.

West Headnotes (30)

[1] **Bankruptcy** Evidence; witnesses

Bankruptcy court may take judicial notice of (1) prior court proceedings as a matter of public record, (2) its own records, (3) related proceedings and records in cases before that court, and (4) all documents filed with the court in the bankruptcy case.

[2] **Bankruptcy** Frivolity or bad faith; sanctions

Bankruptcy court could draw an adverse inference where witness, in response to each line of questioning by Chapter 13 trustee and others at hearing on trustee's motion for sanctions, asserted his Fifth Amendment privilege against self-incrimination and refused to testify. U.S. Const. Amend. 5.

[3] **Bankruptcy** Attorneys

Bankruptcy attorney, by filing unauthorized Chapter 13 petition and related schedules and statements using social security number and former name of client's ex-wife, the purported debtor, whom he had never met, violated the sections of the Bankruptcy Code governing debt relief agencies; through failure to exercise reasonable care, attorney made numerous untrue and misleading statements in the petition and its attachments, attorney forged purported debtor's electronic signature at least six times, attorney never actually met with or spoke to purported debtor and so neglected to perform any of the disclosure-related duties required of him, and attorney never formed a written contract with purported debtor. 11 U.S.C.A. §§ 526, 526(a)(2), 527, 528.

[4] **Bankruptcy** Attorneys

Under the Bankruptcy Code, a bankruptcy attorney falls within the definition of a "debt relief agency." 11 U.S.C.A. §§ 101(12A), 526, 527, 528.

[5] **Bankruptcy** Attorneys

Attorney must ensure, prior to filing a bankruptcy petition, that a potential debtor understands all of the consequences of filing bankruptcy and the responsibilities of being a debtor in a bankruptcy case. 11 U.S.C.A. § 527.

[6] **Bankruptcy** Attorneys

Attorney must ensure that a potential debtor, knowing and appreciating the consequences of filing a bankruptcy petition, has the present intention of filing bankruptcy. 11 U.S.C.A. § 527.

[7] **Bankruptcy** Petition

Bankruptcy rule requiring that petitions and accompanying papers be verified or contain an unsworn declaration, though brief, operates as a vitally important safeguard against fraudulent and unauthorized filings. Fed. R. Bankr. P. 1008.

[8] **Bankruptcy** Petition

Bankruptcy Schedules and Statement of Affairs

Bankruptcy Amendment

Under bankruptcy rule requiring that petitions and accompanying papers be verified or contain an unsworn declaration, debtor must sign all petitions, lists, schedules, statements, and amendments thereto as a means of (1) authorizing the filing of the documents, (2) verifying, under penalty of perjury, that debtor has reviewed the information, and (3) verifying that the information is truthful and accurate to a degree that only debtor herself could verify. Fed. R. Bankr. P. 1008.

[9] **Bankruptcy** Requisites in general

Under bankruptcy rule requiring that petitions and accompanying papers be verified or contain an unsworn declaration, an attorney who files schedules and statements on a debtor's behalf makes a certification regarding the representations contained therein, one which constitutes an "endorsement" formed after a reasonable inquiry. Fed. R. Bankr. P. 1008.

[10] **Bankruptcy** Petition

Bankruptcy Requisites in general

Bankruptcy Attorneys

Bankruptcy attorney, by filing unauthorized Chapter 13 petition and related schedules and statements using social security number and former name of client's ex-wife, whom he had never met, violated the bankruptcy rule requiring that petitions and accompanying papers be verified or contain an unsworn declaration; attorney filed the petition and papers without first making any inquiry into the accuracy of the information, which he received primarily from his client, or obtaining ex-wife's wet signature, thereby causing her to suffer financial harm. Fed. R. Bankr. P. 1008.

[11] **Bankruptcy** Procedure

When an attorney files documents electronically in a bankruptcy case, the attorney represents to the court and the world that he or she has secured an originally executed petition or other document physically signed by the debtor prior to electronically filing the case or document. Fed. R. Bankr. P. 5005.

[12] **Bankruptcy** Petition

Bankruptcy Requisites in general

Bankruptcy Attorneys

Bankruptcy attorney, by filing unauthorized Chapter 13 petition and related schedules and statements using social security number and

former name of client's ex-wife, whom he had never met, violated the bankruptcy rule governing the filing and transmittal of papers; attorney admittedly did not obtain an original, physical signature from ex-wife before he electronically signed her name at least six times in documents filed with the court, thus intentionally misrepresenting that he had secured original, physical documents signed by ex-wife prior to electronically filing the same. Fed. R. Bankr. P. 5005.

[13] **Bankruptcy** Frivolity or bad faith; sanctions

Bankruptcy rule governing signing and verification of papers is a fundamental rule in protecting the integrity of the bankruptcy courts. Fed. R. Bankr. P. 9011.

[14] **Bankruptcy** Frivolity or bad faith; sanctions

Bankruptcy rule governing signing and verification of papers establishes guidelines governing the signing of papers filed with the court, representations made to the court, and the parameters of sanctions that may be imposed on parties or counsel who violate it. Fed. R. Bankr. P. 9011.

[15] **Bankruptcy** Frivolity or bad faith; sanctions

By presenting a signed petition to the court, an attorney certifies to the court, to the best of the attorney's knowledge, formed after reasonable inquiry, that (1) the petition is not being presented for an improper purpose, (2) the legal contentions therein are warranted by existing law, (3) the allegations and factual contentions have evidentiary support, and (4) the denials of factual contentions are warranted. Fed. R. Bankr. P. 9011.

[16] **Bankruptcy** Frivolity or bad faith; sanctions

In determining whether a person violated the bankruptcy rule governing signing and verification of papers, the court does not need to find bad faith; rather, the court needs to find only that the conduct was objectively unreasonable under the circumstances. Fed. R. Bankr. P. 9011.

[17] **Bankruptcy** Frivolity or bad faith; sanctions

Bankruptcy attorney, by filing unauthorized Chapter 13 petition and related schedules and statements using social security number and former name of client's ex-wife, the purported debtor, whom he had never met, violated the bankruptcy rule governing signing and verification of papers; despite attorney's purported motive of simply wanting to help save a house, attorney's filing of falsified documents containing forged electronic signatures and misrepresentations to the court, without having performed a reasonable investigation, was objectively unreasonable, and his willful violations were an abuse of the judicial process and enabled his client to commit what were quite likely one or more crimes, including identity theft and bankruptcy fraud. Fed. R. Bankr. P. 9011.

[18] **Bankruptcy** Who May Institute Case

Only the prospective debtor may file a voluntary bankruptcy petition on his or her own behalf; by their very nature, voluntary bankruptcy cases must be undertaken on the debtor's own volition. 11 U.S.C.A. § 301(a).

[19] **Bankruptcy** Frivolity or bad faith; sanctions

Fact that a client's home is scheduled for imminent foreclosure does not excuse the reasonable inquiry requirement of the bankruptcy rule governing signing and verification of papers. Fed. R. Bankr. P. 9011, 9011(b).

[20] **Bankruptcy** Frivolity or bad faith; sanctions

There can be no "inquiry reasonable under the circumstances," as required by the bankruptcy rule governing signing and verification of papers, where the attorney has not met with the client prior to filing the petition. Fed. R. Bankr. P. 9011, 9011(b).

[21] **Attorneys and Legal Services** Multiple violations; merger

Bankruptcy attorney violated the Texas Disciplinary Rules of Professional Conduct (TDRPC) by filing unauthorized Chapter 13 petition and related schedules and statements using social security number and former name of client's ex-wife, whom he had never met; having listed ex-wife as the debtor on the voluntary petition and his purported client, attorney owed ethical duty to competently and diligently represent her interests, yet utterly failed to do so, attorney failed to heed "red flags" regarding unauthorized bankruptcy filing and failed to counsel his actual client on consequences of bankruptcy fraud, perjury, and identity theft, but instead enabled his client to engage in potentially criminal behavior, attorney failed to counsel ex-wife to make an informed decision, and attorney intentionally made myriad misrepresentations to the court. Tex. Disciplinary R. Prof. Conduct 1.01, 1.02, 1.03, 3.03.

[22] **Bankruptcy** Frivolity or bad faith; sanctions

When considering attorney misconduct and violations of the bankruptcy rule governing signing and verification of papers, a bankruptcy court may also take into consideration the rules of professional conduct of the state in which the court sits. Fed. R. Bankr. P. 9011.

[23] **Attorneys and Legal Services** Education and training

Attorneys and Legal Services Demonstration of competence; examinations

Before a law student or other prospective licensee can become eligible to practice law in the state of Texas, the state requires them to take a Professional Responsibility course in law school and pass the Multistate Professional Responsibility Examination, which tests the students' understanding of model rules nearly identical to those published by the State Bar of Texas.

[24] **Attorneys and Legal Services** Violations as grounds for discipline

No attorney can be excused from violating the fundamental, basic rules of the Texas Disciplinary Rules of Professional Conduct (TDRPC) for any reason.

[25] **Attorneys and Legal Services** Federal system

Bankruptcy Frivolity or bad faith; sanctions

Bankruptcy court, pursuant to local bankruptcy rules, was authorized to take disciplinary action against bankruptcy attorney who filed unauthorized Chapter 13 petition and related schedules and statements using social security number and former name of client's ex-wife, whom he had never met, in violation of the Bankruptcy Code, the bankruptcy rules, and the Texas Disciplinary Rules of Professional Conduct (TDRPC). U.S.Bankr.Ct.Rules N.D.Tex., Rule 2090-2(b).

[26] **Attorneys and Legal Services** Disgorgement or restitution

Attorneys and Legal Services Indefinite Suspension

Attorneys and Legal Services Other particular disposition, punishment, or sanction

Bankruptcy Frivolity or bad faith; sanctions

Bankruptcy Attorneys

Bankruptcy attorney who, by filing unauthorized Chapter 13 petition and related schedules and statements using social security number and former name of client's ex-wife, whom he had never met, violated the Bankruptcy Code, the bankruptcy rules, and the Texas Disciplinary Rules of Professional Conduct (TDRPC), would be suspended indefinitely, required to disgorge $3,500 fee, and ordered to attend ethics training; although attorney, a highly experienced bankruptcy practitioner, had a clean disciplinary record until the present case, had some well-meaning intentions, and had offered contrite testimony, the bankruptcy court declined to limit sanctions to monetary sanctions, given attorney's conduct in forging numerous electronic signatures of ex-wife, including on the unauthorized bankruptcy petition, and the financial cataclysm that attorney's conduct helped perpetuate in her life. 11 U.S.C.A. §§ 526, 527, 528; Fed. R. Bankr. P. 1008, 5005, 9011; Tex. Disciplinary R. Prof. Conduct 1.01, 1.02, 1.03, 3.03.

[27] **Bankruptcy** Frivolity or bad faith; sanctions

An attorney's conduct in forging a debtor's signature and presenting it to the bankruptcy court as if it were an authentic signature is never reasonable, under any circumstances, for purposes of, inter alia, the bankruptcy rule governing signing and verification of papers. Fed. R. Bankr. P. 9011.

[28] **Bankruptcy** Order; prejudice

Bankruptcy Offenses

Where bankruptcy attorney filed unauthorized Chapter 13 petition and related schedules and statements in former name of client's ex-wife because client, a serial bankruptcy filer, was then subject to a 180-day refiling bar and faced imminent foreclosure on his house, the appropriate sanctions to be imposed on client included a ten-year bar on filing bankruptcy, as well as a criminal referral to the United States Attorney; client, who made multiple false oaths or representations in a Title 11 proceeding, not only abused the bankruptcy system, but also manipulated the attorney into assisting him in what appeared to be a scheme to commit bankruptcy fraud and identity theft against ex-wife. 18 U.S.C.A. §§ 152, 157.

[29] **Bankruptcy** Offenses

Bankruptcy fraud is a crime. 18 U.S.C.A. § 157.

[30] **Bankruptcy** Offenses

It is a crime to commit perjury in a Title 11 proceeding and falsify documents in contemplation of filing a bankruptcy case under Title 11. 18 U.S.C.A. § 152.

Attorneys and Law Firms

***337** Steve Le, Law Office of Steve Le, Grand Prairie, TX, for Purported Debtor.

MEMORANDUM OPINION AND ORDER ON SHOW CAUSE ORDER REQUIRING STEVE LE AND GABRIEL SANTOS TO APPEAR AND SHOW CAUSE WHY THEY SHOULD NOT BE SANCTIONED FOR CONDUCT DESCRIBED HEREIN WITH RESPECT TO THE FILING OF AN UNAUTHORIZED CHAPTER 13 PETITION AND RELATED SCHEDULES AND STATEMENTS

Stacey G. C. Jernigan, United State Bankruptcy Judge

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*338 I. INTRODUCTION

This is the story of Gabriel Santos's wrongheaded scheme to manipulate the bankruptcy system, of attorney Steve Le's failure to uphold the integrity of his profession, and of the stress they both caused to Cynthia Ramos—Gabriel Santos's ex-wife, an innocent victim, and the Purported Debtor in this case.[1]

In a nutshell, Gabriel Santos, who had filed bankruptcy three times, was barred from filing bankruptcy for 180 days after having his most recent Chapter 13 case dismissed with prejudice. To work around this bar, Mr. Santos sought to file bankruptcy ***in his ex-wife's name***, without a power of attorney or any other form of authorization, to prevent imminent foreclosure on his house.[2] He falsified emails purportedly from his ex-wife authorizing the bankruptcy and sent them to Mr. Le, an attorney, the day before the scheduled foreclosure. Mr. Santos also brought Mr. Le $3,500 cash. Mr. Le, perhaps well-intentioned, nevertheless ignored his ten years of experience as a debtor's attorney (and his many hours of ethics training) and filed a Voluntary Chapter 13 Petition, Bankruptcy Schedules, a Statement of Financial Affairs ("SOFA") and other items, using Mrs. Ramos's name and social security number. Mr. Le never spoke to Mrs. Ramos or obtained a single wet signature. Mr. Santos said his ex-wife was out-of-town and unavailable to talk to Mr. Le on the telephone—yet, somehow, she was supposedly able to take credit counseling from a remote location and email Mr. Le purported profit and loss statements for a business. Instead of taking reasonable steps to protect himself and the Purported Debtor in light of the strange circumstances he faced, Mr. Le decided to forge Mrs. Ramos's electronic signature at least six times on documents filed with the court—allegedly assuming, in good faith, that he had her permission—via her ex-husband—to do so.

The results of these men's actions were unquestionably harmful for Mrs. Ramos, whose credit has been adversely affected and whose name is now permanently etched in the bankruptcy database to be searched by banks, employers, and the public at large. Now, Mrs. Ramos, the court, Mr. Le, and all attorneys involved in this matter must commit untold hours and resources to try to unwind a grievous mistake that was easily preventable had Mr. Le, the attorney at the center of this mess, simply remembered his ethics training.

II. PROCEDURAL HISTORY

On September 30, 2019, attorney Steve Le filed a Chapter 13 Bankruptcy Petition on behalf of the Purported Debtor using the CM/ECF system.[3] The electronic file ***339** containing the Petition also contained the Purported Debtor's (a) Schedules; (b) Declaration; (c) SOFA; (d) Statement of Current Monthly Income; (e) Verification of Mailing List for

the Creditor Matrix; and several other documents. In all, the first docket entry filed in this case contains six electronic signatures that read, "/s/ Cynthia Santos."

The same day, Mr. Le also filed a Certificate of Credit Counseling,[4] which indicates that the Purported Debtor completed online credit counseling, and a Form 121 Social Security Number Verification,[5] which contains Mrs. Ramos's social security number and an electronic signature that reads, "/s/ Cynthia Santos."

Eight days later, on October 8, 2019, the standing Chapter 13 Trustee, Mr. Tom Powers, filed a Motion for a Show Cause Order, alleging that "Cynthia Ramos f/k/a Cynthia Santos contacted the Trustee's office and stated that she did not file the Voluntary Petition and did not give anyone permission to do so on her behalf."[6] The Chapter 13 Trustee also filed a Motion to Dismiss,[7] and Mr. Le, in an attempt to undo his mistake, filed a Motion to Expunge the case on behalf of Mrs. Ramos.[8]

The court held a hearing on the Trustee's Motion for a Show Cause Order and Motion to Dismiss on November 18, 2019.[9] Mr. Powers and an attorney for the U.S. Trustee, Erin Schmidt, both appeared. Mr. Le, represented by Corbet Bryant, testified. Finally, Mrs. Ramos testified and Mr. Santos, her ex-husband, also testified.[10]

After hearing from all parties-in-interest, the court found that this bankruptcy case was improperly filed without Mrs. Ramos's authorization. Reticent to eliminate evidence of potential bankruptcy fraud and preempt any potential criminal referral against Mr. Santos, the court declined to expunge the case.[11] Instead, the court requested that the Chapter 13 Trustee submit an order of dismissal. The court further requested that the order contain strong language indicating in the clearest possible terms that what happened to Mrs. Ramos was tantamount to identity theft, so that she may use the order to clear her name with regard to the credit reporting agencies, banks, and anyone else who may become aware of the purported bankruptcy filing. On November 26, 2019, the court entered its Memorandum Opinion and Order Dismissing Unauthorized Bankruptcy to that effect.[12]

At the November 18 hearing, the court also granted the Chapter 13 Trustee's Motion for a Show Cause Order and requested that he submit a form of show cause order that directed Mr. Le and Mr. Santos ***340** to appear at a future hearing.[13] After advising everyone in the room that this unauthorized filing triggered Title 18 implications and after explaining to Mr. Santos and Mrs. Ramos that those implications meant the court would consider referring the case to the U.S. Attorney's office for criminal prosecution, the court exhorted Mr. Santos to hire a lawyer to represent him at the next hearing. Accordingly, on November 26, 2019, the court entered its Show Cause Order Directing Steven Le and Gabriel Santos to Appear for another hearing on February 3, 2020.[14]

On February 3, 2020, the same parties-in-interest returned to court pursuant to the Show Cause Order. This time, Mr. Santos appeared represented by attorney Willie Cantu. Before the evidentiary hearing began, Mr. Cantu made an oral motion to continue the hearing on grounds that he was unprepared to provide effective assistance of counsel to Mr. Santos. Mr. Cantu represented to the court that he was not aware of the nature of this show cause hearing before arriving at court that day because the ECF transcript of the last hearing was still unavailable to the public at that time. Mr. Cantu also stated that he was only hired by Mr. Santos on Friday, January 30 (just three days prior) and that Mr. Santos had given him a different idea of what would happen at the February 3 hearing. The Chapter 13 Trustee, counsel for Mr. Le, and counsel for Mrs. Ramos, Julianne Parker, each opposed the oral motion to continue. The court denied the oral motion to continue on grounds that Mr. Santos had been afforded ***two-and-a-half months' notice*** of the February 3 hearing (and the nature of it), and that the court had strongly urged Mr. Santos to hire counsel.[15] Accordingly, the parties proceeded to put on evidence and make arguments on the record.

III. JURISDICTION

Bankruptcy subject matter jurisdiction exists in this proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157(b). The bankruptcy court has authority to adjudicate this matter pursuant to Miscellaneous Rule No. 33 for the Northern District of Texas.

IV. FINDINGS OF FACT

A. The Parties and Counsel.

There are, essentially, four individuals involved in various capacities in this bankruptcy matter, one of whom is known by a different name than the name used on all the documents filed

with this court. Each party was represented by counsel at one or both of the hearings before this court. The following table is intended to make clear who participated in the proceedings.

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Person	Relation to Case	Counsel	Representation
Cynthia Ramos f/k/a Cynthia Santos	Victim of identity theft and forged bankruptcy filing. Former spouse of Gabriel Santos (divorced 2009).	Julianne Parker	At the February 3 hearing only.
Gabriel Santos	Perpetrator of identity theft and forged bankruptcy filing. Hired Mr. Le to file bankruptcy in his ex-wife's former name.	Willie Cantu	At the February 3 hearing only.
Steve Le	Attorney hired by Gabriel Santos to file bankruptcy using Cynthia Ramos's social security number. Testified at both the November 18 and February 3 hearings.	Corbet Bryant	At both the November 18 and February 3 hearings.
Tom Powers	Standing Chapter 13 Trustee. Testified at both the November 18 and February 3 hearings.	Erin Schmidt	At both the November 18 and February 3 hearings.

B. Mr. Le's Testimony, Public Disciplinary Record and Experience Before this Court as a Debtor's Attorney.

[1] The court makes these findings of fact based in part on Mr. Le's testimony and Mrs. Ramos's testimony from the November 18 and February 3 hearings. The court finds Mr. Le and Mrs. Ramos to be credible witnesses. The court does not find Mr. Santos to be a credible witness but will address his testimony in a separate section, below. In making its findings of fact, this court also takes judicial notice of the evidentiary record made at both hearings and of all documents filed with the court in this bankruptcy case.[16]

On Thursday, September 26, 2019, the Purported Debtor's ex-husband, Mr. Santos, arrived at the offices of Mr. Le with $3,500 cash in hand seeking to stop a foreclosure on his home that was scheduled for October 1, 2019—five days later. Mr. Santos and Mr. Le discussed the possibility of filing bankruptcy as a means to prevent the foreclosure. Then, on Friday, September 27, 2019, Mr. Le ran an ECF/PACER check to determine Mr. Santos's eligibility to file bankruptcy and found that Mr. Santos, who had filed bankruptcy multiple times, was barred from refiling by an order entered on April 23, 2019 dismissing his prior Chapter 13 case with prejudice for 180 days.[17] So, Mr. Le ***342** notified Mr. Santos that he was barred from refiling. According to Mr. Le, Mr. Santos called him later that day and "asked [him] whether his ***ex-wife*** can file."[18] Mr. Le then explained to Mr. Santos that if the home mortgage note was under Mrs. Santos's (*i.e.*, Mrs. Ramos's) name, she could file bankruptcy to stop the foreclosure.[19] Mr. Santos then told Mr. Le that he would call Mrs. Ramos and get back to him.[20]

On Monday, September 30, 2019—the day before the scheduled foreclosure—Mr. Santos called Mr. Le and asked if he could come to Mr. Le's office to file bankruptcy. Mr. Le explained that he needed information from Mrs. Ramos to file for her. That is when Mr. Le received two emails purportedly

from Mrs. Ramos, with her former name in both the email address and the signature; one, sent at 8:15 a.m., containing a credit counseling certificate, and the other, sent at 8:50 a.m., containing a profit and loss statement for a business.[21] The court believes, based on the preponderance of the evidence, that it was Mr. Santos who created the email address and sent the emails to Mr. Le to induce him to file bankruptcy. The second email, sent to Mr. Le at 8:50 a.m., read as follows:

> Steve,
>
> My name is Cynthia Santos, and my ***ex husband*** [sic] has filled me on [sic] everything. I have never filed for bankruptcy before. I will be filing for bankruptcy. I sent you my certificate from the credit counseling class to your email. Attached is my profit and loss statement verifying my income. Gabriel stated he had sent you all documents need [sic] from him. I am attending a funeral this morning and will be able to answer any questions you may need afterwards. If you have questions or need anything else please let me know.
>
> Sincerely,
>
> Cynthia Santos[22]

After receiving the emails, Mr. Le told Mr. Santos that he would still have to speak to Mrs. Ramos to make sure she wanted to file. At that point, Mr. Santos allegedly dialed a number that went straight to voicemail and explained to Mr. Le that Mrs. Ramos was unavailable because she was at a funeral in a remote location without any signal (despite her having purportedly completed credit counseling and sent two emails to Mr. Le earlier that morning).[23] Mr. Santos allegedly assured Mr. Le that Mrs. Ramos would come to his office to provide additional ***343** information and documents, including a tax return and a copy of her driver license, after she returned from the funeral on Wednesday, October 2.[24] At no point leading up to the filing of the bankruptcy Petition did Mr. Le receive a purported power of attorney from Mr. Santos or Mrs. Ramos. Mr. Le testified that the emails and Mr. Santos's assurances were the impetus of his ill-fated decision to file bankruptcy using Cynthia Ramos's social security number.[25]

The Chapter 13 Trustee examined Mr. Le again at the February 3 hearing. Mr. Le's testimony revealed what the court considers to be a number of additional red flags that should have prevented him from filing the bankruptcy Petition. For example,

i. Mr. Le testified that he knew a client's wet signature was required ***before*** an attorney could file a bankruptcy Petition on the client's behalf—nevertheless, he ignored his knowledge and training and proceeded to file a Petition, Schedules, Statement of Financial Affairs, and other documents without Mrs. Ramos's actual signature.[26]

ii. Mr. Le further testified that Mr. Santos paid Mr. Le's fee of $3,500 in cash.[27] A person with $3,500 cash-in-hand wanting to file bankruptcy in someone else's name is unusual, to say the least, and should have made Mr. Le suspicious. Perhaps it did, considering Mr. Le marked "Debtor," rather than "Other (specify)," as the source of compensation paid to him on the Disclosure of Compensation of Attorney for Debtor and then signed the certification at the bottom of the form.[28]

iii. Mr. Le further testified that Mr. Santos provided Mrs. Ramos's social security number, included in response to Question 3 of the Voluntary Petition.[29]

iv. Mr. Le further testified that, at the time he was completing the bankruptcy Petition, he believed the Purported Debtor's address was 14864 Ledgeview Ct., Balch Springs, TX 75180, as indicated in response to Question 5 of the Voluntary Petition.[30] This is unusual because this is the address of the house that was scheduled for foreclosure, where Mr. Santos lived. Given that one of the purported Cynthia Santos emails referred to Gabriel Santos as her ex-husband and that Mr. Le received the email before completing the Petition, Mr. Le had reason to know Mrs. Ramos and Mr. Santos were divorced. And, generally speaking, divorced persons do not live together.

v. Mr. Le further testified that he could not have known whether Mrs. Ramos owned any property that posed an imminent threat to public ***344** health or safety because he was going through the questions line-by-line with Mr. Santos, not Mrs. Ramos. He said he may have marked "No" in response to Question 14 simply because Question 14 is not normally marked "Yes" on Voluntary Petitions.[31] In other words, Mr. Le was consciously aware that he was fabricating answers to questions and,

yet, it never crossed his mind that he should get the information from Mrs. Ramos, not from her ex-husband.

vi. Mr. Le testified that, despite the electronic signature dated September 30, 2019 and located on Page 6 of the Voluntary Petition, he did not actually obtain a wet signature from Mrs. Ramos on that date.[32]

vii. Mr. Le further testified that, by signing the Petition on page 7, he certified to the court that he communicated a number of things to the Purported Debtor, Mrs. Ramos, even though he knew he had communicated none of those things to her and had not made a reasonable inquiry regarding the accuracy of the information in the schedules at that time.[33]

viii. Mr. Le further testified that he marked "No" in response to Question 7 regarding whether the Purported Debtor owned any household electronics even though he knew it was highly unlikely that she did not own any household electronics, such as a television.[34]

ix. Mr. Le further testified that he marked "No" in response to Question 8 regarding whether the Purported Debtor owned any collectibles of value. When pressed as to why he marked no, Mr. Le testified that he marked no without making any inquiry whatsoever.[35]

x. Mr. Le further testified that he marked "No" in response to Question 12 regarding whether the Purported Debtor owned any Jewelry and that, despite marking no, it was unlikely that Mrs. Ramos, a woman, owned no jewelry whatsoever.[36]

xi. Mr. Le further testified that he knew that he could file a barebones bankruptcy Petition without filing the Schedules. When asked why he did not wait to file the Schedules and SOFAs until the Purported Debtor could come to his office on Wednesday, Mr. Le responded that he had planned to verify the Schedules with Mrs. Ramos on Wednesday and make amendments as necessary. The Chapter 13 Trustee asked Mr. Le whether he knew that the Schedules constituted representations to the court under penalty of perjury and that his client could face sanctions if amended filings were highly contradictory. To that, Mr. Le was unresponsive.[37]

***345** xii. Mr. Le further testified that, despite marking "No" in response to Question 1 on Schedule H, with regard to whether the Purported Debtor had any co-debtors, he knew from reviewing a copy of the home mortgage loan, which Mr. Santos furnished, that Mr. Santos and Mrs. Ramos (who went by Mrs. Santos at the time the loan was executed) were both named on the note.[38]

xiii. Mr. Le further testified that he populated Question 8a. on Schedule I using the Purported Debtor's alleged profit and loss statement, which was attached to one of the two emails he received on September 30, 2019. The second column, which reads "For Debtor 2 ***or non-filing spouse***," (emphasis added) is marked "N/A" in response to each question, suggesting that Mr. Le knew Mr. Santos and Mrs. Ramos were no longer married as of September 30, 2019.[39]

xiv. Mr. Le further testified that he populated Schedule J, Expenses, using numbers he received from Mr. Santos. When asked whether, at that time, he thought Mr. Santos and Mrs. Ramos were living together, Mr. Le said he did not remember, but that, at one point, Mr. Santos stated in a text that Mrs. Ramos had to go to her apartment to get a tax return and that it appeared odd to him. When pressed as to whether, at that point, Mr. Le made any change in the Petition to Question 5 regarding where the Purported Debtor lived, Mr. Le said he did not.[40]

xv. Mr. Le further testified that he signed "/s/ Cynthia Santos" underneath the statement reading "Under penalty of perjury, I declare that I have read the summary and schedules filed with this declaration and that they are true and correct," even though Mrs. Ramos had not, in fact, read the summary and schedules or provided a wet signature.[41]

xvi. Mr. Le further testified that he marked "Not married" in response to Question 1, which reads "What is your current marital status," on the SOFA that he completed on September 30, 2019, suggesting that Mr. Le knew Mr. Santos and Mrs. Ramos were no longer married as of that date.[42]

xvii. Mr. Le further testified that, on the SOFA, he marked "No" in response to Questions 7 through 13 without having any idea whether the Purported Debtor had made payments to insiders within one year prepetition, was party to a lawsuit within one year prepetition, was subject to a creditors' set-off rights within 90 days prepetition, etc.[43]

xviii. Mr. Le further testified that he signed "/s/ Cynthia Santos" underneath the penalty of perjury statement on the last page of the ***346** SOFA even though Mrs. Ramos had not provided answers to the questions on the SOFA or a wet signature.[44]

xix. Mr. Le further testified that he signed "/s/ Cynthia Santos" underneath the penalty of perjury statement on the last page of Official Form 122C-1 Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period even though Mrs. Ramos had not provided six months of income or a wet signature.[45]

xx. Mr. Le further testified that he signed "/s/ Cynthia Santos" on the Verification of Mailing List even though Mrs. Ramos had not actually signed the document. He also testified that he listed only one creditor, Select Portfolio Services—presumably the mortgage loan servicer—even though it was unreasonable that Mrs. Ramos would have only one creditor to notify of a bankruptcy filing.[46]

xxi. Mr. Le further testified that he understood he was not required to file the SOFA with the Petition and that he could have waited until after he had a chance to meet with Mrs. Ramos to file it—just like the Schedules.[47]

It was not until Wednesday, October 2, 2019, when Mrs. Ramos—upon receiving a credit alert regarding a bankruptcy filing using her social security number—reached out to Mr. Le to ask why he filed a bankruptcy on her behalf, that Mr. Le realized that Mrs. Ramos had not authorized Mr. Santos to file the bankruptcy.[48] Mr. Le testified on numerous occasions, during both the November 18 hearing and the February 3 hearing, that he had only filed the bankruptcy Petition because he wanted to help Mr. Santos save his home.[49]

According to Mr. Le's profile on the State Bar of Texas's website, he has been licensed to practice law in Texas since May 1, 2009 and he has no public disciplinary history in the State of Texas or any other state.[50] Furthermore, according to the Bankruptcy Clerk's records, Mr. Le has filed 120 bankruptcy cases dating back to August 2010, nine of which remain active.

C. Mr. Santos's Testimony.

At the November 18 hearing, the Chapter 13 Trustee called Mr. Santos to testify second, after Mr. Le but before Mrs. Ramos. Mr. Santos's testimony reflects a story that does not comport with any of the other testimony heard in this case, including, importantly, the testimony of Mrs. Ramos—his ex-wife and the victim of his unscrupulous behavior. During examination, Mr. Santos represented that Mrs. Ramos had actually authorized the bankruptcy. ***347** [51] The court did not find this statement credible. He also stated that Mr. Le knew Mrs. Ramos and Mr. Santos were divorced from the outset. Mr. Santos's assertion that Mr. Le knew Cynthia Ramos was not Mr. Santos's wife is, perhaps, the only credible testimony Mr. Santos provided to the court. This is because in the very first line of one of the phony emails that Mr. Le received, the sender, purporting to be "Cynthia Santos," specifically identified Gabriel Santos as her "ex husband."[52]

[2] Later, at the February 3 hearing, Mr. Santos was examined by the Chapter 13 Trustee again, and also by Mr. Bryant and by Ms. Parker. However, Mr. Santos asserted his Fifth Amendment privilege against self-incrimination in response to nearly every question asked of him, other than requests to identify himself or a document placed in front of him. Consequently, in making its findings of fact in this civil matter, the court can and does draw an adverse inference against Mr. Santos as to each question on which he invoked his Fifth Amendment privilege against self-incrimination.[53]

After hearing the testimony of Mrs. Ramos and Mr. Le, and considering the other evidence submitted by the Chapter 13 Trustee and the many adverse inferences drawn against Mr. Santos, the court finds that Mr. Santos's story was false and that he lacked all credibility as a witness. The court believes that Mr. Santos falsified the two emails and other documents in order to dupe Steve Le into helping him file a fictitious bankruptcy case, amounting to identity theft against his ex-wife, Cynthia Ramos. It is also likely that Mr. Santos perjured himself during his testimony at the November 18 hearing. As is discussed in more detail below, Mr. Santos's actions are grounds for civil sanctions and for criminal referral to the United States Attorney.[54]

D. Mrs. Ramos's Testimony.

Mrs. Ramos testified last at the November 18 hearing, following Mr. Le and Mr. Santos. She said that she had received a phone call from Mr. Santos on September 30, 2019, after having not heard from him in quite some time, and that Mr. Santos asked her to file bankruptcy to save the

house they once shared (but which he now occupied). She responded to his request by saying, "[y]ou are out of your mind. I would never put my family in that situation."[55] She ended her conversation with Mr. Santos having reason to think that she was happy about the prospect of a foreclosure because she could finally sever her last tie to Mr. Santos.[56] Mrs. Ramos also testified that she and Mr. Santos had been divorced for ten years, since 2009.

Unfortunately, Mrs. Ramos received an email from Experian just two days later, ***348** on October 2, 2019, notifying her that there had been a change to her credit report because a Chapter 13 bankruptcy Petition had been filed under her social security number.[57] She immediately called the Bankruptcy Clerk's office and received Mr. Le's contact information as the attorney of record.[58] Then, she got in touch with Mr. Le and learned the details behind the bankruptcy filing.

Mrs. Ramos testified that, contrary to Mr. Santos's testimony, she was not out of town for a funeral on September 30, but was in Dallas, at work, easily reachable by phone.[59] Mrs. Ramos said that she did not recognize the email address on the two emails sent to Mr. Le on September 30, 2019 because she had not sent them, and that she did not recognize the purported profit and loss statement for a fictitious business that was attached to one of the emails.[60] Finally, during cross-examination by Mr. Bryant, Mrs. Ramos said that Mr. Le had done everything he possibly could to minimize the harm to her since the moment she notified him that she had not authorized the bankruptcy filing.[61]

The court finds the testimony of Mrs. Ramos to have been credible.

V. CONCLUSIONS OF LAW

A. The Bankruptcy Code Provisions and Rules that Mr. Le Violated.

[3] The court concludes that in filing the unauthorized Voluntary Petition, Schedules, SOFA, Verification of Mailing, and other documents using Mrs. Ramos's social security number and former name, Mr. Le acted in bad faith and violated several Bankruptcy Code Provisions, Federal and Local Rules of Bankruptcy Procedure, as well as the ethical rules imposed by the Texas Disciplinary Rules of Professional Conduct ("TDRPC").

1. Mr. Le Violated 11 U.S.C. § 526.

[4] Section 526 of the Bankruptcy Code restricts "debt relief agencies" from undertaking certain actions.[62] Under the Bankruptcy Code, a bankruptcy attorney falls within the definition of a "debt relief agency."[63] Subsection 526(a)(2) specifically prohibits a debt relief agency from making:

> ...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[.][64]

Mr. Le violated 11 U.S.C. § 526(a)(2) in several manners:

- As catalogued in the court's Findings of Fact, Mr. Le violated 11 U.S.C. § 526(a)(2) by making numerous untrue and misleading statements in the Voluntary Petition and its attachments, including the Schedules, the SOFA, and the Verification of Mailing, among others.

- Moreover, the court concludes that Mr. Le's failure to exercise reasonable care caused him to make several ***349** untrue statements that he should have known were untrue. Through reasonable care, he would have realized that the Purported Debtor, Mrs. Ramos, was not involved in the bankruptcy case being filed on her behalf and that it was Mr. Santos who took the credit counseling course and sent the two emails to Mr. Le. And the fact that Mr. Le forged the Purported Debtor's electronic signature at least six times constitutes a violation of 11 U.S.C. § 526(a)(2) for each forgery.

Mr. Le admitted throughout his testimony at the February 3 hearing that he was well aware Mrs. Ramos did not sign the documents or provide any information to him directly. Mr. Le testified that he either received the information used to complete the documents from Mr. Santos or made it up. In fact, Mr. Le admitted that the first time he actually spoke to Mrs. Ramos was when she called him on Wednesday, October 2, 2019—two days after he had already filed the Petition, Schedules, SOFA, and Verification of Mailing, containing a total of six forged electronic signatures in the aggregate.

2. Mr. Le Violated 11 U.S.C. § 527.

Section 527 of the Bankruptcy Code requires attorneys to make certain disclosures or take certain actions:

- Attorneys must provide "clear and conspicuous written notice" advising the debtor that all information disclosed in the required filings and schedules must be "complete, accurate, and truthful" and that failure to comply may result in dismissal and/or sanctions;[65]
- Attorneys must provide prospective debtors with a copy of the statement included in Section 527(b), which is intended to enable prospective debtors to make an informed decision whether or not to file;[66] and
- Attorneys must either obtain accurate information that their debtor clients are required to disclose or supply their debtor clients with enough directions on how to acquire all the information that they need in order to file.[67]

[5] **[6]** Given that Mr. Le never actually met with Mrs. Ramos or spoke with her before using her social security number to file bankruptcy, he neglected to perform any of the duties Section 527 required him to perform. Mr. Le did not provide a clear and conspicuous statement to Mrs. Ramos. He did not obtain accurate and truthful information from her before he filed a bankruptcy Petition using her social security number. Consequently, Mr. Le's actions caused direct financial harm to Mrs. Ramos.

> It is imperative that an attorney ensure, prior to filing a bankruptcy petition, that a potential debtor understands all of the consequences of filing bankruptcy and the responsibilities of being a debtor in a bankruptcy case. An attorney must also ensure that a potential debtor, knowing and appreciating the consequences of filing a bankruptcy petition, has the present intention of filing bankruptcy.[68]

***350** For the foregoing reasons, court concludes that Mr. Le violated Section 527 of the Bankruptcy Code.

3. Mr. Le Violated 11 U.S.C. § 528.

Section 528 of the Bankruptcy Code governs retainer agreements formed between attorneys and their debtor clients.[69] Section 528 imposes certain requirements on attorneys regarding their retainer agreements, including:

- Attorneys must execute a written contract ***with the debtor*** that explains clearly and conspicuously (A) the services to be provided and (B) the fees or charges for such services, including terms of payment;[70] and
- Attorneys must then provide a "fully executed and completed contract" ***to the debtor***.[71]

Mr. Le never formed a written contract with Mrs. Ramos before filing the Petition. He never even spoke with her before filing. Instead, Mr. Le accepted $3,500 in cash from Mr. Santos—whom Mr. Le had good reason to know was the Purported Debtor's ***ex-husband***—and filed the bankruptcy Petition using Mrs. Ramos's social security number, furnished by Mr. Santos.[72] For the foregoing reasons, the court concludes that Mr. Le violated Section 528 of the Bankruptcy Code.

4. Mr. Le Violated Federal Rule of Bankruptcy Procedure 1008.

[7] Federal Rule of Bankruptcy Procedure 1008 is a brief Rule, but it operates as a vitally important safeguard against fraudulent and unauthorized filings:

> All petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 U.S.C. § 1746.[73]

[8] **[9]** Rule 1008 has been interpreted to impose requirements on two parties: the debtor and the debtor's attorney.[74] Under Rule 1008, ***the debtor must sign*** "all petitions, lists, schedules, statements and amendments thereto" as a means of (i) authorizing the filing of the documents, (ii) verifying, under penalty of perjury, that the debtor has reviewed the information, and (iii) verifying that the information is "truthful and accurate to a degree that ***351** only the debtor [*herself*] could verify."[75] Additionally, under Rule 1008, ***an attorney*** "who files schedules and statements on a debtor's behalf ***makes a certification regarding the representations contained therein"—one which constitutes an "endorsement" formed after a reasonable inquiry***.[76]

[10] Mr. Le filed the Petition, Schedules, SOFA and more on behalf of Mrs. Ramos without first (a) making a reasonable inquiry (or any inquiry whatsoever) into the accuracy of the information, which he received primarily from Mr. Santos, or (b) obtaining Mrs. Ramos's wet signature. Had Mr. Le abided by his duties under Rule 1008, the bankruptcy Petition would never have been filed and Mrs. Ramos would never have suffered the financial harm she has credibly described. Mr. Le's actions violated Rule 1008.

5. Mr. Le Violated Federal Rule of Bankruptcy Procedure 5005.

Federal Rule of Bankruptcy Procedure 5005 is related to Rule 1008 and establishes the legal significance of making an electronic filing:

> (2) Electronic filing and signing
>
> ...
>
> (C) Signing. ***A filing made through a person's electronic-filing account*** and authorized by that person, together with that person's name on a signature block, ***constitutes the person's signature***.
>
> (D) Same as a Written Paper. ***A paper filed electronically is a written paper for purposes of these rules***, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code.[77]

[11] **[12]** In other words, when an attorney files documents electronically in a bankruptcy case, he represents to the court and the world that he has "secured an originally executed petition [or other document] ***physically signed by the debtor prior to electronically filing*** the case [or document]."[78] Mr. Le admitted in his testimony that he did not obtain an original, physical signature from Mrs. Ramos before he electronically signed "/s/ Cynthia Santos" at least six times in the documents filed with this court on September 30, 2019. Thus, Mr. Le violated Rule 5005 by intentionally misrepresenting that he had secured original, physical documents ***signed by Mrs. Ramos*** prior to electronically filing the Petition and other documents.

6. Mr. Le Violated Federal Rule of Bankruptcy Procedure 9011.

[13] **[14]** **[15]** **[16]** Rule 9011 is a fundamental rule in protecting the integrity of the bankruptcy courts. It establishes guidelines governing the signing of papers filed with the court, representations made to the court, and the parameters of sanctions that may be imposed on parties or counsel who violate Rule 9011.[79] Judge Woodard neatly summarized Rule 9011, subsection (b) as follows:

> by presenting a signed petition to the court, an attorney certifies to the court that to the best of the attorney's knowledge, ***352** formed after reasonable inquiry, that (1) the petition is not being presented for an improper purpose; (2) that the legal contentions therein are warranted by existing law; (3) that the allegations and factual contentions have evidentiary support; and (4) the denials of factual contentions are warranted.[80]

Furthermore, Subsection (c) of Rule 9011 empowers the court, upon a motion of a party-in-interest or upon the court's own initiative, to impose sanctions on those who violate Rule 9011.[81] Lastly, in determining whether a person violated Rule 9011, the court does not need to find bad faith; rather, the court needs to find only that the conduct was "objectively unreasonable ... under the circumstances."[82]

[17] **[18]** **[19]** **[20]** The court concludes that Mr. Le's filing of falsified documents was objectively unreasonable and that his willful violations were an abuse of the judicial process, despite his purported motive of simply wanting to help save a house. Specifically:

- It was objectively unreasonable under the circumstances for Mr. Le to believe that Mr. Santos could file a voluntary Petition on behalf of his ex-wife, Mrs. Ramos.[83] Mr. Santos quite likely committed one or more crimes, including identity theft and bankruptcy fraud, when he used his ex-wife's social security number to file bankruptcy without her authorization, and Mr. Le enabled Mr. Santos's behavior. That Mr. Le may have been well-intentioned does not absolve him of responsibility for his unethical actions.

- It was objectively unreasonable under the circumstances for Mr. Le to file Schedules, a SOFA and a Statement of Current Monthly Income with falsified information and/or forged signatures on September 30, 2019. Federal

Rule of Bankruptcy Procedure 1007(c) affords debtor's counsel fourteen (14) days from the Petition date to file these required documents.[84] Mr. Le learned from Mrs. Ramos herself that the bankruptcy was unauthorized a mere ***two days*** after filing the Petition. Therefore, Mr. Le could have avoided committing multiple forgeries and making additional misrepresentations to the court had he simply waited to speak with Mrs. Ramos before filing anything other than the Petition.

- It was objectively unreasonable under the circumstances for Mr. Le to neglect his duty to perform a reasonable investigation or inquiry regardless of the imminent foreclosure, or any other exigent circumstances, he may have sought to prevent.[85]

***353** - It was objectively unreasonable under the circumstances for Mr. Le to make no effort whatsoever to verify the accuracy of the information with the Purported Debtor.[86]

- Mr. Le further violated Rule 9011 by forging the Purported Debtor's signature at least six times in documents filed with the court and, thus, misrepresenting to the court that "the allegations and other factual contentions have evidentiary support."[87]

Mr. Le's actions were objectively unreasonable on several grounds and, for the foregoing reasons, the court concludes that Mr. Le violated Rule 9011.

7. Mr. Le Violated the Texas Disciplinary Rules of Professional Conduct (the "TDRPC").

[21] **[22]** The court concludes that Mr. Le violated other rules governing the practice of bankruptcy law, beyond the Bankruptcy Code and Federal Rules of Bankruptcy Procedure. For instance, when considering attorney misconduct and Rule 9011 violations, a bankruptcy court may also take into consideration the rules of professional conduct of the state in which the court sits.[88] Some of the applicable TDRPC are as follows:

- Rule 1.01. Competent and Diligent Representation—prohibiting lawyers from "frequently fail[ing] to carry out completely the obligations that the lawyer owes to a client or clients."[89] In this odd fact scenario before the court, it is hard to define who should be defined as the real client of Mr. Le. However, having listed Cynthia Santos as the debtor on the Voluntary Chapter 13 Petition that he filed and his purported client, Mr. Le owed an ethical duty to competently and diligently represent her interests. Yet, every action he took before learning that the bankruptcy was unauthorized was an utter failure of his duties.

- Rule 1.02. Scope and Objectives of Representation—prohibiting a lawyer from assisting a client to engage in conduct that the lawyer knows is criminal or fraudulent and requiring a lawyer to "promptly make reasonable efforts ... to dissuade the client from committing the crime or fraud."[90] Mr. Le, having seemingly accepted Mr. Santos as a client, should have heeded the red flags regarding this unauthorized bankruptcy filing and counseled Mr. Santos on the consequences of bankruptcy fraud, perjury, and identity theft. He did not. Instead, Mr. Le enabled Mr. Santos to engage in potentially criminal behavior.

354** - Rule 1.03. Communication—requiring a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[91] Mr. Le failed yet another duty that he owed to Mrs. Ramos—his duty counsel her to enable her to make an informed decision as to whether ***she, not Mr. Santos, wanted to file a bankruptcy Petition with her name and social security number on it.

- Rule 3.03. Candor Toward the Tribunal—prohibiting a lawyer from knowingly making a false statement of material fact or law, failing to disclose a fact to the tribunal when disclosure is necessary to avoid a criminal or fraudulent act, offering or using evidence that the lawyer knows to be false, and failing to make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence when the lawyer comes to know of its falsity.[92] The court does not need to repeat the myriad misrepresentations Mr. Le intentionally made in the documents he filed with this court on September 30, 2019, each of which constitutes a violation of Rule 3.03.[93]

[23] **[24]** Before a law student or other prospective licensee can become eligible to practice law in the state of Texas, the state requires them to take a Professional Responsibility course in law school and pass the Multistate Professional Responsibility Examination (which tests the

students' understanding of model rules nearly identical to those published by the State Bar of Texas). No attorney, including Mr. Le, can be excused from violating these fundamental, basic rules—for any reason.

8. Local Bankruptcy Rule 2090-2(b) Authorizes this Court to Discipline Mr. Le for Unethical Behavior and Failure to Comply with Other Rules.

[25] Finally, Local Rule 2090-2(b) permits a "Presiding Judge, after giving opportunity to show cause to the contrary, to take ***any*** appropriate disciplinary action against a member of the bar for:

(1) conduct unbecoming a member of the bar;

(2) failure to comply with any rule or order of the Bankruptcy Court; [or]

(3) unethical behavior ..."[94]

Furthermore, the Local Rules define "unethical behavior" as "conduct undertaken in or related to a case or proceeding in this court that violates the Texas Disciplinary Rules of Professional Conduct."[95] And, as just discussed, Mr. Le violated the TDRPC. Thus, there are at least three grounds stated in the Local Rules upon which this court may take disciplinary action against Mr. Le as a member of the Northern District of Texas bar.

B. Sanctions to be Imposed on Mr. Le: Indefinite Suspension, Disgorgement of Fees, and Additional Ethics CLE.

1. A Note on the Case Law this Court Considered.

[26] At the February 3 hearing, Mr. Le's counsel presented to the court a well-reasoned ***355** Memorandum Opinion from the Southern District of Texas from a case called *In re Stomberg*.[96] In the opinion, the court ordered a Chapter 11 debtor's attorney named Braun to appear and show cause why he should not be sanctioned for electronically filing certain Schedules and a SOFA without first obtaining the debtor's original signatures (*i.e.* by forging the debtor's electronic signature).[97] The court found that Braun had violated numerous Bankruptcy Code Provisions and Rules, but the court ultimately limited sanctions to the monetary variety, declining to disbar or suspend Braun despite multiple instances of ethical violations and disciplinary reviews.[98] Mr. Le's counsel argued that, in this case, should Mr. Le face sanctions, they should be limited to monetary sanctions because it would be inappropriate to suspend or disbar Mr. Le (who, until now, has had a clean disciplinary record)—noting that in *In re Stomberg*, the court refused to disbar or suspend Braun, a repeat offender.[99] Mr. Bryant's reliance on *In re Stomberg* is misplaced. Whereas Braun faced sanctions for forging the debtor's signature on Schedules and the SOFA, ***but not on the Petition, which the debtor had voluntarily signed***, here, ***Mr. Le forged the Purported Debtor's signature on the Petition***, initiating a bankruptcy that never should have happened in the first place.[100] There is a ***notable difference*** between forging signatures on Schedules in a bankruptcy case that the debtor has already authorized and forging a signature on a Petition to file an unauthorized bankruptcy case. For that reason, this court chose not to follow *In re Stomberg* in considering the appropriate sanctions to impose on Mr. Le.

On the other hand, the court found Judge Jason Woodard's comprehensive, well-reasoned Memorandum Opinion in *In re Dobbs* instrumental in guiding the court's analysis here.[101] *In re Dobbs* involved facts that were similar to the facts now before this court—Judge Woodard ordered an attorney, Labovitz, to show cause why he should not be sanctioned after Labovitz ***forged a former client's signature on a Voluntary Chapter 13 Petition*** and filed a case in the Purported Debtor's name without notice to and without authorization from the Purported Debtor.[102] After conducting an evidentiary hearing and finding that Labovitz had intentionally violated many of the same provisions and rules that this court believes Mr. Le intentionally violated, Judge Woodard permanently disbarred Labovitz from the practice of law in the Bankruptcy Court for the Northern District of Mississippi.[103] And while the court does not believe that Mr. Le should be permanently disbarred because his conduct does not rise to the level of Labovitz's, the court does believe suspension is appropriate, in addition to monetary ***356** sanctions and court-ordered ethics training.

2. Indefinite Suspension, Disgorgement of Fees, and Ethics CLE are Appropriate.

After hearing Mr. Le's contrite testimony, it is clear to the court that he had some well-meaning intentions: Mr. Le sought to help Mr. Santos and he never wished to hurt Mrs. Ramos. But the many Rules and Bankruptcy Code Provisions that Mr. Le shirked were put into place to protect lawyers,

their clients, and innocent third parties alike. By failing to adhere to those rules, Mr. Le helped perpetuate a financial cataclysm in the life of Mrs. Ramos.[104]

[27] The court expects Mr. Le—and, indeed, ***all attorneys***—to know the rather obvious truism that ***forging a debtor's signature and presenting it to the court as if it were an authentic signature is never reasonable, under any circumstances***. The Bankruptcy Clerk's records show that Mr. Le has filed 120 bankruptcy cases since 2010, a year after he was licensed to practice law in Texas, and that he currently has nine active bankruptcy cases in the Northern District of Texas. Mr. Le is not an inexperienced bankruptcy practitioner. On the contrary, he is highly experienced. He should have appreciated the risk he accepted when he decided to file a Bankruptcy Petition using the social security number of somebody he had never met. Unfortunately for everyone, the risk materialized, and now Mr. Le must face the consequences. The court must be vigilant in protecting innocent people like Mrs. Ramos from what amounts to identity theft in bankruptcy. Sanctioning the lawyers who facilitate it, regardless of their alleged well-meaning intentions, is one of the only tools the court has at its disposal to prevent this kind of reckless behavior from reoccurring. Accordingly, for the foregoing reasons, it is

ORDERED, ADJUDGED and **DECREED** that Steve Le is hereby **SUSPENDED FROM THE PRACTICE OF LAW** in the United States Bankruptcy Court for the Northern District of Texas effective **March 17, 2020**, at which time the Clerk of the Bankruptcy Court is directed to terminate Mr. Le's CM/ECF privileges. Within seven (7) days of the date of entry of this Order, Mr. Le shall give notice to each of his clients with cases or adversary proceedings pending in this court of his inability to act as an attorney in the bankruptcy court. The notice shall advise his clients to promptly substitute another attorney in his place, otherwise they will be proceeding *pro se*. Mr. Le shall do everything within his power to facilitate the transition of his live cases to new counsel, including, but not limited to, transmission of electronic and paper documents, or face additional sanctions. The Bankruptcy Clerk is further directed to provide notice of Mr. Le's inability to practice law in this court to all parties listed on the matrices for any pending cases and adversary proceedings in which Mr. Le is an attorney of record. Mr. Le may petition the Chief Judge of the Bankruptcy Court for the Northern District of Texas for reinstatement after a period of **TWO YEARS** from the entry date of this Order, at which time the presiding Chief Judge may conduct a hearing to consider reinstatement. Notice of that hearing will be provided to the United States Trustee, the Chapter 13 Trustee, and to such other parties as the court deems appropriate. It is further

***357 ORDERED, ADJUDGED** and **DECREED** that Steve Le is hereby **PROHIBITED** from filing any new bankruptcy cases in this court effective immediately upon entry of this Order. Additionally, because of the ethical violations Mr. Le committed, the court believed he requires additional continuing legal education. Thus, it is further

ORDERED, ADJUDGED and **DECREED** that Steve Le shall, within the next 12 months, attend 15 hours of ethics continuing legal education, in addition to the standard requirements imposed by the State of Texas. Mr. Le shall provide proof of such attendance to the court *in camera* no later than **March 17, 2021**. Finally, it is further

ORDERED, ADJUDGED and **DECREED** that Steve Le shall pay $3,500 to Cynthia Ramos, the victim in this case, representing the disgorgement of the fee Mr. Le received from Mr. Santos. This sanction shall be paid in full to Mrs. Ramos within thirty (30) days of the entry of this Order. This sanction is not punitive but is the appropriate measure to deter Mr. Le and other attorneys that practice before this court from repeating such disturbing, reckless conduct in the future.

C. Sanctions to be Imposed on Mr. Santos: Ten-Year Bar on Filing Bankruptcy; Criminal Referral to the United States Attorney.

[28] **[29]** After considering all the evidence, the court found that Gabriel Santos not only abused the bankruptcy system but also manipulated Steve Le into assisting Mr. Santos in what appears to be a scheme to commit bankruptcy fraud and identity theft against his ex-wife, Cynthia Ramos. Bankruptcy fraud is a crime:

> A person who, having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or attempting to do so—
>
> (1) files a petition under title 11, including a fraudulent involuntary petition under section 303 of such title;
>
> (2) files a document in a proceeding under title 11; or
>
> (3) makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11, at any time before or after the filing of the petition,

> or in relation to a proceeding falsely asserted to be pending under such title,
>
> shall be fined under this title, imprisoned not more than 5 years, or both.[105]

[30] It is likewise a crime to commit perjury in a Title 11 proceeding and falsify documents in contemplation of filing a bankruptcy case under Title 11:

> A person who—
>
> ...
>
> (2) knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11;
>
> (3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11; [or]
>
> ...
>
> (8) after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently ... falsifies, or makes a false entry in any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor ...
>
> ***358** shall be fined under this title, imprisoned not more than 5 years, or both.[106]

Therefore, in light of Mr. Santos's apparent scheme to defraud the court, Mr. Le, Mrs. Ramos, and the mortgagee of his house, and in light of Mr. Santos's false oaths or representations in a proceeding under Title 11, the court will be making a criminal referral to the United States Attorney. Finally, apart from the criminal referral, it is also hereby

ORDERED, ADJUDGED and **DECREED** that Gabriel Santos shall be prohibited from filing bankruptcy for a period of ten years from the entry date of this Order.

All Citations

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Footnotes

1 "Cynthia Santos" is the name listed as the debtor in the Voluntary Chapter 13 Petition and other documents filed with the court. Cynthia Santos is the former name of Cynthia Ramos, the victim of an apparent bankruptcy fraud in this case. As described herein, Mrs. Ramos never intended to file bankruptcy, so she is not a debtor—she is a "Purported Debtor." Furthermore, out of respect for Mrs. Ramos, this court will refer to her in this Memorandum Opinion and Order either by her actual name, Mrs. Ramos, or as the "Purported Debtor," but not by the former name that was forged on the documents filed with the court.

2 For reasons that are immaterial to this court's analysis, Mrs. Ramos's name was still on the bank note for Mr. Santos's house, despite their having divorced more than a decade earlier in 2009.

3 Case No. 19-33256-sgj13, Docket No. 1. Herein, docket entries will be cited as "ECF [#]" because all docket entries relate to the same bankruptcy case and are, at this point, accessible through the CM/ECF system.

4 ECF 2.

5 ECF 3.

6 ECF 9.

7 ECF 10.

8 ECF 11.

9 ECF 9. Herein, the court will refer to the hearing held on November 18, 2019 as the "November 18 hearing."

10 Neither Mrs. Ramos nor Mr. Santos were represented by counsel at the November 18 hearing. However, by this point, Mr. Le had already taken it upon himself to try and undo the unauthorized bankruptcy in order to help Mrs. Ramos and Mrs. Ramos was aware of Mr. Le's intent.

11 *See In re Dick*, Case No. 05-80347-BJH13, 2006 WL 6544157, at *5 n. 3 (Bankr. N.D. Tex. May 19, 2006) ("The Court is also hesitant to order expunction, as its practical effect would be to destroy evidence of conduct which may be criminal.").

12 ECF 25.

13 The court reserved jurisdiction post-dismissal to address the issues raised in the Chapter 13 Trustee's Motion.

14 ECF 23. Herein, the court will refer to the hearing held on February 3, 2020 as the "February 3 hearing."

15 The court recognizes that Mr. Le never challenged whether notice of the show cause hearing was proper against him. In fact, Mr. Le attended both the November 18 hearing and the February 3 hearing—both times represented by separate counsel. Thus, Mr. Le has been afforded complete due process under the law in this matter.

16 Under Fifth Circuit law, a court may take judicial notice of (a) prior court proceedings as a matter of public record; (b) its own records; (c) related proceedings and records in cases before that court; and (d) all documents filed with the court in the bankruptcy case. *See In re Deepwater Horizon*, 934 F.3d 434, 440 (5th Cir. 2019); *State of Fla. Bd. of Trustees of Internal Imp. Tr. Fund v. Charley Toppino & Sons, Inc.*, 514 F.2d 700, 704 (5th Cir. 1975); *Sherman v. Greenstone Farm Credit Services, ACA*, Case No. 3:11-CV-0710-N, 2011 WL 2038573, at *3 n. 6 (N.D. Tex. May 24, 2011); *In re Texas Rangers Baseball Partners*, 521 B.R. 134, 142 n. 13 (Bankr. N.D. Tex. 2014).

17 *See* Case No. 19-30455-HDH13, Docket No. 27. The 180-day bar prevented Mr. Santos from refiling bankruptcy until late-October—well past the October 1 foreclosure date.

18 ECF 31 at 7:15-16 (emphasis added). The court interrupted Mr. Le's testimony to clarify whether Mr. Santos truly said "ex-wife" and when exactly Mr. Le learned that Mrs. Ramos was no longer married to Mr. Santos, but Mr. Le could not provide a straightforward answer, instead asserting that he was unsure of their marital status because Mr. Santos referred to Mrs. Ramos as his wife in text messages. *See id.* at 7:17-8:13. To the contrary, Mr. Santos testified that he had always referred to Cynthia Ramos as his ex-wife when speaking with Mr. Le. *Id.* at 16:19-25.

19 *Id.* at 9:8-13.

20 *Id.*

21 *See id.* at 9:14-11:7. The two emails were sent from the same email address: cynthiasantos1029@yahoo.com. Copies of the two emails were marked as Exhibits 1 and 2, respectively, and admitted into evidence at the November 18 hearing. The Chapter 13 Trustee also presented the emails as Exhibits 2 and 3 in its argument at the February 3 hearing.

22 *See* Exhibit 2 (emphasis added), Chapter 13 Trustee's Witness and Exhibit List for the February 3, 2020 hearing.

23 *See* ECF 31 at 11:9-23.

24 *Id.*

25 *See Id.* at 11:24-12:7.

26 Audio Recording, 2/3/2020 Hearing at 10:28:17 a.m.

27 Audio Recording, 2/3/2020 Hearing at 10:29:23 a.m.

28 Audio Recording, 2/3/2020 Hearing at 10:54:00 a.m.; ECF 1 at 41 (*i.e.* the Voluntary Petition, which was marked as Chapter 13 Trustee's Exhibit 1 at the February 3 hearing).

29 Audio Recording, 2/3/2020 Hearing at 10:29:55 a.m.; ECF 1 at 1. Mrs. Ramos's social security number is also included on the Verification of Mailing List form attached to the Petition. ECF 1 at 42.

30 Audio Recording, 2/3/2020 Hearing at 10:30:12 a.m.; ECF 1 at 2.

31 Audio Recording, 2/3/2020 Hearing at 10:31:30 a.m.; ECF 1 at 4.

32 Audio Recording, 2/3/2020 Hearing at 10:33:17 a.m.; ECF 1 at 6.

33 Audio Recording, 2/3/2020 Hearing at 10:33:42 a.m.; ECF 1 at 7.

34 Audio Recording, 2/3/2020 Hearing at 10:35:50 a.m.; ECF 1 at 11.

35 Audio Recording, 2/3/2020 Hearing at 10:36:38 a.m.; ECF 1 at 11.

36 Audio Recording, 2/3/2020 Hearing at 10:37:28 a.m.; ECF 1 at 12.

37 Audio Recording, 2/3/2020 Hearing at 10:40:50 a.m.; *see also* Fed. R. Bankr. P. 1007(c).

38 Audio Recording, 2/3/2020 Hearing at 10:42:49 a.m.; ECF 1 at 21.

39 Audio Recording, 2/3/2020 Hearing at 10:43:35 a.m.; ECF 1 at 22-23.

40 Audio Recording, 2/3/2020 Hearing at 10:44:11 a.m.; ECF 1 at 25.

41 Audio Recording, 2/3/2020 Hearing at 10:46:00 a.m.; ECF 1 at 26.

42 Audio Recording, 2/3/2020 Hearing at 10:46:29 a.m.; ECF 1 at 27.

43 Audio Recording, 2/3/2020 Hearing at 10:50:25 a.m.; ECF 1 at 28.

44 Audio Recording, 2/3/2020 Hearing at 10:52:42 a.m.; ECF 1 at 33.

45 Audio Recording, 2/3/2020 Hearing at 10:53:40 a.m.; ECF 1 at 36.

46 Audio Recording, 2/3/2020 Hearing at 10:54:51 a.m.; ECF 1 at 42-43.

47 Audio Recording, 2/3/2020 Hearing at 10:55:45 a.m.; *see also* Fed. R. Bankr. P. 1007(c).

48 *See* ECF 31 at 8:5-12.

49 *See, e.g.*, *id.* at 12:5-7.

50 State Bar of Texas, Profile of Attorney Steve Le (License No. 24067723), https://www.texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&template=/Customsource/MemberDirectory/MemberDirectoryDetail.cfm&ContactID=307541, accessed 2/6/2020 at 4:12 p.m.

51 ECF 31 at 15:13-17:10.

52 *See* discussion *supra* Section III.B. Mr. Le testified that he decided to file bankruptcy at least partially because of these phony emails, so he must have known Gabriel Santos was no longer married to the Purported Debtor before he filed the Petition. Regardless, the court finds that nearly every other statement Mr. Santos made at the November 18 hearing to be a lie and in direct contradiction to the facts of this case and the testimonies of Mrs. Ramos and Mr. Le.

53 It is well settled that the court may draw an adverse inference from Mr. Santos's refusal to testify in response to each line of questioning. *See e.g.*, *In re Binnion*, Case No. 13-30234, 2014 WL 1047858, at *9 (Bankr. S.D. Tex. Mar. 18, 2014) (citing *Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976)).

54 *See* discussion *infra* Section IV.C.

55 ECF 31 at 26:13-25. *Id.* at 25:10-27:15.

56 *See id.* at 30:20-31:1.

57 *Id.* at 31:2-16.

58 *Id.* at 31:17-32:5.

59 *Id.* at 25:23-26:8.

60 *Id.* at 32:7-25.

61 *Id.* at 33:11-2

62 *See In re Dobbs*, 535 B.R. 675, 683 (Bankr. N.D. Miss. 2015).

63 *See id.* (citing 11 U.S.C. § 101(12A)).

64 11 U.S.C. § 526(a)(2) (West 2019).

65 *Id.* § 527(a)(2). As discussed in this Memorandum Opinion *supra* Section IV.A.1., attorneys fall within the term "debt relief agency" as it is defined in the Bankruptcy Code.

66 *See id.* § 527(b).

67 *See id.* § 527(c).

68 *In re T.H.*, 529 B.R. 112, 139 (Bankr. E.D. Va. 2015).

69 *See* 11 U.S.C. § 528 (West 2019).

70 *See id.* §§ 528(a)(1)(A), (B).

71 *See id.* § 528(b).

72 *See* discussion *supra* Section III.B.; *see also* ECF 31 at 12:3-7.

73 Fed. R. Bankr. P. 1008. The cross-referenced declaration found in 28 U.S.C. § 1746. Unsworn declarations under penalty of perjury is as follows:

> Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:
>
> > (1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)".
> >
> > (2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)".
>
> 28 U.S.C. § 1746 (West 2019).

74 *See* *In re Dobbs*, 535 B.R. at 685-86.

75 *See* *id.* (citing *Briggs v. LaBarge (In re Phillips)*, 317 B.R. 518, 523 (8th Cir. BAP 2004)).

76 *See* *id.* (citing *In re Withrow*, 405 B.R. 505, 512 (1st Cir. BAP 2009)).

77 Fed. R. Bankr. P. 5005(a)(2).

78 *See* *In re Dobbs*, 535 B.R. at 686 (emphasis added) (quoting *In re Wenk*, 296 B.R. 719, 724 (Bankr. E.D. Va. 2002)).

79 *See* Fed. R. Bankr. P. 9011; *see also* *In re Dobbs*, 535 B.R. at 686-88 (discussing violations of Fed. R. Bankr. P. 9011).

80 *In re Dobbs*, 535 B.R. at 686.

81 Fed. R. Bankr. P. 9011(c).

82 *See* *In re Dobbs*, 535 B.R. at 686-87 (quoting *In re Taylor*, 655 F.3d 274, 282 (3d Cir. 2011); *Bus. Guides, Inc. v. Chromatic Commc'ns Enter., Inc.*, 498 U.S. 533, 551, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991)).

83 As noted by Judge Woodard, "only the prospective debtor may file a bankruptcy petition on his or her own behalf. Pursuant to 11 U.S.C. § 301(a), a voluntary case 'is commenced by the filing with the bankruptcy court of a petition under such chapter ***by*** an entity that may be a debtor under such chapter' ... By their very nature, ***voluntary*** bankruptcy cases must be undertaken on the debtor's ***own volition***." *In re Dobbs*, 535 B.R. at 687 (emphasis added).

84 Fed. R. Bankr. P. 1007(c).

85 "[T]he fact that a client's home is scheduled for imminent foreclosure does not excuse the reasonable inquiry requirement of Rule 9011(b)." *In re Dobbs*, 535 B.R. at 688 (quoting *In re Tran*, No. 14-11837, 2014 WL 5421575, at *7 (Bankr. E.D. Va. Oct. 17, 2014)); *see also* *In re T.H.*, 529 B.R. at 128 ("The Court does not consider even the most exigent of circumstances as a justification for an attorney to disregard or ignore the duties of care and due diligence ...").

86 "There can be no 'inquiry reasonable under the circumstances' where the attorney has not met with the client prior to filing the petition." *In re Dobbs*, 535 B.R. at 688 (quoting *In re Tran*, 2014 WL 5421575, at *7).

87 *Id.* (citing Fed. R. Bankr. P. 9011(b)(3)); *see also* *In re Phillips*, 317 B.R. at 524 (holding that "the petition [the attorney] filed did not have the debtor's original signature and therefore lacked a verification of the facts. With no verification, the factual contentions have no evidentiary support and thus the petition violate[d] Rule 9011(b)(3).").

88 *In re Dobbs*, 535 B.R. at 689 (citing *In re Zuniga*, 332 B.R. 760, 772 (Bankr. S.D. Tex. 2005)).

89 TX ST RPC Rule 1.01(b)(2).

90 TX ST RPC Rule 1.02(c), (d) and (e).

91 TX ST RPC Rule 1.03(b).

92 TX ST RPC Rule 3.03(a)(1), (2), (5) and Rule 3.03(b).

93 *See* Discussion *supra* Section III.B.

94 N.D. Tex. L.B.R. 2090-2(b)(1)-(3).

95 N.D. Tex. L.B.R. 2090-2(d).

96 487 B.R. 775 (Bankr. S.D. Tex. 2013).

97 *Id.* at 780.

98 *See id.* at 822-24.

99 *See id.*; *see also* Audio Recording, 2/3/2020 Hearing at 12:22:00: p.m.

100 *See In re Stomberg*, 487 B.R. at 784 ("On December 23, 2010, the Debtor went to the Firm's office and met with Braun ... One purpose of the meeting was for the Debtor to sign the Chapter 11 petition (the Petition), which he in fact did ... Then, Braun electronically filed the 'barebones' Petition, ***which both he and the Debtor had signed***, initiating the Debtor's Chapter 11 case. [Doc. No. 1]. By signing the Petition as counsel for the Debtor, Braun became the attorney-in-charge of the Debtor's case.").

101 535 B.R. 675 (Bankr. N.D. Miss. 2015).

102 *Id.* at 678-79.

103 *Id.* at 699

104 "The road to hell is paved with good intentions." Henry G. Bohn, A Handbook of Proverbs, 514 (London, 1st ed. 1855).

105 18 U.S.C. § 157 (West 2019).

106 18 U.S.C. § 152 (West 2019).

970 F.3d 1255
United States Court of Appeals, Tenth Circuit.

IN RE: David A. STEWART; Terry P. Stewart, Debtors.
SE Property Holdings, LLC, Appellant,
v.
David A. Stewart; Terry P. Stewart; Douglas Gould, Chapter 7 Trustee; Ruston C. Welch; Welch Law Firm, P.C.; Kirkpatrick Bank, Appellees.

Nos. 19-6103 & 19-6104
|
FILED August 14, 2020

Synopsis

Background: Creditor filed motion for disgorgement of compensation paid to Chapter 7 debtors' counsel, based on his violation of fee disclosure obligations. The United States Bankruptcy Court for the Western District of Oklahoma, Court, Janice D. Loyd, J., 583 B.R. 775, ordered partial disgorgement, but not of all compensation paid, and denied creditor's motion to alter or amend, and creditor appealed. The Bankruptcy Appellate Panel, Nos. WO-18-068 and WO-18-079, Marker, J., sitting by designation. 600 B.R. 425, affirmed. Creditor again appealed.

Holdings: The Court of Appeals, Hartz, Circuit Judge, held that:

[1] while full disgorgement of attorney's entire fee is not always the appropriate sanction for debtor's attorney's violation fee disclosure obligations, it should be the default sanction, and there must be sound reasons for anything less, and

[2] bankruptcy court abused its discretion when, as sanction for Chapter 7 debtor's attorney's egregious violations of his fee disclosure obligations, it ordered disgorgement of only a small fraction of attorney's fee.

Reversed and remanded.

West Headnotes (13)

[1] **Bankruptcy** Necessity of Appointment or Approval

Chapter 7 debtor's attorney can be paid out of the bankruptcy estate only if first employed by the trustee and approved by the bankruptcy court.

[2] **Bankruptcy** Disclosure requirements

Obligation of debtor's attorney to file with the court a statement of all compensation received, or to be received, in connection with the bankruptcy is a continuing one, and attorneys are required to submit supplemental statements in timely fashion as to any payment or agreement not previously disclosed. 11 U.S.C.A. § 329(a); Fed. R. Bankr. P. 2016(b).

1 Cases that cite this headnote

[3] **Bankruptcy** Disclosure requirements

Fee disclosure requirements enable bankruptcy judges to perform their core and traditional role of overseeing lawyers who represent bankrupt debtors. 11 U.S.C.A. § 329(a); Fed. R. Bankr. P. 2016(b).

1 Cases that cite this headnote

[4] **Bankruptcy** Scope of review in general

On appeal from decision of the Bankruptcy Appellate Panel affirming bankruptcy court's decision, the Court of Appeals reviews only the bankruptcy court's decision.

3 Cases that cite this headnote

[5] **Bankruptcy** Discretion

Court of Appeals reviews bankruptcy court's imposition of an attorney-fee sanction, whether rooted in statute, rule, or court's inherent authority, only for abuse of discretion.

[6] **Bankruptcy** Discretion

Bankruptcy court abuses its discretion when it: (1) fails to exercise meaningful discretion, such as acting arbitrarily or not at all; (2) commits an error of law, such as applying an incorrect legal standard or misapplying the correct legal standard; or (3) relies on clearly erroneous factual findings.

2 Cases that cite this headnote

[7] **Bankruptcy** Disclosure requirements

Duty of disclosure owed by debtor's attorney is a fiduciary one. 11 U.S.C.A. § 329(a); Fed. R. Bankr. P. 2016(b).

1 Cases that cite this headnote

[8] **Bankruptcy** Disclosure requirements

Sanctions imposed on debtors' attorneys for violating their fee disclosure obligations are harsh, going far beyond the need to compensate for the damage done or even to deter the specific offender. 11 U.S.C.A. § 329(a); Fed. R. Bankr. P. 2016(b).

3 Cases that cite this headnote

[9] **Bankruptcy** Disclosure requirements

Sanctions imposed on debtors' attorneys for violating their fee disclosure obligations must sting hard: bankruptcy system functions on the premise that the overwhelming majority of those who utilize it are honest, that those who are dishonest are not likely to be caught, and that the penalties for dishonesty are severe. 11 U.S.C.A. § 329(a); Fed. R. Bankr. P. 2016(b).

[10] **Bankruptcy** Disclosure requirements

Use of the standard for imposing Rule 11 sanctions, i.e., the least-possible-sanction standard, as standard for sanctioning a debtor's attorney for violating his or her fee disclosure obligations would not be effective in assuring compliance; to put the matter another way, the least possible sanction to assure compliance by other lawyers is generally disgorgement of attorney's entire fee. 11 U.S.C.A. § 329(a); Fed. R. Civ. P. 11; Fed. R. Bankr. P. 2016(b).

[11] **Bankruptcy** Disclosure requirements

While full disgorgement of attorney's entire fee is not always the appropriate sanction for debtor's attorney's violation fee disclosure obligations, it should be the default sanction, and there must be sound reasons for anything less. 11 U.S.C.A. § 329(a); Fed. R. Bankr. P. 2016(b).

37 Cases that cite this headnote

[12] **Bankruptcy** Disclosure requirements

To justify anything less than full disgorgement as sanction for debtor's attorney's violation fee disclosure obligations, any potential mitigating circumstances must be compelling ones. 11 U.S.C.A. § 329(a); Fed. R. Bankr. P. 2016(b).

2 Cases that cite this headnote

[13] **Bankruptcy** Disclosure requirements

Bankruptcy court abused its discretion when, as sanction for Chapter 7 debtor's attorney's egregious violations of his fee disclosure obligations in disclosing his fee compensation agreement with debtors more than two years after he was required to do so, and in disclosing the $350,000 fee that he was paid one year late, only when ordered to do so by bankruptcy court, the court ordered disgorgement of a mere $25,000 of attorney's fee; bankruptcy court's conclusory statements about attorney's lack of experience with bankruptcy system, without examining the source of the fee payments, was insufficient to justify its departure from default rule of full disgorgement of entire fee. 11 U.S.C.A. § 329(a); Fed. R. Bankr. P. 2016(b).

8 Cases that cite this headnote

***1257 Appeals from the Bankruptcy Appellate Panel (BAP Nos. WO-18-068 & WO-18-079)**

Attorneys and Law Firms

Richard M. Gaal, McDowell Knight Roedder & Sledge, LLC, Mobile, Alabama (S. Fraser Reid, III, McDowell Knight Roedder & Sledge, LLC, Mobile, Alabama, Mark B. Toffoli, The Gooding Law Firm, Oklahoma City, Oklahoma, with him on the briefs), for Appellant.

David Cheek, Cheek & Falcone, PLLC, Oklahoma City, Oklahoma (Ruston C. Welch, Welch Law Firm, P.C., Oklahoma City, Oklahoma, with him on the brief) for Appellees.

Before HARTZ, BALDOCK, and EID, Circuit Judges.

Opinion

HARTZ, Circuit Judge.

Attorney Ruston Welch received $348,404.41 in fees for representing David and Terry Stewart in their Chapter 7 bankruptcy proceedings. This appeal arises out of his failure to disclose his fee arrangements and payments, as required by 11 U.S.C. § 329(a) and Federal Rule of Bankruptcy Procedure 2016(b), until ordered to do so by the bankruptcy court more than two years after he should have disclosed his fee agreement and more than a year after he should have disclosed the payments. For these violations the bankruptcy court sanctioned Mr. Welch by requiring him to pay $25,000 to the bankruptcy estate.

The bankruptcy appellate panel (BAP) affirmed the sanction after the Stewarts' largest creditor, SE Property Holdings (SEPH), which had initiated the proceedings as an involuntary bankruptcy, challenged the sanction as so inadequate as to ***1258** constitute an abuse of discretion. SEPH appeals that decision. Exercising jurisdiction under 28 U.S.C. § 158(d), we agree with SEPH and reverse and remand for further consideration. The presumptive sanction for a violation of § 329(a) is forfeiture of the entire fee. For good reason the bankruptcy court can impose a lesser sanction. But the court thus far has not provided good reason. It assumed facts that were not in evidence and, most importantly, apparently assumed good faith without examining the possible motives for nondisclosure.

I. ATTORNEY DISCLOSURE REQUIREMENTS UNDER BANKRUPTCY LAW

[1] **[2]** Attorneys for debtors perform an essential role in bankruptcy proceedings. But when it comes to compensation, they play second fiddle to creditors. In a Chapter 7 proceeding, such as the one before us, the attorney can be paid out of the bankruptcy estate only if first employed by the trustee and approved by the bankruptcy court. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 538–39, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004). As a check on debtor attorneys, the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure require them to promptly disclose their fee arrangements and all payments for their bankruptcy services. Section 329(a) of the Bankruptcy Code states:

> 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.

Rule 2016(b), which implements § 329, states:

> 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 [*see* 11 U.S.C. § 303(h) (requirements that must be satisfied before issuance of order for relief after filing of a petition for involuntary bankruptcy)], 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.

These provisions "require[ ] every attorney representing a debtor in bankruptcy to file with the court [within 14 days of the order for relief] a statement of all compensation received during the preceding year, or to be received, in connection with the bankruptcy." *Bethea v. Robert J. Adams & Assocs.*, 352 F.3d 1125, 1127 (7th Cir. 2003). The disclosure obligation is a continuing one. Rule 2016(b) requires attorneys to submit supplemental statements "within 14 days after any payment or agreement not previously disclosed."

[3] The disclosure requirements enable bankruptcy judges to perform their core and traditional role of overseeing lawyers who represent bankrupt debtors. *See* 3 Richard Levin & Henry J. Sommer, *Collier on Bankruptcy* ¶ 329.LH, at 329–34 (16th ed. 2020) ("Under prior law, as under ***1259** the modern Bankruptcy Code, compensation of the attorney for the debtor was scrutinized more closely than the compensation of other officers and professional persons."). The oversight is justified by two significant concerns. Debtors can be exploited by overreaching lawyers who overcharge for their services. And creditors can be denied their proper share of the bankruptcy estate if debtors (particularly those who believe they will net nothing from the nonexempt assets of the estate) direct money to their attorneys in preference to other creditors. *See Bethea*, 352 F.3d at 1127 (when facing bankruptcy, "[d]ebtors may not care who gets what money remains (if the attorney gets more, other creditors get less), and, when clients do not haggle over price, some attorneys will be tempted to divert the funds to themselves by charging excessive fees"); *In re Redding*, 263 B.R. 874, 878 (B.A.P. 8th Cir.) (§ 329 "reflects Congress' concern that payments to attorneys in the bankruptcy context might be the result of evasion of creditor protections and provide the opportunity for overreaching by attorneys"), *revised on rehearing on other grounds*, 265 B.R. 601 (B.A.P. 8th Cir. 2001); H.R. Rep. No. 95–595, at 329 (1977) (Congress adopted § 329 because "[p]ayments 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"); S. Rep. No. 95–989, at 39 (1977) (same). The required disclosures are necessary for that oversight. *See Bethea*, 352 F.3d at 1127 (disclosures "enable[ ] the court to determine whether the lawyer has received a preferential transfer"); *Law Offs. of Nicholas A. Franke v. Tiffany (In re Lewis)*, 113 F.3d 1040, 1045 (9th Cir. 1997) (court must be able to rely on attorney's disclosures).

II. THE RELATIONSHIP BETWEEN SEPH AND THE STEWARTS

SEPH has complained that Mr. Welch, through arrangements not timely disclosed to the bankruptcy court, has been paid large sums that should have gone to SEPH and other creditors. To understand this issue, we must review the relationship between SEPH and the Stewarts.

SEPH is the largest creditor in the Stewarts' bankruptcy, with a claim exceeding $20 million. It has loaned millions of dollars to businesses that were controlled and largely owned by the Stewarts, in particular Neverve, LLC, in which David Stewart owned at least a 50% interest. The Stewarts personally signed or guaranteed the loans.

As the maturity date of a $16 million note approached, SEPH agreed to extend it in return for additional security. The security was the assignment by the Stewarts and companies they controlled of an interest in claims against British Petroleum (BP) arising out of the disastrous 2010 "Deepwater Horizon" oil spill in the Gulf of Mexico. According to SEPH, the assignment document gave SEPH a security interest in the BP claims of all entities that David Stewart owned directly or indirectly.

The new maturity date came but the note was not paid. SEPH therefore filed on September 30, 2014, a petition in the United States Bankruptcy Court for the Southern District of Alabama to place the Stewarts in involuntary Chapter 7 bankruptcy. On March 18, 2015, the court ordered entry of orders for relief, and it entered an order on April 24 for joint administration of the cases for the two Stewarts.

The case was moved on June 12, 2015, to the United States Bankruptcy Court for ***1260** the Western District of Oklahoma. Mr. Welch, who had not entered an appearance in Alabama, entered his appearance as attorney for the Stewarts in the Oklahoma proceedings on June 17.

III. WELCH'S FEE ARRANGEMENT AND PAYMENTS

On the same day that Mr. Welch entered an appearance, he executed a representation agreement with the Stewarts. The engagement included general representation, debt counseling, and corporate-structure and bankruptcy representation to the Stewarts and certain named business affiliates. Also at that time, the named affiliates, including Neverve, guaranteed Mr. Welch's legal fees in connection with the bankruptcy representation.

The BP claims were settled in spring 2016. By that time Mr. Welch had obtained an interest in the settlement proceeds. Under a fee-sharing agreement executed on April 19, 2016, the total attorney fee was 40% of the proceeds; that amount was split three ways with 52% of it going to the chief attorney, 32% to Mr. Welch, and 16% to the person who referred the matter to the chief attorney. Mr. Welch's fee would therefore be about 13% of the amount recovered on the claims. There had been a previous attorney-compensation agreement governing the BP claims. But according to Mr. Welch, it could not be found; and the record apparently does

not show what the terms of that earlier agreement were, or even whether he was a party to it. To explain his receipt of a contingency fee, Mr. Welch told the bankruptcy court that he "advised and assisted the non-debtor claimants in providing substantiating documents to support [the chief attorney] in the settlement process and negotiated specific language to the settlement agreements." Aplt. App., Vol. 13 at 3305.

The settlement proceeds were disbursed in August 2016. All of Mr. Welch's $348,404.41 in fees in this case came out of proceeds that were wired to him. He received $144,591.85 under his contingency-fee contract, but he then credited all that toward what he was owed for his bankruptcy work. In his own words, this was "a matter of fairness and efficiency in [his] mind." *Id.* at 3198. The remaining $203,812.56 came out of the $275,572.27 in net-settlement proceeds for Neverve. Mr. Welch paid himself because of Neverve's guarantee of his fee.

Although 11 U.S.C. § 329 and Bankruptcy Rule 2016(b) require attorneys for debtors to disclose their fee arrangements and all payments for their bankruptcy services, Mr. Welch failed to do so until September 2017, more than two years after entering into the bankruptcy-fee arrangement and more than a year after being paid. His disclosure was not voluntary. The failure to disclose was pointed out by SEPH during proceedings on August 30, 2017, to determine whether the bankruptcy court would approve an agreement between the Trustee and the Stewarts signed in April. The agreement stated that the Trustee would abandon (thereby relinquishing to the Stewarts) all nonexempt property, including the Stewarts' membership interests in various limited liability companies, and the Stewarts would pay $750,000.

Before negotiations on the settlement agreement the Stewarts had argued that the Trustee should abandon those membership interests because they were valueless. In particular, on November 3, 2015, the Stewarts had moved in bankruptcy court to have the Trustee abandon their membership interests in three companies: Raven Resources, LLC, Oklamiss Investments, LLC, and Shimmering Sands Development Company, LLC, claiming that the three entities were in so much debt that they provided no value to the Stewarts' bankruptcy estate. *See* ***1261** 11 U.S.C. § 554(a) ("[T]he trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate."). At a hearing on the matter on January 20, 2016, Mr. Welch acknowledged that at least one of the entities, Shimmering Sands, had a $600,000 claim against BP and that "an attorney's contingency fee firm [had] agreed to try it" (he makes no mention that he was to receive any of that contingency fee). Aplt. App., Vol. 6 at 1516. But he downplayed the value of the claim, saying that it was "years from ever even being heard" and that they still would need to put on evidence and witnesses and the result was uncertain. *Id.* On March 18, however, Mr. Welch informed the Trustee that he had just learned that there was movement on the BP claims. On April 13 the bankruptcy court denied the motion to abandon, at least in part because of the possibility the estate could benefit from the BP claims.

This led to the settlement agreement between the Stewarts and the Trustee, and then the August 30, 2017 hearing on whether the court should approve it. It was when Mr. Welch stated at the hearing that he had paid himself out of the BP proceeds, that SEPH and the bankruptcy court began questioning Mr. Welch about his compensation arrangements. SEPH brought up that Mr. Welch had never filed his required disclosures, including anything regarding his compensation or representation agreement. Offering no explanation, Mr. Welch merely acknowledged his obligation to make disclosures. The bankruptcy court said that it did not understand why he had not turned over the Neverve BP claim proceeds to the Trustee, telling Mr. Welch that the Trustee "should be the one making these decisions, not you and not David Stewart." Aplt. App., Vol. 29 at 6568. It told Mr. Welch to immediately make his disclosures. He filed disclosures on September 14 and 20, 2017.

IV. BANKRUPTCY COURT PROCEEDINGS ON FAILURES TO DISCLOSE

In October 2017 SEPH filed a motion seeking disgorgement of Mr. Welch's fees and the denial of future compensation for violation of his disclosure obligations under § 329(a) and Rule 2016(b). SEPH cited precedent within (and outside of) the Tenth Circuit that such strong medicine was appropriate for violations like Mr. Welch's. SEPH also argued that it was entitled to the money received by Mr. Welch because it had a security interest in the Neverve funds or, alternatively, they were property of the estate. It accused Mr. Welch of "conceal[ing] the fact that he was in possession of assets that belonged to either the Estate or to SEPH and then [ ] convert[ing] those assets to pay himself legal fees." Aplt. App., Vol. 13 at 3105. SEPH also pointed out that Mr. Welch had never said that he failed to disclose "because of ignorance of the law or because of oversight." *Id.* at 3106.

To excuse his failure to disclose some of the payments, Mr. Welch argued that his contingency fees did not need to be disclosed because they were "earned for services not in connection with the bankruptcy case." *Id.* at 3194; *see* 11 U.S.C. § 329(a) (requiring reporting of compensation for services *in connection with* the bankruptcy case). He did not otherwise seek to justify his failures to disclose even after SEPH's accusations. Instead, he argued that he had not taken property of the estate to pay his fees. He also requested that the bankruptcy court consider the beneficial work he had done for the estate. In reply, SEPH again argued that Mr. Welch's payments were from estate property and that in any event his violations warranted full disgorgement and denial of his fees.

***1262** The bankruptcy court did not conduct a hearing on the motion for disgorgement. In its written order it found to be meritless Mr. Welch's argument that the contingency fee was not for services rendered "in connection with" the bankruptcy case because he applied the BP funds to his bankruptcy fees. It found Mr. Welch to be in clear violation of § 329(a) and Rule 2016(b). The bankruptcy court said it was "incredulous" that such an able and experienced bankruptcy practitioner as Mr. Welch would commit such misconduct. *In re Stewart*, 583 B.R. 775, 784 (Bankr. W.D. Okla. 2018). It lamented that the concealment of Mr. Welch's fees, in light of the lack of candor and veracity of the debtors,[1] generated even more suspicion and mistrust in the already contentious bankruptcy proceedings. And it doubted that Mr. Welch would ever have made the requisite disclosures without being ordered to do so. The bankruptcy court recognized that Mr. Welch's violations allowed it to order disgorgement of all his fees. But it did not choose that path.

Relying in part on a case involving sanctions against attorneys under Federal Rule of Civil Procedure 11, the bankruptcy court applied "the overriding principle in applying sanctions that 'the appropriate sanction should be the least severe sanction adequate to deter and punish' the offender and deter future violations of the rules." *Id.* at 786 (quoting *White v. Gen. Motors, Inc.*, 908 F.2d 675, 684 (10th Cir. 1990)). Also, the court agreed with Mr. Welch that his services had benefited the bankruptcy estate. Notably, it deviated from the parties' briefing to consider mitigating factors never raised by the parties:

- "[T]o this Court's knowledge, Welch has not been previously sanctioned."
- "It appears that he has not had much experience representing debtors in Chapter 7 in which court approval is not required for either employment or payment of counsel."
- "It may well be that Welch ... overlooked the attorney fee disclosure requirements imposed upon counsel in all chapters of the Bankruptcy Code."
- "The Court also believes that ordering disgorgement of all fees as sought by SEPH (or even a substantial portion of such fees) would be financially catastrophic to someone as Welch engaged in a largely solo practice."

Id. at 786–87. In addition, the court expressed its view that it lacked authority to require Mr. Welch to pay funds to the debtors' estate, which never had an interest in them, so it would have to order repayment to the entities that paid him and the entities would then likely simply repay him. The bankruptcy court ordered Mr. Welch to pay $25,000 to the Trustee for the benefit of the estate. It said that this disgorgement and the court's public chastisement of Mr. Welch would adequately deter him from future misconduct.

Unsatisfied with only a 7% reduction in Mr. Welch's fee, SEPH moved to alter or amend the bankruptcy court's order. It argued that the bankruptcy court's sua sponte consideration of mitigating circumstances lacked an evidentiary basis in the record because the parties themselves had not anticipated that such mitigating circumstances would be applied. SEPH also ***1263** asked the bankruptcy court to clarify whether it concluded that the BP funds were property of the estate.

The bankruptcy court declined to alter the $25,000 sanction. It justified its sua sponte consideration of mitigating factors in light of the bankruptcy judge's common sense and 30 years of experience in bankruptcy private practice. The only specific argument it addressed on that score was its agreement that Mr. Welch never raised the issue of his ability to pay. But the bankruptcy court maintained that "it was appropriate for the Court to not require specific evidence as to Welch's net worth, but to exercise its significant discretion in determining the amount of sanctions ... subject to the principle that the sanction should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons." *In re Stewart*, Bankr. No. 15-12215-JDL, 2018 WL 3388925, at *3 (Bankr. W.D. Okla. July 10, 2018). Although the bankruptcy court had appeared to say in its initial order that the BP proceeds were not property of the estate, it clarified that it had not decided the issue.

SEPH appealed to the BAP, which affirmed the $25,000 sanction and the denial of SEPH's motion to alter or amend as within the bankruptcy court's discretion. *See SE Prop. Holdings, LLC v. Stewart (In re Stewart)*, 600 B.R. 425, 436 (B.A.P. 10th Cir. 2019). It stated that the sanction fell under the bankruptcy court's inherent power and should be exercised with restraint. Although it acknowledged that the Tenth Circuit had not previously recognized the mitigating factors relied on by the bankruptcy court, the BAP saw no problem with the bankruptcy court's considering them in deciding on its sanction. It did not address SEPH's argument that the bankruptcy court's sua sponte assessment of mitigating factors was without evidentiary basis.

V. ANALYSIS

[4] [5] [6] "Although this appeal is from a decision by the BAP, we review only the Bankruptcy Court's decision." *First Nat'l Bank of Durango v. Woods (In re Woods)*, 743 F.3d 689, 692 (10th Cir. 2014) (internal quotation marks omitted). "We review the imposition of an attorney-fee sanction, whether rooted in statute, rule, or a court's inherent authority, only for an abuse of discretion." *Farmer v. Banco Popular of N. Am.*, 791 F.3d 1246, 1256 (10th Cir. 2015); *see Jensen v. U.S. Tr. (In re Smitty's Truck Stop, Inc.)*, 210 B.R. 844, 846, 847–48 (B.A.P. 10th Cir. 1997) (reviewing sanctions for violations of § 329(a) and Rule 2016(b) for abuse of discretion). "A [bankruptcy] court abuses its discretion when it (1) fails to exercise meaningful discretion, such as acting arbitrarily or not at all, (2) commits an error of law, such as applying an incorrect legal standard or misapplying the correct legal standard, or (3) relies on clearly erroneous factual findings." *Farmer*, 791 F.3d at 1256.

A. Required Disclosures and Sanctions for Noncompliance

[7] It is undisputed that Mr. Welch violated the disclosure requirements of § 329(a) of the Bankruptcy Code and Bankruptcy Rule 2016(b). The attorney's duty of disclosure is that of a fiduciary. *See Mapother & Mapother, P.S.C. v. Cooper (In re Downs)*, 103 F.3d 472, 480 (6th Cir. 1996) ("Section 329 and Rule 2016 are fundamentally rooted in the fiduciary relationship between attorneys and the court. Thus, the fulfillment of the duties imposed under these provisions are crucial to the administration and disposition of proceedings before the bankruptcy courts."); ***1264** *Futuronics Corp. v. Arutt, Nachamie & Benjamin (In re Futuronics Corp.)*, 655 F.2d 463, 470 (2d Cir. 1981).

[8] Courts have found violations of the duty to be intolerable, and the sanctions imposed have been harsh, going far beyond the need to compensate for the damage done or even to deter the specific offender. For example, in *Futuronics* a law firm had failed to disclose a fee-sharing arrangement with another firm. *See id.* at 470. Such arrangements are prohibited by the bankruptcy statute "because of their natural tendency to cause an attorney to inflate his fees in order to offset the diminution in compensation caused by the agreement." *Id.*; *see* Fed. R. Bankr. P. 2016(b) (disclosure shall include "whether the attorney has shared or agreed to share the compensation with any other entity"). The law firm argued that "none of the evils that otherwise might be attributable to fee-sharing or their other acts manifested themselves" in the case because the bankruptcy proceedings were a great success, *Futuronics*, 655 F.2d at 471, with general creditors possibly receiving 100% payment, *see id.* at 466. Apparently recognizing this, the bankruptcy judge allowed the firm $850,000 in fees (including a $200,000 bonus!) after imposing a penalty of $190,000. *See id.* at 468. But because of the potential harm from the firm's conduct, the circuit court affirmed the district court's ruling that the bankruptcy court had abused its discretion by allowing any fees. *See id.* at 471. Perhaps the harshness of sanctions has had the desired deterrent effect, because there are relatively few reported cases of violations among the many, many bankruptcy proceedings that are filed.

Other circuits have similarly supported the full disgorgement or denial of fees for § 329(a) violations. *See Lewis*, 113 F.3d at 1045–46 (affirming bankruptcy court's exercise of its inherent authority over debtor attorney's compensation by completely denying attorney fees for failure to disclose under § 329(a)); *Downs*, 103 F.3d at 478 (reversing district court's affirmance of bankruptcy court's order because it failed to impose complete disgorgement and denial of fees, explaining that "[i]n cases involving an attorney's failure to disclose his fee arrangement under § 329 or Rule 2016, ... the courts have consistently denied all fees."); *Neben & Starrett, Inc. v. Chartwell Fin. Corp. (In re Park-Helena Corp.)*, 63 F.3d 877, 882 (9th Cir. 1995) ("Even a negligent or inadvertent failure to disclose fully relevant information may result in a denial of all requested fees.... The court's denial of all fees was within its discretion."). *See generally Redding*, 263 B.R. at 880 ("It is well settled that disgorgement of fees is an appropriate sanction for failure to comply with the disclosure requirements of section 329 and Rule 2016.

Indeed, the Courts of Appeal which have addressed this and similar disclosure issues are emphatic in affirming the grant of sanctions.").

[9] The view underlying the imposition of total disgorgement for failure to disclose has been well-expressed by Bankruptcy Judge Michael of this circuit:

> Ours is a system built upon the principle of full and candid disclosure. Debtors must truthfully and accurately list all of their assets and all of their liabilities. Counsel must honestly and completely disclose the full nature of their relationship with their clients. Creditors must honestly and correctly calculate and state their claims. It is these disclosures which allow the public to have confidence in the system, and hopefully to believe that bankruptcy laws exist to protect the "honest but unfortunate" debtor, that those creditors who receive funds receive only their just and proper share, and that those who represent debtors perform a service beyond satisfaction of their selfish avarice. Without ***1265** those beliefs, public confidence in the bankruptcy process, and perhaps far more, is placed at risk.
>
> The fragility of the system is found in the fact that many of the required disclosures are difficult if not impossible to police, at least in a cost-effective manner.

In re Lewis, 309 B.R. 597, 602–03 (Bankr. N.D. Okla. 2004). As a result, sanctions must sting hard: "The bankruptcy system functions on the premise that the overwhelming majority of those who utilize it are honest, that those who are dishonest are [not][2] likely to be caught, and that the penalties for dishonesty are severe." *Id.* at 603 n.16.

It should come as no surprise that this circuit, and, at least until now, the lower courts in this circuit, have also consistently affirmed the denial of all fees for § 329(a) violations. *See Turner v. Davis, Gillenwater & Lynch (In re Investment Bankers)*, 4 F.3d 1556, 1565 (10th Cir. 1993) ("[A]n attorney who fails to comply with the requirements of § 329 forfeits any right to receive compensation for services rendered on behalf of the debtor, ... and a court may order an attorney *sua sponte* to disgorge funds already paid to the attorney."); *Fairshter v. Stinky Love, Inc. (In re Lacy)*, 306 F. App'x 413, 419–20 (10th Cir. 2008) (unpublished) (following *Turner*); *Quiat v. Berger (In re Vann)*, 986 F.2d 1431, at *2 (10th Cir. 1993) (unpublished) (affirming full disgorgement of fees when attorney failed to comply with Rule 2016(b) and disclosure statements were wholly inadequate to determine reasonableness of fees); *Smitty's Truck Stop*, 210 B.R. at 847, 849 (affirming full disgorgement of $5000 retainer and denial of fees even though Chapter 11 attorney argued inadvertence and that the information was disclosed in part in debtor's statement of affairs because "a clear violation of § 329 and Rule 2016(b)[,] ...[e]ven if this failure was negligent or inadvertent, ... is sufficient, in itself, to deny all fees"); *In re Brown*, 371 B.R. 486, 492 n.17, 501–04 (Bankr. N.D. Okla. 2007) (ordering disgorgement of all $10,697.08 in payments because of failure to seek approval under § 330 and to disclose under § 329, but allowing $460 used toward court costs), *amended on other grounds by* 371 B.R. 505 (Bankr. N.D. Okla. 2007); *In re Bartmann*, 320 B.R. 725, 750 (Bankr. N.D. Okla. 2004) (ordering disgorgement of undisclosed compensation in the amount of $28,000 for violations of §§ 327 and 329, and Bankruptcy Rules 2014 and 2016; although ***1266** the Trustee argued that the attorney should disgorge all undisclosed fees and the attorney had been paid $38,000 prepetition, the Trustee sought disgorgement of only $28,000, perhaps because it was debatable whether some of the fees were paid in connection with the bankruptcy); *Lewis*, 309 B.R. at 606, 611 (ordering disgorgement of all $892 in one case and denial of all fees sought in another because of failure to disclose); *In re Woodward*, 229 B.R. 468, 475 (Bankr. N.D. Okla. 1999) (ordering disgorgement of $2500 fee because the "law is clear that the failure to properly disclose compensation received is in and of itself grounds for disgorgement").

[10] In short, the disgorgement sanction imposed on attorneys for violating their duties of disclosure to the bankruptcy court is of the nature of a sanction for breach of fiduciary duty. The case law under Federal Rule of Civil Procedure 11 invoked by the bankruptcy court and the BAP in this proceeding is inapposite. Unlike a failure to make disclosures required by § 329(a) and Bankruptcy Rule 2016(b), a violation of Rule 11—generally based on the lack of factual or legal support for a party's claims or defenses—is highly likely to see the light of day. When the great majority of violations are likely to be discovered, the need for harsh sanctions is greatly diminished. The lesson of the case law discussed above is that imposition of the least possible sanction as the standard for violations of § 329(a) and Bankruptcy Rule 2016(b) would not be effective in assuring compliance. Or, to put the matter another way, the least possible sanction to assure compliance by others is generally disgorgement of the entire fee.

A better analogy than Rule 11 is presented by *Eastman v. Union Pacific Railroad Co.*, 493 F.3d 1151, 1158–60 (10th Cir. 2007), where we held that a debtor who failed to disclose

to the bankruptcy court a cause of action that could be an asset of the estate was judicially estopped from bringing the claim after closure of the bankruptcy proceeding. Before filing for bankruptcy, the debtor had brought a personal-injury suit against nine defendants in federal court. *See id.* at 1153, 1159. He intentionally failed to disclose this litigation in his filings and testimony in bankruptcy court. *See id.* at 1153–55, 1158–59. About a year after the debtor obtained a discharge in his Chapter 7 bankruptcy, his personal-injury lawyer discovered that there had been bankruptcy proceedings and promptly informed the bankruptcy trustee. The trustee successfully moved to reopen the bankruptcy and was substituted as the real party in interest in the personal-injury action. *See id.* at 1154. The trustee settled with two of the personal-injury defendants, obtaining enough funds to pay all allowable creditor claims. *See id*. at 1155. The district court ruled that the debtor could not pursue the personal-injury claims, holding that he was judicially estopped because he had obtained his discharge in bankruptcy on the representation that he had no such asset. *See id.* at 1154–55 & n.3. We affirmed. In light of the seductive "motive to conceal legal claims and reap the financial rewards," "[t]he doctrine of judicial estoppel serves to offset such motive, inducing debtors to be completely truthful in their bankruptcy disclosures." *Id.* at 1159. We explained that it would not be enough to simply return the debtor to the position he would be in if he had made the proper disclosures:

> That [the debtor's] bankruptcy was reopened and his creditors were made whole once his omission became known is inconsequential. A discharge in bankruptcy is sufficient to establish a basis for judicial estoppel, even if the discharge is later vacated. Allowing [the debtor] to "back up" and benefit from the reopening of his bankruptcy only ***1267** after his omission had been exposed would suggest that a debtor should consider disclosing potential assets only if he is caught concealing them. This so-called remedy would only diminish the necessary incentive to provide the bankruptcy court with a truthful disclosure of the debtor's assets.

Id. at 1160 (original brackets, citations, and further internal quotation marks omitted). In our view, a similar approach is warranted when the debtor's attorney does not make the required disclosures regarding the terms of the representation and compensation received.

[11] This is not to say that full disgorgement is always appropriate for failure to disclose under § 329. But it should be the default sanction, and there must be sound reasons for anything less. For example, in a case where the attorney violated a different fiduciary duty (the attorney had a conflict of interest when he acquired a creditor's interest in the bankruptcy estate while providing legal services to the trustee) we said: "In exercising the discretion granted by the statute we think *the court should lean strongly toward denial of fees, and* if the past benefit to the wrongdoer fiduciary can be quantified, to require *disgorgement of compensation previously paid* that fiduciary even before the conflict arose. *This approach is most in keeping with common law fiduciary principles and best serves the deterrence purpose of the rule*." *Gray v. English*, 30 F.3d 1319, 1324 (10th Cir. 1994) (emphasis added). Nevertheless, we held that the bankruptcy court had not abused its discretion in declining to require disgorgement of fees earned before the conflict of interest arose or of fees for work by other attorneys in the conflicted attorney's law firm, who knew nothing of his conflict. We noted that the bankruptcy court had "credited [the attorney] with having performed extraordinary services to the estate both before and after he acquired the creditor's interest," that there was no embezzlement or self-dealing, and that "the principal harm done by [the conflicted attorney] was to the creditor whose claim he acquired" and that creditor had apparently obtained satisfaction from the attorney for that harm. *Id.* We concluded, "It is a close case, and we might well have upheld more severe punishment of [the conflicted attorney] and his law firm, to whom his conflict was attributable under ordinary agency principles," but we deferred to the bankruptcy judge. *Id.* at 1324–25.

[12] It would be unwise to try to catalog all potential mitigating circumstances. But they must be compelling ones. For example, in *In re Wright*, 591 B.R. 68 (Bankr. N.D. Okla. 2018), an opinion consolidating 13 bankruptcy proceedings, the court said that full disgorgement of all fees was appropriate, but it limited disgorgement to postpetition payments. *See id.* at 95. According to the court, ordering disgorgement of the prepetition fees, often less than $200, "would be administratively unworkable, since some of the funds paid by the debtors pre-petition were allocated to court fees and other miscellaneous services." *Id.*

Or the breach may have been only a technical one. *See Vergos v. Mendes & Gonzales PLLC (In re McCrary & Dunlap Const. Co., LLC)*, 79 F. App'x 770, 780 (6th Cir. 2003) (unpublished) ("[W]hile a bankruptcy court does not abuse its discretion if it denies all compensation where, through mere negligence, an attorney fails to satisfy the requirements of the Code and Rules, ... a 'technical breach' of the Code and Rules generally warrants a sanction far more lenient than

full disgorgement and denial of all compensation."). *But see id.* at 786 (Batchelder, J., dissenting) (full disgorgement was appropriate because law firm held itself out as experienced ***1268** and should be held to that standard).

Additional situations when leniency may be warranted can be addressed when they arise.

B. Application to This Case

[13] Mr. Welch egregiously violated the disclosure requirements of § 329(a) and Bankruptcy Rule 2016(b). As the bankruptcy judge noted, he probably never would have made the disclosures had the court not ordered him to. The disclosures came more than two years after he was required to disclose his compensation agreement with the Stewarts and more than a year after he was required to report the $350,000 paid him.

As explained above, the default sanction for Mr. Welch's failures to disclose is that he must disgorge all fees received in connection with the bankruptcy. The bankruptcy court could order a lesser disgorgement, but only for sound reasons supported by solid evidence. Otherwise, the failure to disgorge all fees is an abuse of discretion. On the record before us, we must hold that there was an abuse of discretion in this case.

The bankruptcy court's reasons for disgorging only a small fraction of Mr. Welch's fee were wholly inadequate. Without any evidence, or even a supporting argument from Mr. Welch, it speculated that Mr. Welch had never been sanctioned, had not represented debtors in Chapter 7 proceedings and was not familiar with the disclosure requirements, and would face financial catastrophe if he had to disgorge the full fee. The court relied on its common sense and long experience with bankruptcy practice. We fail, however, to see how those sources could provide a basis for those grounds favoring only partial disgorgement. We believe the bankruptcy judge's experience and participation in the proceedings could support its determination that Mr. Welch had provided exceptional representation to his clients. But a conclusory statement does not suffice. Particularly given the court's observation about the lack of candor and honesty of his clients, we should note that it would not be enough to fight tooth and nail in defense of indefensible improprieties of a client. On the other hand, credit should be given to an attorney who manages to convince the client of the need for full disclosure and candor in the proceedings.

Most importantly, however, the bankruptcy court failed to examine the source of the payments to Mr. Welch. The court seems to have inferred from Mr. Welch's talent and experience that his failures to disclose must have been inadvertent. But an alternative hypothesis is that he surely knew of his duty and must have had some very strong reason to keep the payments secret. If, for example, he had thought that disclosure would lead to substantial challenges to the payments (as indeed occurred), he would have had a motive not to disclose. The lure of an uncontested $350,000 might induce some people to violate the disclosure requirements, particularly if the downside risk was limited to a $25,000 penalty and criticism in a bankruptcy-court opinion.

We would therefore expect the court to examine those payments before deciding not to require complete disgorgement. Consider the contingency-fee payment of $144,591.85. The only document entitling him to that fee is dated shortly before the BP settlement and about a month after he had informed the Trustee that there was movement in the BP litigation. That is pretty late in the litigation to be adding a recipient of a contingency fee, yet there is no evidence that he had been promised any contingency fee before the document was executed. Also, there is a question about the value of the work he purportedly performed ***1269** to earn that fee —"advis[ing] and assist[ing] the non-debtor claimants in providing substantiating documents to support [the chief attorney] in the settlement process and negotiat[ing] specific language to the settlement agreements." Aplt. App., Vol. 13 at 3305. Mr. Welch would not be entitled to the fee if it were merely a device to divert to him money that would otherwise be available for creditors of the Stewarts' companies.

The other payment was $203,812.56 out of Neverve's net share of the BP proceeds. SEPH makes two plausible arguments why that payment was improper. First, it contends that it had a security interest in BP payments to any of the Stewarts' companies. Second, as we understand the point, it argues that any disbursement by Neverve for the Stewarts' benefit was a dividend to them and therefore property of the estate.

We make no judgment on the validity of the challenges to these payments to Mr. Welch. The challenges may lack merit. But Mr. Welch's burden on the disgorgement issue requires

more than simply prevailing on the challenges. Even if they fail, they may have caused sufficient concern to induce him to avoid the challenges by keeping the payments secret. As we said before about a debtor's failure to disclose a cause of action as an asset of the estate, allowing the debtor "to back up and benefit from the reopening of his bankruptcy only after his admission had been exposed would suggest that a debtor should consider disclosing potential assets only if he is caught concealing them." *Eastman*, 493 F.3d at 1160 (brackets and internal quotation marks omitted). If the sole penalty for not disclosing is that the debtor's attorney has to face the challenges that would have presented themselves had he disclosed the matter as required, then there is no incentive to comply with disclosure requirements.

For the above reasons, we must reverse the bankruptcy court's disgorgement order and remand for further proceedings.[3]

VI. CONCLUSION

We **REVERSE** the bankruptcy court's order requiring Mr. Welch to pay to the Trustee $25,000 for the benefit of the estate and **REMAND** for further proceedings consistent with this opinion.

All Citations

970 F.3d 1255, 69 Bankr.Ct.Dec. 51, Bankr. L. Rep. P 83,558

Footnotes

1 For example, the Trustee brought a fraudulent-transfer proceeding to recover property given by the Stewarts to their children and to a trust for which David Stewart was the primary beneficiary. The bankruptcy court found that the transfers took place after SEPH had commenced litigation against the Stewarts and were made without consideration, that the Stewarts' personal tax returns continued to claim losses with respect to the property, that financial statements provided to lenders continued to claim personal ownership, and that David Stewart retained control over the companies.

2 The *not* is not in the original text. But we assume that is a scrivener's error. After all, the sentence appears in a footnote to the sentence in the text that says that "many of the required disclosures are difficult if not impossible to police, at least in a cost-effective manner." 309 B.R. at 603. And it would be somewhat inconsistent to say that we are so dependent on the honesty of lawyers in bankruptcy cases if we are usually able to detect the dishonesty. Besides, the usual thinking is that sanctions must be harsher when detection of misconduct is difficult. A severe sanction on those who misbehave may deter people even if the likelihood of being caught is small. *See* Jeremy Bentham, *The Theory of Legislation* 325 (C.K. Ogden ed. 1931) ("The more deficient in certainty a punishment is, the severer it should be."); *cf. Dixon v. District of Columbia*, 666 F.3d 1337, 1343 (D.C. Cir. 2011) ("An individual officer can catch only so many speeding motorists.... It is precisely the severity of such sanctions that can be expected to deter some motorists from speeding."); *Directv, Inc. v. Barczewski*, 604 F.3d 1004, 1010 (7th Cir. 2010) ("One economically sound way to determine a penalty is to divide the harm done by the probability of apprehension. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968), a theory of sanctions that played a role in his receipt of a Nobel Prize in 1992.... Thus if signal theft enables a person to avoid paying $200 in fees to DirecTV, and only 1 in 50 signal thieves is caught, the appropriate penalty would be $10,000.").

3 We realize that if further disgorgement seems proper, a question may arise regarding where the disgorged funds should go. We leave that possibility for the bankruptcy court to resolve in the first instance, because what is determined on remand may moot the issue. There may be no further disgorgement; or it may be determined that all the funds paid to Mr. Welch were property of the estate or subject to liens of creditors.

971 F.3d 1299
United States Court of Appeals, Eleventh Circuit.

LAW SOLUTIONS OF CHICAGO LLC, UpRight Law LLC, Mariellen Morrison, Plaintiffs - Appellants,

v.

J. Thomas CORBETT, Defendant - Appellee.

No. 19-11405
|
(August 21, 2020)

Synopsis

Background: Bankruptcy Administrator filed motion for imposition of sanctions against large nationwide law firm and affiliated local attorney named as defendants in previously settled adversary proceedings in two separate Chapter 7 cases, alleging that they had failed to comply with court order implementing settlement by, inter alia, charging additional fees, limiting scope of legal services provided for flat fee to certain clients, and/or filing materially inaccurate attorney disclosure statements. Following issuance of show cause order and evidentiary hearing, the United States Bankruptcy Court for the Northern District of Alabama, No. 17-bkc-40093-JJR, James J. Robinson, Chief Judge, 2018 WL 1902491, imposed monetary sanctions totaling $150,000 as well as non-monetary sanctions which included revocation of filing privileges. Firm and attorney appealed. The District Court, No. 1:18-cv-00677-AKK, Abdul K. Kallon, J., 2019 WL 1125568, affirmed. Appeal was taken.

Holdings: The Court of Appeals, C. Roger Vinson, District Judge, sitting by designation, held that:

[1] the Bankruptcy Court had authority to impose sanctions on the basis of firm's "misleading" attorney disclosures;

[2] the Bankruptcy Court had subject matter jurisdiction to impose sanctions in the three post-settlement cases that were closed at the time;

[3] the Bankruptcy Court retained jurisdiction over the settlement agreement, even though the agreed order "approved" the settlement but did not incorporate the agreement or any of its terms and the court did not expressly retain jurisdiction to enforce it;

[4] the Bankruptcy Court did not violate the due process rights of firm and attorney when it acted and imposed relief pursuant to specified sections of the Bankruptcy Code and rules, even though its order to show cause did not reference such provisions; and

[5] monetary sanctions of $150,000 were not excessive.

Affirmed.

West Headnotes (27)

[1] **Bankruptcy** Constitutional and Statutory Provisions

Bankruptcy is a creation of statute, and those who practice bankruptcy law must comply with its myriad statutory provisions and implementing rules.

[2] **Bankruptcy** Scope of review in general

When a District Court affirms a Bankruptcy Court's order, on further appeal the Court of Appeals reviews the Bankruptcy Court's decision.

4 Cases that cite this headnote

[3] **Bankruptcy** Scope of review in general

As the "second court of review," the Court of Appeals must independently examine the factual and legal determinations of the Bankruptcy Court and employ the same standards of review as the District Court.

2 Cases that cite this headnote

[4] **Bankruptcy** Conclusions of law; de novo review

Bankruptcy Clear error

Court of Appeals reviews the Bankruptcy Court's factual findings for clear error and its legal conclusions de novo.

3 Cases that cite this headnote

[5] **Bankruptcy** Findings of Fact

In reviewing the Bankruptcy Court's decision, neither the District Court nor the Court of Appeals may make independent factual findings.

4 Cases that cite this headnote

[6] **Bankruptcy** Discretion

Bankruptcy Court's decision to impose sanctions is reviewed for abuse of discretion, an extremely limited and highly deferential standard of review.

1 Cases that cite this headnote

[7] **Bankruptcy** Discretion

"Abuse of discretion" can occur only when the bankruptcy judge fails to apply the proper legal standard or to follow proper procedures in making the determination, or bases an award upon findings of fact that are clearly erroneous.

2 Cases that cite this headnote

[8] **Bankruptcy** Discretion

Abuse-of-discretion standard of review allows a range of possible conclusions that the Bankruptcy Court could reach, as long as those conclusions do not constitute a clear error of judgment.

2 Cases that cite this headnote

[9] **Bankruptcy** Scope of review in general

When a Bankruptcy Court relies on several sources of authority for imposing sanctions, the Court of Appeals' task upon review is to determine if the sanctions were allowable under at least one of those sources of authority; if any one of the sources of authority invoked by the Bankruptcy Court provides a sound basis for the sanctions, the appellate court must affirm the sanctions order.

[10] **Bankruptcy** Disclosure requirements

Under the Bankruptcy Code, an attorney representing a debtor must file, and 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. 11 U.S.C.A. § 329(a); Fed. R. Bankr. P. 2016(b).

[11] **Bankruptcy** Attorneys

If an attorney representing a debtor qualifies as a "debt relief agency" under the Bankruptcy Code, the Code 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. 11 U.S.C.A. § 528(a).

2 Cases that cite this headnote

[12] **Bankruptcy** Carrying out provisions of Code

Bankruptcy Contempt

Distinct from the bankruptcy courts' inherent contempt powers, the section of the Bankruptcy Code authorizing a court to issue any order necessary or appropriate to carry out the provisions of title 11 creates the bankruptcy courts' statutory civil contempt power. 11 U.S.C.A. § 105.

[13] **Bankruptcy** Frivolity or bad faith; sanctions

Bankruptcy Disclosure requirements

If a debt relief agency files an attorney disclosure setting forth the amount of compensation that it has or will be paid 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, its inherent contempt authority, or the sections of the Bankruptcy Code governing debt

relief agencies and dismissal of Chapter 7 cases. 11 U.S.C.A. §§ 105, 329(a), 526, 707; Fed. R. Bankr. P. 2016(b), 9011.

1 Cases that cite this headnote

[14] **Bankruptcy** Trustees

Bankruptcy Trustee and Bankruptcy Administrator programs remain constitutionally distinct, as they fall under different branches of government; while Bankruptcy Trustees are part of the executive branch, a "Bankruptcy Administrator," who is part of the judicial branch, is an independent officer of the judiciary who operates with a full-time staff and is completely independent of the Bankruptcy Court and the District Court.

1 Cases that cite this headnote

[15] **Bankruptcy** Nature and form; adversary proceedings

Adversary proceedings are governed by special procedural rules and are based on conflicting claims, usually between the debtor or the bankruptcy trustee and a creditor or other interested party. Fed. R. Bankr. P. 5005(a)(1), 7003.

[16] **Bankruptcy** Nature and form; adversary proceedings

Although adversary proceedings are generally viewed as stand-alone lawsuits, they are usually initiated by filing a complaint in the same court that is handling the bankruptcy petition. Fed. R. Bankr. P. 5005(a)(1), 7003.

[17] **Bankruptcy** Disclosure requirements

Bankruptcy Court had authority to impose sanctions against law firm that represented debtors on the basis of firm's "misleading" attorney disclosures; firm qualified as a "debt relief agency" that represented "assisted persons" under the Bankruptcy Code, firm knew that, pursuant to its settlement agreement with Bankruptcy Administrator, it could not charge additional fees or limit the scope of legal services for clients who retained it before specified date, but firm's attorney disclosures "represented to the world" that firm was authorized and able to charge extra fees to covered clients for excluded services, and the disclosures might have misled some covered clients to believe that they were not entitled to excluded services for no extra charge, even though they were. 11 U.S.C.A. § 526(a)(2).

1 Cases that cite this headnote

[18] **Bankruptcy** Power and Authority

Bankruptcy Disclosure requirements

Bankruptcy Court had subject matter jurisdiction to impose sanctions against law firm that represented debtors on the basis of firm's "misleading" attorney disclosures, which were contrary to firm's settlement agreement with Bankruptcy Administrator, even though three of the post-settlement cases were closed at the time sanctions were imposed and they were never reopened; bankruptcy courts retain jurisdiction to impose sanctions after the underlying bankruptcy case is closed. 11 U.S.C.A. § 526(a)(2).

1 Cases that cite this headnote

[19] **Federal Courts** Settlements

If a federal District Court either incorporates the terms of a settlement into its final order of dismissal or expressly retains jurisdiction to enforce a settlement, it may thereafter enforce the terms of the parties' agreement; absent such action, however, a party's failure to comply with the terms of a settlement agreement will generally present a state breach-of-contract action, unless there is some independent basis for federal jurisdiction.

[20] **Bankruptcy** Frivolity or bad faith; sanctions

Bankruptcy Disclosure requirements

Bankruptcy Court retained jurisdiction over settlement agreement between Bankruptcy

Administrator (BA) and law firm that represented debtors, and so could discipline the attorney conduct that implemented the agreement, even though the court's agreed order "approved" the settlement but did not incorporate the agreement or any of its terms and the court did not expressly retain jurisdiction to enforce it; there was "some independent basis for federal jurisdiction," namely, the provisions of the Bankruptcy Code and rules on which the BA had moved and on which the court relied in imposing sanctions. 11 U.S.C.A. §§ 526, 707; Fed. R. Bankr. P. 2016(b).

[21] **Bankruptcy** Disclosure requirements

Constitutional Law Bankruptcy

Bankruptcy Court did not violate the due process rights of law firm and affiliated local attorney who represented debtors when, in imposing sanctions on the basis of firm's "misleading" attorney disclosures, which were contrary to firm's settlement agreement with Bankruptcy Administrator (BA), the court acted and imposed relief pursuant to specified sections of the Bankruptcy Code and rules, even if its order to show cause did not reference those sections but, instead, referred only to settlement agreement; at hearing on show cause order, counsel for BA and firm's counsel referred to the subject provisions in discussing the admittedly "inconsistent" attorney disclosures, BA's motions to examine, the hearing on those motions, and post-cause hearing briefing also cited those sources, and so firm and attorney had ample notice that BA was alleging violations of the subject sections and rules, as well as a reasonable opportunity to respond both orally and in writing. U.S. Const. Amend. 5; 11 U.S.C.A. §§ 526, 707; Fed. R. Bankr. P. 2016(b).

[22] **Constitutional Law** Fairness in general

Due process is ultimately about fairness. U.S. Const. Amend. 5.

[23] **Constitutional Law** Penalties, fines, and sanctions in general

In the context of sanctions, due process requires that an attorney or party be given fair notice that his conduct may warrant sanctions and the reasons why. U.S. Const. Amend. 5.

[24] **Constitutional Law** Penalties, fines, and sanctions in general

Notice that an attorney's or party's conduct may warrant sanctions, as required by due process, may come from the party seeking sanctions, from the court, or from both. U.S. Const. Amend. 5.

1 Cases that cite this headnote

[25] **Constitutional Law** Penalties, fines, and sanctions in general

In the context of sanctions, due process requires that an attorney or party accused of misconduct must be given an opportunity to respond, orally or in writing, to the invocation of such sanctions and to justify his actions. U.S. Const. Amend. 5.

[26] **Federal Courts** Particular cases

Appeal of a suspension is rendered moot when the suspension period has expired.

[27] **Bankruptcy** Disclosure requirements

Monetary sanctions of $150,000 imposed by the Bankruptcy Court against large nationwide law firm and affiliated local attorney who represented debtors for their failure to comply with court order implementing their settlement agreement with Bankruptcy Administrator by, inter alia, filing materially false attorney disclosures in six post-settlement bankruptcy cases were not excessive; although court used strong language in referring to firm as "high-volume, monolithic" "internet cartel" and "bankruptcy mill" that was motivated purely by "profits" as opposed to "public service," made repeated references to ethical problems with firm's business model, and engaged in lengthy discussion of fraudulent

> scheme that was not directly relevant to violative conduct at issue, serious sanctions were appropriate given the clear violations of the Bankruptcy Code, previous sanctions were not effective, and sanctions of $25,000 per case seemed the norm in this court for serious Code violations. 11 U.S.C.A. §§ 105, 329(a), 526, 707; Fed. R. Bankr. P. 2016(b), 9011.

Attorneys and Law Firms

***1303** Richard Patrick Carmody, Aaron Gavin McLeod, Adams & Reese, LLP, Birmingham, AL, John M. Duck, Adams & Reese, LLP, New Orleans, LA, David M. Menditto, Deighan Law, LLC, Chicago, IL, for Plaintiff - Appellant Law Solutions of Chicago LLC

Aaron Gavin McLeod, Richard Patrick Carmody, Adams & Reese, LLP, Birmingham, AL, for Plaintiff - Appellant UpRight Law LLC

Richard Patrick Carmody, Aaron Gavin McLeod, Adams & Reese, LLP, Birmingham, AL, David M. Menditto, Deighan Law, LLC, Chicago, IL, for Plaintiff - Appellant Mariellen Morrison

Robert J. Landry, III, U.S. Bankruptcy Administrator, Anniston, AL, for Defendant - Appellee

Appeal from the United States District Court for the Northern District of Alabama, D.C. Docket Nos. 1:18-cv-00677-AKK; 17-bkc-40093-JJR7

Before ROSENBAUM and ED CARNES, Circuit Judges, and VINSON,[*] District Judge.

Opinion

VINSON, District Judge:

***1304** **[1]** Bankruptcy is a creation of statute, and those who practice bankruptcy law must comply with its myriad statutory provisions and implementing rules.[1] "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.

I.

[2] **[3]** **[4]** **[5]** "[W]hen a district court affirms a bankruptcy court's order, as the district court did here, this Court reviews the bankruptcy court's decision." *In re Brown*, 742 F.3d 1309, 1315 (11th Cir. 2014). As the "second court of review," we must independently examine the factual and legal determinations of the Bankruptcy Court and employ the same standards of review as the District Court. *In re Hood*, 727 F.3d 1360, 1363 (11th Cir. 2013). We review the Bankruptcy Court's factual findings for clear error and its legal conclusions *de novo*. *Id.* "Neither the district court nor this court may make independent factual findings." *In re Englander*, 95 F.3d 1028, 1030 (11th Cir. 1996).

[6] **[7]** **[8]** The decision to impose sanctions is reviewed for abuse of discretion. *In re Hood,* 727 F.3d at 1363. This standard of review is "extremely limited and highly deferential." *United Kingdom v. United States,* 238 F.3d 1312, 1319 (11th Cir. 2001); *see also United States v. Frazier*, 387 F.3d 1244, 1258 (11th Cir. 2004) (en banc) (noting that " 'deference ... is the hallmark of abuse-of-discretion review' ") (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 143, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997)). "Such an abuse can occur only 'when the bankruptcy judge fails to apply ***1305** the proper legal standard or to follow proper procedures in making the determination, or bases an award upon findings of fact that are clearly erroneous.' " *In re Beverly Mfg. Corp.*, 841 F.2d 365, 369 (11th Cir. 1988) (citation omitted). Under abuse-of-discretion review, there is a "range of possible conclusions" that the Bankruptcy Court could reach:

> By definition ... under the abuse of discretion standard of review there will be occasions in which we affirm the district court even though we would have gone the other way had it been our call. That is how an abuse of discretion standard differs from a *de novo* standard of review. As we have stated previously, the abuse of discretion standard

allows "a range of choice for the district court, so long as that choice does not constitute a clear error of judgment." *Frazier*, 387 F.3d at 1259 (citations omitted); *accord McMahan v. Toto*, 256 F.3d 1120, 1129 (11th Cir. 2001) (noting that "under an abuse of discretion standard there will be circumstances in which we would affirm the district court whichever way it went"); *In re Rasbury*, 24 F.3d 159, 168 (11th Cir. 1994) ("Quite frankly, we would have affirmed the district court had it reached a different result, and if we were reviewing this matter *de novo*, we may well have decided it differently.").

[9] When a Bankruptcy Court relies on several sources of authority for imposing sanctions, our task is to determine if the sanctions were allowable "under at least one of those sources of authority." *Amlong & Amlong, P.A. v. Denny's, Inc.*, 500 F.3d 1230, 1238 (11th Cir. 2007). "If any one of the sources of authority invoked by the [Bankruptcy Court] provides a sound basis for the sanctions, we must affirm the sanctions order." *Id.*; *accord* 2 James Wm. Moore, *Moore's Federal Practice* § 11.41[1] (3d ed. 2014) (noting same).

II.

A.

To provide the proper context, we begin by discussing the specific statutory provisions and rules at issue in this case.

[10] **[11]** 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.

First, Rule 9011(b) provides that by filing a pleading "or other paper" with the Bankruptcy Court the attorney is certifying that she has conducted a reasonable inquiry and, to the best of her knowledge, information, and belief, the contentions therein have "evidentiary support." Section 707(b)(4)(B) provides that "[i]f the court finds that the attorney for the debtor violated rule 9011 ... the court, on its own initiative or on the motion of a party in interest," may order "the assessment of an appropriate civil penalty against the attorney for the debtor[.]"

[12] Similarly, and even more expansively, § 707(b)(4)(C)-(D) provides that an ***1306** 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."[2]

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.

[13] 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.

B.

With the foregoing provisions and rules in mind, we will now discuss the background of this case. To fully and accurately capture what took place below, we will at times quote extensively from the record.

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.

At the time relevant to this case, Morrison was a Birmingham attorney and an UpRight "partner." Per her partnership agreement, she accepted bankruptcy referrals from the firm and represented those debtors in the Bankruptcy Court for the Northern District of Alabama. Although she was designated a partner of The UpRight Law Firm, she never voted at (or even attended) a partnership meeting; she never received a year-end draw or distribution of any kind; and she didn't know the names of other attorneys in the firm (and, in fact, couldn't even provide an estimate as to how many other attorneys there were).

In 2016, UpRight was representing debtors in two Chapter 7 cases that had ***1307** been filed in the Northern District of Alabama, *In re Cook*, Case No. 15-41812, and *In re Mikulin*, Case No. 15-83322. The Attorney Disclosures that UpRight filed in those cases indicated that the debtors paid UpRight a flat fee that covered basic bankruptcy representation, e.g., financial counseling and preparation of the petition and schedules. However, the flat fee didn't entitle the debtors to an array of other bankruptcy services that were excluded in Paragraph 9 of their Retention Agreements, but which they might need in their cases ("Excluded Services"). The filings in *Cook* and *Mikulin* form the underpinnings of this case.

[14] **[15]** **[16]** On April 5, 2016, J. Thomas Corbett, the Bankruptcy Administrator ("BA") for the Northern District of Alabama, brought two adversary proceedings ("APs") against UpRight in the *Cook* and *Mikulin* cases.[3] APs are "governed by special procedural rules, and based on conflicting claims usually between the debtor (or the trustee) and a creditor or other interested party." *See* Black's Law Dictionary (11th ed. 2019). Although they are generally viewed as " 'stand-alone lawsuits,' " *In re Boca Arena, Inc.*, 184 F.3d 1285, 1286 (11th Cir. 1999) (citation omitted), they are usually initiated—as they were here—by filing a complaint in the same court that is handling the bankruptcy petition. *See* Fed. R. Bankr. P. 5005(a)(1); 7003.

The complaints in the *Cook* and *Mikulin* APs 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.[4]

The BA and UpRight subsequently went to mediation, where they agreed to a proposed settlement of the APs in the *Cook* and *Mikulin* cases. In relevant part, the ***1308** proposed settlement agreement ("Settlement Agreement") required UpRight to pay each bankruptcy estate $25,000 (for a total of $50,000), and it required the firm to self report to the Alabama State Bar and hire a full-time licensed Alabama attorney for its main office in Chicago. The Settlement Agreement also precluded UpRight from filing any new bankruptcy cases in the Northern District of Alabama for six months, from September 1, 2016, until March 1, 2017, which was referred to as the "Interim Period." After March 1, 2017, Upright was allowed to file new cases for clients who had retained them during or after the Interim Period, subject to the following proviso in Paragraph 6 of the Settlement Agreement:

> For those clients who retained UpRight prior to March 21, 2016 [("Covered Clients")], UpRight shall provide the [Excluded Services] referred to in Paragraph 9 of UpRight's standard client retention agreement[5] without additional charge for attorney's fees.... This paragraph shall affect only those bankruptcy cases filed by UpRight for clients who retained the firm prior to March 21, 2016 for bankruptcy representation in the Northern District of Alabama.

On September 23, 2016, the BA filed a motion for the Bankruptcy Court to approve the Settlement Agreement, and the court held a hearing on the motion on October 27, 2016. The BA's attorney, Robert Landry, told the Bankruptcy Court during the hearing that although the complaints in the APs had raised a number of ethical violations, UpRight had already hired an Alabama attorney for its Chicago office and self-reported to the Alabama Bar, which the BA expected would solve the vast majority ("85 to 90 percent") of the ethical problems alleged in the APs. As for the Sperro/Fenner repo scam, the BA advised the Bankruptcy Court that he believed the Settlement Agreement was reasonable under the circumstances as it was not clear to what extent UpRight was culpable in the scheme. Specifically, Landry told the court (emphasis added):

> MR. LANDRY: I mean, I think the $50,000—and that's exactly what we've asked for almost in our complaint. It's real—it might not be a lot of money to other folks, but it's a lot of money for lawyers in Alabama that screw up.... So it's a real penalty and a real sanction. And to report it to the Alabama Bar and having to hire a lawyer, I mean, you know, *we've done the best we can. It's a hard case. There's factual problems on both sides of the table.*

The Bankruptcy Court agreed that $50,000 was a sufficient penalty, and it stated from the bench that it would approve the proposed Settlement Agreement. Later that day, the Bankruptcy Court entered a short order to that effect ("Agreed Order"). The Agreed Order didn't adopt, repeat, paraphrase, or incorporate any of the specific terms of the Settlement Agreement. Importantly, it also didn't say that the Bankruptcy Court would retain jurisdiction over performance of the agreement. It merely said, in relevant part, "the Compromise is **APPROVED**."

Approximately seven months later, during a routine audit of UpRight's pending ***1309** cases, the BA discovered that in three Chapter 7 cases filed on behalf of Covered Clients—*In re White*, Case No. 17-40093; *In re Calloway*, Case No. 17-40462; and *In re Tidwell*, Case No. 17-40599 ("Open Cases")—the Attorney Disclosures filed in those cases stated that UpRight *would* require the payment of additional fees for the Excluded Services that they had agreed to provide without extra charge under Paragraph 6 of the Settlement Agreement. Shortly thereafter, on May 19, 2017, the BA filed three substantively identical "motions to examine" with the Bankruptcy Court. The motions asked the court to examine the debtors' transactions with UpRight in the three Open Cases and determine if the Attorney Disclosures filed in those cases violated the terms of the Settlement Agreement. The BA stated his belief that the disclosures were in direct conflict with the Settlement Agreement and that the conflict rendered them materially inaccurate, untrue, and/or misleading in violation of § 707, § 526, and Rule 2016. The motions concluded as follows:

> If the Court finds that Morrison, UpRight Law LLC and Law Solutions Chicago LLC are not in compliance with the terms of the Settlement Agreement, filed a materially inaccurate 2016 Disclosure and/or violated the other code provisions set forth herein, [the Court should] enter an order setting a show cause hearing as to why appropriate sanctions, including but not necessarily limited to, disgorgement of attorney fees, civil penalties and/or an injunction under § 526(c)(5), sanctions under § 105, and other sanctions under this Court's inherent authority should not be imposed against [them].

After the BA filed the motions to examine (but before the Bankruptcy Court took any action on the motions), UpRight filed amended disclosures in the Open Cases. The Bankruptcy Court held a hearing on July 13, 2017. The BA conceded at the start of the hearing that the amended disclosures appeared to be consistent with the Settlement Agreement, but he argued that was only done after and because he had filed the motions to examine. The BA further stated: "[T]he rub is not just the fact the disclosures [were] wrong, the real rub and crux is that I don't have any information to indicate they ever told these debtors, until after we filed the motion, possibly—I don't really know—that the scope of services was different than their original contract." The BA asserted that it appeared UpRight had thus violated § 707, § 526, and Rule 2016, and he stated:

> MR. LANDRY: ... And so, what we're asking the Court today is to look at those basic facts and determine whether or not there's been violations of those provisions. And if there are, ask the Court to set it for a show cause hearing as to why there shouldn't be sanctions or penalties for this.

UpRight was represented at the hearing by attorney Valrey Early, and he told the Bankruptcy Court as follows:

> MR. EARLY: ... [T]he BA is correct, mistakes were made in those particular filings. They should not have been made.
>
> * * *
>
> And if you'll recall, there was considerable question earlier about excluded services and hourly rates to be charged for those services and APs and so forth and so on. UpRight has not charged a nickel, has not sought a nickel, will not seek a nickel in any of those matters. Their disclosures are now correct. Did it take a prod? Yes, it did, to make sure that ***1310** everything was—all the I's were dotted, all the T's were crossed.
>
> And please understand, I'm not trying to minimize this. I get it.... Should they disgorge the fees in these three cases? I think I can—putting on a different hat for the moment, I think I can; yes, they should.

The BA responded by telling the Bankruptcy Court that he had conducted a review of UpRight's other cases involving Covered Clients and discovered at least three *other* Attorney

Disclosures that violated the Settlement Agreement. Those three cases, which had at that point already been closed, were: *In re Conlin*, Case No. 17-00999; *In re McDaniel*, Case No. 16-72114; and *In re Jackson*, Case No. 17-70171 ("Closed Cases"). The BA continued:

> MR. LANDRY: At one of the prior hearings, they talked about how we retained an Alabama lawyer in the Chicago office to fix everything. Okay, that happened March 21st. That's the date we're using because after that date, everything should be in order. It's a joke, Judge. They ignored that settlement agreement. Nobody cared—Morrison, UpRight—no one cared to double-check it. They can't just thumb their nose at that order. They don't care. And so I think we need to have a sanction hearing on it and, you know, disgorgement might not be enough.
>
> THE COURT: Mr. Early?
>
> MR. EARLY: Well obviously, Mr. Landry and I disagree on the severity of this. Were mistakes made? Yes, they were. Have reasonable efforts been made to resolve those mistakes? So far, yes. Do we need to make more efforts? Perhaps we do....
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> THE COURT: But isn't that beside the point?
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> MR. EARLY: Is it beside the point?
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> THE COURT: I mean, there was an order in a very serious matter—
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> MR. EARLY: Yes, sir.
>
> THE COURT: —and frankly, I think there were some bullets dodged. And if I had been sitting in Chicago, I wouldn't want to come back to Alabama and have to address this again. And the business model of sitting up there in Chicago and handling cases, I assume, nationwide —
>
> MR. EARLY: Yes, sir.
>
> THE COURT: —is just a—it just reeks with ethical issues, and people getting on the phone and retaining a lawyer in Chicago when they're down here in Calhoun County, Alabama. And why that lawyer thinks that they can represent that debtor and become intimate enough with what they need is beyond me. But that may not be something I'm—it may have to go somewhere else. But, you know, ya'll settled that and that it is.
>
> There was an article recently written in the American Bankruptcy Journal about internet lawyers representing out-of-state debtors in cases and the ethical issues with that. Those aren't really, I guess, before me. They may be, eventually.
>
> I'm going to look at this. Let me go back. I need to look at the settlement agreement again and look at this, and then I'll get an order out on it. I'll tell you, in all likelihood, that there probably will be another hearing on this.... And if so, I think at that hearing, we'll probably need to hear from the folks up in Chicago in person.

The next day the Bankruptcy Court entered an "Order to Appear and Show ***1311** Cause." The order didn't mention § 707, § 526, or Rule 2016. It read, in relevant part, as follows:

> Previously, the court issued an order that approved a settlement agreement among Debtors' Counsel and the BA pertaining to, *inter alia*, the scope of representation by Debtors' Counsel of their debtor-clients who filed cases under title 11 in this court, i.e., the Eastern Division of the Northern District of Alabama. Specifically, the settlement agreement, implemented by this court's order, prohibited Debtors' Counsel from limiting the scope of their representation of their debtor-clients who had retained Debtors' Counsel before a specific date. Debtors' Counsel admitted they did not fully comply with the settlement agreement, and the BA argues that sanctions are mandated due to such non-compliance.
>
> The court concludes that a hearing is necessary for the court to determine the extent to which Debtors' Counsel failed to comply with the order approving and implementing the settlement agreement, as well as the reasons for any noncompliance, in all cases encompassed by the order approving and implementing the settlement agreement, and to further determine what sanctions, if any, are appropriate due to such noncompliance.
>
> Accordingly, each of Debtors' Counsel is ORDERED to appear, in person and with counsel, before this Court on **August 24, 2017 at 1:30 p.m.** in the Bankruptcy Courtroom, U.S. Federal Courthouse, 1129 Noble Street, Room 117, Anniston, Alabama, and show cause, if there be any, why their failure to comply with the settlement agreement and order implementing the same does not warrant contempt sanctions, which may include disgorgement of fees and expenses paid by debtor-clients whose cases were subject to such agreement, and additional

> monetary and non-monetary sanctions, which may include, without limitation, a bar from Debtors' Counsel, or any of them, practicing in the United States Bankruptcy Court for the Northern District of Alabama (all divisions) for a period of up to two (2) years, and reporting their conduct to the bar associations where they are licensed.

The Bankruptcy Court held an evidentiary hearing on August 24, 2017. The BA called Morrison as a witness during the hearing, and evidence was introduced to support the BA's claim that the Attorney Disclosures filed in at least six cases—the three Open Cases, and the three Closed Cases—didn't comply with Paragraph 6 of the Settlement Agreement (collectively, "the Post-Settlement Cases").

UpRight called David Menditto, the firm's Associate General Counsel of Litigation, to testify at the hearing. Menditto testified that although UpRight had believed that their original Attorney Disclosures complied with Paragraph 6 of the Settlement Agreement—and that they didn't intentionally violate the provision—he conceded that UpRight had made "mistakes" in the filings and said he was there to "take responsibility" for those mistakes. However, Menditto emphasized that although the original Attorney Disclosures may have been a "mistake," none of the debtors was actually charged for the Excluded Services. But Menditto conceded on cross examination that the language in the disclosures (which told the debtors that UpRight *would* charge extra for the services if the debtors had needed and requested them) was "inconsistent" with Paragraph 6 of the Settlement Agreement.

***1312** At the conclusion of the hearing, the Bankruptcy Court invited the attorneys to file follow-up briefs (simultaneous opening briefs and simultaneous replies) to address any issues that they wanted to argue. But the Bankruptcy Court stated the following from the bench:

> THE COURT: The circumstances in this case disturb me. And I have—I'm trying to separate it in my mind that the business model that UpRight uses strikes me as unusual. And I think even this—at this day and time, most lawyers and judges would agree with me. However, I think if—like a lot of things that are in the digital world now, if you had the ability to look into where we're all going with this it probably wouldn't be a surprise. And this may be—excuse me. This may be the way of the future. I don't know.
>
> * * *
>
> What concerns me in this case is that the BA recognized a problem, what was going on, and legitimately addressed it. And the UpRight Law firm, Ms. Morrison, and the BA then went to mediation. And at the time, there were some other matters going on with those firms. And what I'm primarily referring to is this repo outfit that was absorbing the firm (indiscernible). And that really bothered me. It really did. But I'm assuming, knowing Mr. Landry, that he got comfortable that there was no culpability on behalf of UpRight with that. Because when I saw that, I said this is serious.
>
> .... So I was glad that went away. But that disturbed me. But I was aware of it.
>
> But what concerns me was we entered into a settlement agreement with a law firm with a federal judge and that the firm should have bent over backwards to make sure there was absolute compliance with that consent agreement, which was then made—or approved by this Court's order. And that's what concerns me is that I can't help but get the feeling that, okay, we've got this behind us, we'll cough up $50,000, and we'll go our way. And that it was just pretty well after that ignored....
>
> * * *
>
> So if you all want to address that in a brief, I guess primarily UpRight, then—and, you know, there's no blood that was spilled. But it still concerns me. And as I understand the law, folks, is when I issue an order and it's not complied with and the party that is in noncompliance is aware of it, I cannot ignore that.
>
> * * *
>
> So I guess I'm telling you that, you know, I'm going to enter an order that—and they'll be some repercussions. And, you know, how severe? I have no ambitions of trying to put UpRight out of business, at least not permanently, either financially or because of some other reason, but—
>
> So why don't you all give me something in writing, what you think is appropriate and the reasons why.

The Bankruptcy Court continued by saying that "the significant thing" was that UpRight had filed several cases where "there should not have been excluded services," but "notwithstanding the agreement, they were." At that point, counsel for UpRight asked: "Is Your Honor inviting briefing

on the question of whether or not UpRight failed to comply with that section 6? Because it feels like Your Honor has already made that decision. And we don't want to brief something that Your Honor has already heard enough of." The ***1313** court replied that the attorneys could try in their briefs to "convince me otherwise," but

> I'm very much leaning towards that just from what I see here [because] we have retention agreements and we have disclosures that do exclude certain services, but in fact under the settlement agreement during those cases that fall in that category that wasn't to be done. And what concerns me, if I'm a, you know, probably pretty unsophisticated Chapter 7 debtor, I look down there and say, well, there's no reason—I don't have any more money so I can't—there's no reason for me to call on this firm to do [those services]. I don't know whether that happened or not. We don't know.... But, no, convince me of anything you want me to do.

In his post-hearing briefing, the BA argued that UpRight had violated the terms of the Settlement Agreement in the Post-Settlement Cases and that in doing so they "repeatedly violated basic requirements of the Bankruptcy Code and Rules applicable to attorneys and debt relief agencies." He argued that the Settlement Agreement required UpRight to provide the Excluded Services for no additional fee, which required notification to the debtors of the availability of those services. To instead tell them in the Attorney Disclosures that the services weren't included was tantamount to denying them the services insofar as it led them to believe they weren't provided. The BA argued that sanctions were appropriate under the same provisions that he cited in his motions to examine, including, *inter alia*, § 707 and § 526. UpRight had the opportunity to respond to the BA's argument on this point (and did respond) in their reply brief, and they argued that those provisions had not been violated (at least not intentionally).

The Bankruptcy Court issued its Memorandum Opinion and Order on April 19, 2018. The opinion began with a discussion of the Sperro/Fenner repo scam. Although the Bankruptcy Court acknowledged that the *Cook* and *Mikulin* APs had been settled (and "thus, the impropriety, if not illegality, of that scheme is not an issue that must be explicitly decided in the matters currently before the court"), it discussed the repo scam at length. The Bankruptcy Court stated that it felt the scheme was relevant to assessing UpRight's "motives" and that it bore on "their pattern and practice of questionable conduct in the contested matters now before the court."

As to those motives and questionable conduct, the Bankruptcy Court found that UpRight "simply ignored" their obligations under the Settlement Agreement because they were "under the misconception that the BA ... would not discover their non-compliance." According to the court, the untrue statements in the Attorney Disclosures "were not the result of a simple oversight or excusable neglect." Rather, they constituted "arrogant disregard" and "indifference" by UpRight, which was "tantamount to an intentional misrepresentation." The Bankruptcy Court strongly suggested that this was bad faith —although it did not explicitly use those words—because:

> If the Defendants had been acting in good faith and wanted to demonstrate the same to the court and BA, they would have closely monitored their case filings in this District to make certain their Attorney Disclosures in the Post-Settlement Cases complied with the Settlement. They did not.

The court acknowledged that UpRight had filed amended disclosures in the Open Cases, but it dismissed those amendments ***1314** as "self-serving" and "too little, too late." It noted that the amended disclosures only came after the BA had filed the motions to examine and after UpRight knew that they faced possible additional sanctions, which indicated that they were "not motivated by a good faith attempt to correct an inadvertent oversight." The Bankruptcy Court continued:

> The Defendants maintain that they did not breach the terms of the Settlement in spite of their continued use of the services-exclusion-language in Post–Settlement Cases because the Settlement did not expressly require that Retention Agreements and Attorney Disclosures for yet-to-be-filed Post–Settlement Cases conform to the Settlement's requirements. That argument is incredulous; the Defendants have missed the point. The Settlement was for the benefit of the debtors in the Post–Settlement Cases, who knew nothing about the Settlement. Those debtors knew only what the Defendants disclosed in their Attorney Disclosures and Retention Agreements, which misrepresented the services the debtors were entitled to receive from the Defendants. If the debtors were not made aware of the scope of legal services they were entitled to receive in return for their flat fee payment, then the Settlement's requirement that the scope of services be expanded was illusory and of no benefit to anyone—other than the Defendants as a small price to pay for settling [the APs].

Although the Bankruptcy Court acknowledged there was no evidence that a debtor had requested and was charged for the services (and thus, as it noted at the evidentiary hearing, "no blood ... was spilled"), the court stated that it "cannot 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 Bankruptcy Court concluded that "debtors were misled by the Defendants, and the debtors were necessarily harmed when they were given the wrong information regarding the scope of services the Defendants would provide for the flat fee." Notably, the court observed that UpRight had not filed *any* cases on behalf of Covered Clients that had Attorney Disclosures in compliance with the Settlement Agreement. Thus, the Bankruptcy Court surmised, it was reasonable to assume "that if there were a hundred Post-Settlement Cases instead of six, none of the Attorney Disclosures would have complied with the Settlement."

Based on these findings, the Bankruptcy Court held that UpRight violated Rule 9011, § 707, and § 526, and it imposed monetary sanctions totaling $150,000 ($25,000 for each of the six Post-Settlement Cases), and it ordered disgorgement of all attorney and filing fees in those cases. Pursuant to § 105, the Bankruptcy Court next imposed non-monetary sanctions; to wit, it revoked The UpRight Law Firm's authority to file cases in the Northern District of Alabama for a period of 18 months (three months for each of the six cases) and revoked Morrisson's filing privileges for a period of 60 days, and it provided for a refund of fees and expenses paid by unfiled clients impacted by the revocation. The Bankruptcy Court concluded that the sanctions it imposed were warranted "to enforce compliance with its orders—i.e., the Agreed Order—and to prevent further abuse of the bankruptcy process by the Defendants, who have shown themselves undeterred by the original sanctions imposed by the Settlement."

***1315** 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." And it concluded with an explanation of why some leniency was being given to Morrison:

> With respect to why the court imposed sanctions against UpRight that are harsher than those imposed against Morrison (although Morrison and UpRight are jointly and severally liable for the $150,000 civil penalties as well as fee and expense disgorgement), the court is convinced that Morrison was a minor malefactor in the events that led to these contested matters. Other than cases filed by Morrison as a "partner" with UpRight, the court is not aware of other ethical problems involving Morrison. The court is convinced that Morrison—like other attorneys across the country—was enticed to join the UpRight team as a "partner" with visions of getting in on the ground floor of an emerging consumer bankruptcy industry that promised to disrupt the conventional manner in which bankruptcy clients are retained, not unlike Amazon's impact on the consumer retail business. Only time will tell if UpRight's business model of attracting new clients through the internet will succeed. But if it does, at least in this court, it will succeed only because UpRight and similar internet-based "firms" comply with traditional ethical standards and the requirements of the Code and Rules.
>
> * * *
>
> Thus, based on the court's perception of Morrison's involvement in these matters, the court will not bar her from practicing in this District beyond sixty days, but once the sixty days expires, she must not accept referrals, or otherwise be associated with UpRight in this District, until UpRight's authority to practice within this District is reinstated.

As previously noted, UpRight appealed the Bankruptcy Court's order to the District Court, which affirmed, and they now seek a "second review" with us.

III.

[17] We begin by addressing a threshold issue: whether the Bankruptcy Court had authority to impose sanctions. The Bankruptcy Court found that the Attorney Disclosures contained "untrue and misleading" statements in violation of several statutory provisions and rules, but we need only consider one. *Amlong & Amlong, P.A.*, 500 F.3d at 1238 (when district court relies on multiple sources of authority for imposing sanctions, appellate court need only decide if they "were permissible under at least one of those sources of authority"). As earlier noted, § 526(a)(2) provides that a debt relief agency shall not make any statement in a bankruptcy court filing that it knew (or reasonably should have known) was untrue or misleading. If a debt relief agency is found to

have intentionally violated this provision, or found to have engaged in a "clear and consistent pattern or practice" of doing so, the bankruptcy court can impose sanctions. That is what the Bankruptcy Court here found and did, and we see no clear error in its doing so.

UpRight's Attorney Disclosures were "misleading" within the meaning of ***1316** § 526(a)(2) because they suggested that UpRight was authorized and able to charge extra fees to Covered Clients for Excluded Services. UpRight knew that, per Paragraph 6 of the Settlement Agreement, it was not allowed to charge such fees. Yet, as Menditto testified, the Attorney Disclosures "represented to the world" that UpRight could. The disclosures might have misled some of the Covered Clients to believe that they were not entitled to Excluded Services for no extra charge, even though they were. That was a violation of § 526(a)(2) and was alone enough to authorize the Bankruptcy Court to impose sanctions.[6]

Indeed, it is worth reemphasizing that UpRight's counsel told the Bankruptcy Court at the hearing on the motions to examine that: "[T]he BA is correct, mistakes were made in those particular filings. They should not have been made." And then at the later evidentiary hearing on the order to show cause, UpRight's Associate General Counsel of Litigation testified similarly that "mistakes" were made in the Attorney Disclosures, and he admitted they were "inconsistent" with Paragraph 6. They were acknowledging the undisputed facts in the record.

Conceding that there may have been sanctionable violations, UpRight advances four arguments why the sanctions should be reversed (in whole or in part), notwithstanding the violations.

A.

UpRight first argues that the Bankruptcy Court didn't have subject matter jurisdiction to impose sanctions in some or all six of the Post-Settlement Cases. There are two separate bases for this jurisdictional argument.

[18] First, UpRight points out that three of the Post-Settlement Cases (the Closed Cases) were closed at the time the Bankruptcy Court imposed sanctions—and they were never reopened—so they argue the court lost jurisdiction over those cases. This argument is unsupported in the law. *See In re White-Robinson*, 777 F.3d 792, 795-96 (5th Cir. 2015) (bankruptcy court retained jurisdiction to impose sanctions against attorney notwithstanding debtor's bankruptcy discharge); *Koehler v. Grant*, 213 B.R. 567, 569 (8th Cir. BAP 1997) (bankruptcy court had jurisdiction to impose sanctions in case that "was closed before the contempt hearing" because jurisdiction "does not end once a plan is confirmed or the case is closed"); *see also, e.g., In re T.H.*, 529 B.R. 112, 134 (Bankr.E.D. Va. 2015) (noting that bankruptcy court's jurisdiction to impose sanctions "is not affected by the status of a [bankruptcy] case, whether dismissed or closed, or by whether a discharge has been entered") (collecting multiple additional cases). In fact, the case that UpRight cites for their argument, *Iannini v. Winnecour*, 487 B.R. 434 (W.D. Pa. 2012), says the same thing. *See id.* at 441-42 (citing cases to support view that bankruptcy courts retain jurisdiction to impose sanctions after the underlying bankruptcy case is closed). In short, the Bankruptcy Court did not lack subject jurisdiction to impose sanctions in the Closed Cases just because they were, ***1317** in fact, closed cases.[7]

[19] UpRight's second jurisdictional argument is based on *Kokkonen v. Guardian Life Insurance Company of America*, 511 U.S. 375, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994), and several cases citing that decision. In *Kokkonen,* a unanimous Supreme Court said that because federal courts are courts of limited jurisdiction, an order that merely approves a settlement and dismisses a case based on that settlement isn't by itself enough for the federal court to retain jurisdiction to enforce the settlement. Instead, a district court will retain jurisdiction over the settlement agreement if the court "embod[ies] the settlement contract in its dismissal order (or, what has the same effect, retain[s] jurisdiction over the settlement contract) if the parties agree." *Id.* at 381-82, 114 S.Ct. 1673. This Court has read *Kokkonen* as follows: "[I]f the district court either incorporates the terms of a settlement into its final order of dismissal or expressly retains jurisdiction to enforce a settlement, it may thereafter enforce the terms of the parties' agreement." *Am. Disability Ass'n, Inc. v. Chmielarz*, 289 F.3d 1315, 1320 (11th Cir. 2002). Absent such action, however, a party's failure to comply with the terms of a settlement agreement will generally present a state breach of contract action, "*unless there is some independent basis for federal jurisdiction*." *See Kokkonen,* 511 U.S. at 382, 114 S.Ct. 1673 (emphasis added).

[20] In this case, UpRight notes that the Agreed Order "approved" the Settlement Agreement, but it didn't incorporate the agreement or any of its terms. But as the BA points out, *Kokkonen* is inapplicable here because there

is "some independent basis for federal jurisdiction," i.e., the bankruptcy provisions on which the BA had moved and on which the Bankruptcy Court relied in imposing sanctions. The specific matters that the Bankruptcy Court was called on to consider (UpRight's compliance with the Bankruptcy Code and Rules as they pertain to the Settlement Agreement and the court's Agreed Order) provide independent grounds for federal jurisdiction over the attorneys. The Bankruptcy Court therefore had subject matter jurisdiction over the Settlement Agreement to discipline the attorney conduct that implemented it. And that is what it did. We also recognize that in this matter, the Settlement Agreement itself was between UpRight and the BA with respect to the *federal* Bankruptcy Code and Rules and UpRight's *future* filings and proceedings within the Bankruptcy Court. Obviously, a breach of that agreement should not present a *state* breach of contract action. It is difficult to see how the Bankruptcy Court could not have independent jurisdiction to deal with that implementation. ***1318** [8]

B.

[21] UpRight next argues that the Bankruptcy Court violated their due process rights when it acted and imposed relief pursuant to § 707, § 526, and Rule 2016 because they weren't provided notice that those particular sources were in play. Specifically, UpRight argues that they went to the evidentiary hearing believing that the Bankruptcy Court—per its order to show cause—was only considering sanctions for violating the Settlement Agreement. According to UpRight, the show cause order and evidentiary hearing "provided no hint," made "[no] reference," and gave them "no reason to suspect" that sanctions might be imposed on any statutory provision or rule, which violated due process. UpRight is wrong on both the facts and the law.

As for the facts, the following testimony was elicited by counsel for the BA from Menditto on cross examination:

> Q: Let's assume that UpRight per the language of paragraph 6 didn't violate it, i.e., they didn't collect any additional fees. That's the caveat. Assuming that's true, doesn't UpRight Law still have an obligation to file 2016 disclosures that are correct?
>
> A: It is obligated to do that.
>
> Q: Doesn't UpRight Law have obligations under the rules of professional conduct to make sure clients understand the scope of services that are in play?
>
> A: It does.
>
> Q: You would agree that UpRight Law is a debt relief agency?
>
> A: It is.
>
> Q: As a debt relief agency, isn't UpRight Law required [under § 526] not to make any misleading or untrue filings in court?
>
> A: It is.
>
> Q: Okay. Isn't an attorney that signs the petition under 704 [*sic*; should be § 707(b)(4)] for anything that gets filed supposed to verify the accuracy to the best of their knowledge—I'm using the language loosely, but to the best of their knowledge that it's accurate what's filed?
>
> A: That's correct.
>
> * * *
>
> Q: Does UpRight Law have an obligation to amend disclosures under [Rule] 2016(b) when circumstances change that make the disclosure initially filed not accurate or not a complete picture?
>
> A: Correct.

Immediately after asking these questions, the BA asked Menditto if he disputed that UpRight had filed inaccurate Attorney Disclosures, and although Menditto said that his answer "does not neatly fall into yes or no," he ultimately conceded that the language in the disclosures was "inconsistent" with Paragraph 6 of the Settlement Agreement. In light of the preceding ***1319** exchange, it is simply inaccurate for UpRight to contend that there was "no hint," "[no] reference," and "no reason to suspect" that sanctions under those sources were being argued by the BA at the hearing and contemplated by the Bankruptcy Court.[9]

[22] **[23]** **[24]** **[25]** As for the law, due process is ultimately about fairness. *Lassiter v. Dep't of Soc. Servs. of Durham, Cty., N.C.*, 452 U.S. 18, 24, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981) (observing that although "due process" cannot be precisely defined, "the phrase expresses the

requirement of 'fundamental fairness' ... in a particular situation"). In the context of sanctions, this Court said as follows in *In re Mroz*, 65 F.3d 1567 (11th Cir. 1995):

> Due process requires that the attorney (or party) be given fair notice that his conduct may warrant sanctions and the reasons why. Notice can come from the party seeking sanctions, from the court, or from both. In addition, the accused must be given an opportunity to respond, orally or in writing, to the invocation of such sanctions and to justify his actions.

Id. at 1575-76 (internal citations omitted).

On the facts presented, UpRight had ample notice that the BA was alleging that they had violated § 707, § 526, and Rule 2016, and that they were potentially subject to sanctions thereunder, including: (1) the BA's motions to examine; (2) the hearing on those motions; (3) the show cause order (which was based on the motions to examine and was issued after the hearing on the motions); (4) the evidentiary hearing on the show cause order (where, as just noted, those sources were referenced on cross examination); and (5) the post-cause hearing briefing. Because adequate notice came from both the BA and the Bankruptcy Court, and UpRight had a reasonable opportunity to respond both orally and in writing, the fundamental fairness of due process was met.

C.

[26] UpRight next argues that the Bankruptcy Court applied the wrong legal standard in imposing the suspensions (or practice injunctions) pursuant to § 105. This argument is moot, however, because by the time this case proceeded to oral argument before us, the suspension periods had run and The UpRight Law Firm and Morrison were out from under their respective suspensions. The law has long recognized that the appeal of a suspension is rendered moot when the suspension period has expired. For example, in *Alejandrino v. Quezon*, 271 U.S. 528, 46 S.Ct. 600, 70 L.Ed. 1071 (1926), a member in the Philippines Senate, Jose Alejandrino, was suspended one year for assaulting another member of the Senate. He filed suit challenging his suspension and took it all the way to Supreme Court, but by the time the case got there he had already served his full suspension. In dismissing the case, a unanimous Court said as follows: "We do not think that we can consider this question, for the reason that the period of suspension fixed in the resolution has expired, ***1320** and, so far as we are advised, Alejandrino is now exercising his functions as a member of the Senate. It is therefore in this court a moot question whether or not he could be suspended in the way in which he was." *Id.* at 532, 46 S.Ct. 600. Thus, to the extent that UpRight argues the suspensions imposed pursuant to § 105 constituted an impermissible obey-the-law injunction that was punitive in nature and not a civil sanction, we cannot (and do not) reach that argument.[10]

D.

[27] For their fourth and final argument, UpRight contends that their conduct was unintentional and that the sanctions imposed were grossly excessive. To the extent UpRight focuses this argument on the non-monetary suspension sanctions, which they claim were punitive in nature, the argument has become moot (as just noted) since the suspensions have already been served. That leaves only the $150,000 monetary sanctions for us to consider.

UpRight contends that the Bankruptcy Court "went out of its way to portray UpRight in a negative light." We agree that the Bankruptcy Court utilized strong language in describing The UpRight Law Firm. It referred to the firm as a "high-volume, monolithic ... internet cartel" and "bankruptcy mill" that was motivated purely by "profits" as opposed to "public service." The Bankruptcy Court made repeated references to ethical problems with the firm's business model, going so far as to imply that it wanted to put them out of business (at least for a little while). And it engaged in a lengthy discussion of the Sperro/Fenner repo scam even though it was not directly relevant to the violative conduct at issue and (as the BA had indicated) there wasn't conclusive evidence (at least none put before the Bankruptcy Court in *this* case) that UpRight was culpable in that scheme.

On the other hand, 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.[11] 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. The record indicates that monetary sanctions of $25,000 per case seem to be the normal sanction for serious violations in this Bankruptcy Court. It is worth pointing out in this regard that the $150,000 constituted ***1321** $25,000 for each of the Post-Settlement cases, and $25,000 per case is exactly what UpRight had agreed to settle the *Cook* and *Mikulin* matters that gave rise to the Settlement Agreement in the first place. We conclude in light of our highly deferential standard of review that the monetary sanctions that were imposed weren't grossly excessive and didn't fall outside the reasonable "range of choice" that was available to the Bankruptcy Court. *See Frazier*, 387 F.3d at 1259.

IV.

As stated at the outset of this opinion, bankruptcy practitioners are required to comply with the bankruptcy statute and its implementing rules. If they don't, they can be sanctioned—and they know that. For all the reasons discussed above, the Bankruptcy Court did not commit clear error in finding that UpRight violated the Bankruptcy Code and Rules of Bankruptcy Procedure, and it did not abuse its broad discretion in imposing sanctions for those violations. Thus, the Bankruptcy Court's order and the District Court's order affirming it are **AFFIRMED**.

All Citations

971 F.3d 1299, 69 Bankr.Ct.Dec. 60, 28 Fla. L. Weekly Fed. C 1680

Footnotes

* Honorable C. Roger Vinson, United States District Judge for the Northern District of Florida, sitting by designation.

1 All sectional references in this opinion will be to the Bankruptcy Code, Title 11 U.S.C., and all rule citations will be to the Federal Rules of Bankruptcy Procedure.

2 As this Court has observed: "Distinct from the bankruptcy courts' inherent contempt powers, 11 U.S.C. § 105 creates the bankruptcy courts' statutory civil contempt power." *In re Ocean Warrior, Inc.*, 835 F.3d 1310, 1316 (11th Cir. 2016).

3 The six federal judicial districts in Alabama and North Carolina are the only districts in the country that have a Bankruptcy Administrator instead of a Bankruptcy Trustee. *See* Dan J. Schulman, *The Constitution, Interest Groups, and the Requirements of Uniformity: The United States Trustee and the Bankruptcy Administrator Programs*, 74 Neb. L. Rev. 91, 119-23 (1995) (describing the history of the United States Trustee Program and discussing why Alabama and North Carolina opted out). While the Bankruptcy Reform Act of 1994 "diminishe[d] some of the practical differences between" the two programs, they remain constitutionally distinct as they fall under different branches of government. *Id.* at 93-94. Specifically, Bankruptcy Trustees are part of the executive branch, whereas Bankruptcy Administrators are part of the judicial branch. *Id.* The BA is an independent officer of the judiciary who operates with a full time staff and is completely independent of the Bankruptcy Court and the District Court.

4 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.

5 These "Excluded Services" included dischargeability proceedings, motions for stay relief, motions to redeem property, lien avoidance, contested matters or APs, amendments to schedules, contested exemptions, Rule 2004 examinations,

continued 341 creditor meetings, motions to abandon or sell property, performing statement of intentions, monitoring an asset case, and help with reaffirmation agreements.

6 UpRight briefly argues on appeal, as they did below, that they didn't really violate the terms of the Settlement Agreement because Paragraph 6 only prohibited them from *charging* Covered Clients for the Excluded Services, and there is no evidence they did that. Because we are affirming the Bankruptcy Court's sanctions on the basis of § 526(a)(2), we need not decide whether UpRight violated the Settlement Agreement.

7 This Court has said the same in several non-bankruptcy cases. *See, e.g., Hyde v. Irish,* 962 F.3d 1306, 1309, 1310 (11th Cir. 2020) (court can address sanctions motion "even if it lacks jurisdiction over the underlying case"); *Mahone v. Ray*, 326 F.3d 1176, 1180 (11th Cir. 2003) ("As both the Supreme Court and we have recognized, Rule 11 motions [for sanctions] raise issues that are collateral to the merits of an appeal, and as such may be filed even after the court no longer has jurisdiction over the substance of the case."); *Didie v. Howes*, 988 F.2d 1097, 1103 (11th Cir. 1993) (stating "a district court has the authority to consider and rule upon the collateral issue of sanctions, although the case from which allegedly sanctionable conduct arose is no longer pending," because "a determination on sanctions is not a judgment on the merits, but a decision as to whether an attorney has abused the judicial process").

8 Notably, the BA argued in its brief on appeal that § 707, § 526, and Rule 2016 provided independent bases for federal jurisdiction under *Kokkonen*, and UpRight didn't argue otherwise in their reply brief, impliedly conceding the point. Instead, UpRight only argued in its reply that those bases weren't cited in the order to show cause and weren't mentioned at the subsequent evidentiary hearing, so those jurisdictional sources "were no longer pending at the time of the Hearing." This dovetails into UpRight's second argument on appeal, which we will discuss in the text above.

9 In support of their claim that the sole focus of the evidentiary hearing was on whether they should be held in contempt for violating the Settlement Agreement—and not whether they violated § 707 and/or § 526—UpRight points out that a word search for the terms "707" and "526" in the transcript of the hearing yields no results. However, as indicated in the bracketed language above, that's merely because § 526 was only mentioned by necessary implication and § 707(b)(4) was mistakenly referred to as § 704.

10 We note that counsel for UpRight impliedly conceded the point at the conclusion of oral argument in this case, when he acknowledged that the suspensions have been served and said the monetary sanctions are the only reason this case is still here.

11 To be sure, the fact that UpRight argued that they didn't initially believe they had done anything wrong in the original Attorney Disclosures would seem to indicate that, had there been more Covered Clients, there would have been more violations.

Matter of Kamensky
2022 NY Slip Op 02874
Decided on April 28, 2022
Appellate Division, First Department
Per Curiam
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided and Entered: April 28, 2022 SUPREME COURT, APPELLATE DIVISION First Judicial Department
Anil C. Singh,J.P.,
Lizbeth González
Tanya R. Kennedy
Saliann Scarpulla
Martin Shulman, JJ.

Motion No. 2022-00779 Case No. 2021-02725

[*1]In the Matter of Daniel B. Kamensky, a Suspended Attorney: Attorney Grievance Committee for the First Judicial Department, Petitioner, Daniel B. Kamensky, (OCA Atty. Reg. No. 3046752.) Respondent.

Disciplinary proceedings instituted by the Attorney Grievance Committee for the First Judicial Department. Respondent was admitted to the Bar of the State of New York at a Term of the Appellate Division of the Supreme Court for the First Judicial Department on April 10, 2000.

Jorge Dopico, Chief Attorney, Attorney Grievance Committee, New York (Raymond Vallejo, of counsel), for petitioner.

Michael S. Ross, Esq., for respondent.

Per Curiam

Respondent Daniel B. Kamensky was admitted to the practice of law in the State of New York by the First Judicial Department on April 10, 2000. At all times relevant to this proceeding, he maintained an office for the practice of law within the First Department.

On February 3, 2021, in the United States District Court for the Southern District of New York, respondent pleaded guilty to committing an act of bribery or extortion in connection with the federal bankruptcy laws (*see* 18 USC § 152[6]). Respondent timely notified this Court and the Attorney Grievance Committee (AGC) of his conviction. Respondent was sentenced to six months' imprisonment and six months' supervised release with a condition of home detention. He was fined $55,000 with an assessment of $100. He was released from prison two months early.

The AGC moved this Court for an order to deem respondent's offense as a "serious crime" under Judiciary Law § 90(4)(d) and to immediately suspend respondent pursuant to the Rules for Attorney Disciplinary Matters (22 NYCRR) § 1240.12(c)(2) and Judiciary Law § 90(4)(f). This Court granted the AGC's motion and determined that respondent's offense was a "serious crime" within the meaning of Judiciary Law § 90(4)(d) (*Matter of Kamensky*, 199 AD3d 114 [1st Dept 2021]). Respondent was suspended from the practice of law on September 16, 2021.

The parties now jointly move under 22 NYCRR 1240.8(a)(5) for an order imposing discipline by consent and request that respondent be suspended for a period of six months effective retroactively to September 16, 2021.

A joint motion for discipline by consent must include a stipulation of facts, the respondent's conditional admission to acts of professional misconduct and the violation of specific Rules of Professional Conduct, the relevant factors in mitigation and aggravation, and the agreed-upon discipline (*see* 22 NYCRR 1240.8[a][5][i]). The motion must also be accompanied by an affidavit from the respondent acknowledging the respondent's conditional admission of misconduct, the respondent's freely given consent to the agreed-upon discipline, and the respondent's full awareness of the consequences of such consent (*see* 22 NYCRR 1240.8[a][5][iii]).

The parties have stipulated to the following facts. Respondent started his own hedge fund, Marble Ridge Capital, in 2015. Marble Ridge Capital, in 2018, invested in unsecured bonds of Neiman Marcus. Neiman Marcus transferred a valuable online business, the MyTheresa subsidiary, out of the reach of its creditors ostensibly for the benefit of Neiman Marcus' private equity owners. During the next two years, respondent through Marble Ridge Capital pursued fraudulent conveyance claims against the private equity owners of Neiman Marcus.

Neiman Marcus commenced Chapter 11 Bankruptcy proceedings in May 2020. Respondent applied and was appointed to the Official [*2]Committee of Unsecured Creditors (Creditors' Committee) on behalf of Marble Ridge Capital. By statute, members of the Creditors' Committee are required to act as fiduciaries to all unsecured creditors and to put the interests of the unsecured creditors above their personal interests.

In the midst of the bankruptcy proceedings, Neiman Marcus agreed, as part of a settlement, to transfer back certain illiquid assets which would be held by a trust for the benefit of the unsecured creditors. After the settlement was accepted, the counsel to the Creditors' Committee made a proposal to allow unsecured creditors, as a class, the option to receive an upfront cash payment for their share of the illiquid assets that they are entitled to receive under the settlement. Marble Ridge Capital and other bondholders would fund the cash payment. The Creditors' Committee voted to continue negotiations with bondholders, including Marble Ridge Capital, for a potential cash-out option as part of a settlement.

During these proceedings, the counsel to the Creditors' Committee informed respondent that a trading desk at an investment bank expressed interest in placing a bid for the cash out option that was being negotiated. Specifically, the investment bank expressed interest in purchasing the Series B shares of the MyTheresa subsidiary from the unsecured creditors of Neiman Marcus.

Respondent telephoned a trader who worked on the trading desk at the investment bank, and he told the trader to refrain from placing a competing bid. Respondent threatened the trader by suggesting that he would use his position on the Creditors' Committee to ensure that the investment bank's bid would be rejected. He also informed the trader that he would withhold Marble Ridge Capital's future business from the investment bank if it did not step down. The investment bank initially communicated its decision not to make a bid; however it did place a bid the next day.

Several hours after respondent's phone call to the investment bank, the counsel to the Creditors' Committee informed respondent that the trader believed that respondent had threatened the investment bank. Respondent subsequently placed a second call to the trader. Respondent attempted to persuade the trader to falsely state that he was mistaken about the nature of respondent's previous call and that respondent only suggested that the investment bank should bid if it was making a serious offer. Respondent was federally indicted one month later.

Respondent conditionally admits that his conduct, violated Rules of Professional Conduct (22 NYCRR 1200.0) rules 8.4(b) (illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer) and 8.4(h) (other conduct that adversely reflects on the lawyer's fitness as a lawyer).

In mitigation, the parties note that respondent has no prior disciplinary history and that the offense occurred within the span of a few hours. The parties also note that there [*3]was no harm to the unsecured creditors to whom respondent owed a fiduciary duty, as the investment bank placed a bid the following day after respondent's offense. Respondent also

promptly withdrew from the Creditors' Committee and subordinated all of his personal interests in the Neiman Marcus bankruptcy. In settling his personal claims with the Neiman Marcus estate, he agreed to, among other things, never again serve on any official bankruptcy committee.

In aggravation, the parties emphasize that respondent harmed and threatened the integrity of the bankruptcy process. Respondent's coercive phone call to the trader was predicated upon Marble Ridge Capital's potential financial gain. In light of respondent's personal financial condition, there was no financial need for him to engage in the underlying misconduct. Furthermore, respondent willfully attempted to obstruct and impede the administration of justice with respect to the government's investigation of his offense by attempting to persuade the trader to change his account of the coercion.

We agree with the parties that the discipline to be imposed upon respondent should be a suspension for a period of six months effective retroactively to September 16, 2021 (*cf. Matter of Novins*, 119 AD3d 37 [1st Dept 2014]; *Matter of Rosenblatt*, 253 AD2d 106 [1st Dept 1999]).

Accordingly, the parties' joint motion for discipline by consent should be granted and respondent is suspended from the practice of law for a period of six months effective retroactively to September 16, 2021 and until further order of the Court. The AGC's petition of charges should be denied as moot.

All concur.

It is Ordered that the parties' joint motion for discipline by consent pursuant to 22 NYCRR 1240.8(a)(5) is granted, and respondent Daniel B. Kamensky is suspended from the practice of law in the State of New York for a period of six months, effective retroactively to September 16, 2021, and continuing until further order of this Court, and

It is further Ordered that the Attorney Grievance Committee's petition of charges is denied as moot, and

It is further Ordered that during the period of suspension, respondent Daniel B. Kamensky is commanded to desist and refrain from (1) the practice of in any form, either as principal or agent, clerk or employee of another, (2) appearing as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law; and

It is further Ordered that respondent Daniel B. Kamensky shall comply with the rules governing the conduct of disbarred or suspended attorneys (see NYCRR 1240.15), which are made part hereof; and

It is further Ordered that if respondent Daniel B. Kamensky has been issued a secure pass by the Office of Court Administration, it shall be returned to the issuing [*4]agency.

Entered: April 28, 2022

Return to Decision List

921 F.3d 629
United States Court of Appeals, Seventh Circuit.

In the MATTER OF: Steven Robert LISSE, Debtor. Appeals of: Wendy Alison Nora

Nos. 18-1866 & 18-1889
|
Argued January 14, 2019
|
Decided April 1, 2019
|
Rehearing and Rehearing En Banc Denied May 3, 2019

Synopsis
Background: Following Chapter 13 debtor-mortgagor's voluntary dismissal, more than 16 months after it was filed, of his appeal from order of the United States Bankruptcy Court for the Western District of Wisconsin, refusing to confirm proposed plan and dismissing bankruptcy case, the District Court, William M. Conley, J., entered order to show cause why debtor's attorney should not be sanctioned for her frivolous, or at best vexatious, appeal. The District Court., Conley, J., imposed sanctions under Bankruptcy Rule and on "unreasonable and vexatious multiplication" theory and also suspended attorney from practicing in that District, and attorney appealed.

Holdings: The Court of Appeals, Brennan, Circuit Judge, held that:

[1] district court did not abuse its discretion in imposing sanctions for filing frivolous appeal on attorney who persisted in raising arguments that were barred by Rooker-Feldman doctrine;

[2] district court did not abuse its discretion in awarding sanctions against Chapter 13 debtor-mortgagors' attorney on an "unreasonable and vexatious multiplication" theory;

[3] district court acted properly in suspending attorney from practicing law in the Western District of Wisconsin for periods of six and then twelve months; and

[4] conduct of attorney for Chapter 13 debtor-mortgagors, in connection with her appeal from sanctions imposed on her by district court, warranted additional sanctions.

Affirmed with sanctions.

West Headnotes (30)

[1] Bankruptcy Right of review and persons entitled; parties; waiver or estoppel

Attorney who was sanctioned for professional misconduct in representing Chapter 13 debtor-mortgagors' possessed standing to appeal the district court's decisions in her own name.

[2] Bankruptcy Frivolity or bad faith; sanctions

Bankruptcy appeal is "frivolous," so as to warrant an "award just damages and single or double costs" pursuant to Bankruptcy Rule, when the result is obvious, or when appellant's argument is wholly without merit. Fed. R. Bankr. P. 8020(a).

[3] Federal Courts Sanctions

Court of Appeals reviews a sanctions order entered by district court on an "unreasonable and vexatious multiplication" theory for abuse of discretion. 28 U.S.C.A. § 1927.

1 Cases that cite this headnote

[4] Bankruptcy Good faith in general

Bankruptcy court did not clearly err in finding that Chapter 13 petition, which attorney had filed in contravention of *Rooker-Feldman* doctrine in effort to collaterally attack state court's conclusion that mortgage note was not forged, and that holder of note had standing to foreclose, was filed for improper purpose of thwarting debtors' creditors, rather than of paying them, so as to be subject to dismissal under "for cause"

dismissal provision for lack of good faith. 11 U.S.C.A. § 1307(c).

1 Cases that cite this headnote

[5] **Bankruptcy** Frivolity or bad faith; sanctions

District court did not abuse its discretion in imposing sanctions for filing frivolous appeal on attorney who persisted in raising arguments that were barred by *Rooker-Feldman* doctrine, in connection with appeal from bankruptcy court order dismissing, for lack of good faith, a Chapter 13 petition that was filed not in legitimate attempt to deal with residential mortgage debt but to thwart rights of holder of debtors' mortgager note, while continuing to collaterally attack state court's conclusion that mortgage note was not forged, and that holder of note had standing to foreclose. Fed. R. Bankr. P. 8020(a).

1 Cases that cite this headnote

[6] **Bankruptcy** Individual Debt Adjustment

Basic premise of Chapter 13 of the Bankruptcy Code is to facilitate debtor's ability to pay his creditors, not to frustrate creditors' rights. 11 U.S.C.A. § 1301 et seq.

1 Cases that cite this headnote

[7] **Bankruptcy** Good faith in general

Bankruptcy court may dismiss a Chapter 13 petition for "cause" if it finds that the petition was filed in bad faith. 11 U.S.C.A. § 1307(c).

5 Cases that cite this headnote

[8] **Bankruptcy** Good faith in general

Requirement that debtors must act in good faith in filing for Chapter 13 relief, or risk having case dismissed under "for cause" provision, prevents debtors from manipulating the Code for wrongful purposes. 11 U.S.C.A. § 1307(c).

[9] **Bankruptcy** Good faith in general

Bankruptcy Particular cases and issues

Whether debtor filed his Chapter 13 petition in good faith is a factual question, a bankruptcy court's determination on which, in deciding whether to dismiss case under the "for cause" provision, will be reversed only if, based on totality of the circumstances, that determination is clearly erroneous. 11 U.S.C.A. § 1307(c).

3 Cases that cite this headnote

[10] **Bankruptcy** Good faith in general

Bankruptcy Home mortgages or similar obligations

Using Chapter 13 petition to stave off impending home foreclosure sale is not necessarily improper, and a debtor may properly use a Chapter 13 petition to cure past defaults on residential mortgage loan by making regular payments to mortgage lender, thereby preventing loss of home through foreclosure sale.

[11] **Courts** Debtor and creditor; bankruptcy; mortgages, liens, and security interests

Under *Rooker-Feldman* doctrine, federal courts are bound by state court's resolution of debtor-mortgagors' defenses to foreclosure.

2 Cases that cite this headnote

[12] **Bankruptcy** Frivolity or bad faith; sanctions

Inclusion of one plausible argument, amidst plethora of frivolous arguments, will not insulate party from sanctions under Bankruptcy Rule for filing a frivolous appeal. Fed. R. Bankr. P. 8020(a).

1 Cases that cite this headnote

[13] **Courts** Federal-Court Review of State-Court Decisions; Rooker-Feldman Doctrine

Federal courts do not exist to provide disappointed state court losers a second bite at the apple.

2 Cases that cite this headnote

[14] **Costs, Fees, and Sanctions** Objective or subjective standard

Lawyer's subjective bad faith is a sufficient, but not a necessary, condition for imposition of sanctions on an "unreasonable and vexatious multiplication" theory. 28 U.S.C.A. § 1927.

[15] **Costs, Fees, and Sanctions** Objective or subjective standard

Attorney may be sanctioned on an "unreasonable and vexatious multiplication" theory, despite his or her subjective good faith, if attorney's conduct was in objective bad faith. 28 U.S.C.A. § 1927.

[16] **Costs, Fees, and Sanctions** Reasonableness or Bad Faith

Attorneys demonstrate "objective bad faith," of kind warranting sanctions on an "unreasonable and vexatious multiplication" theory, when they pursue a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound. 28 U.S.C.A. § 1927.

[17] **Costs, Fees, and Sanctions** Mandatory duty or discretion

Trial judges, being in best position to detect bad faith litigation conduct, possess broad discretion in exercising the power to impose sanctions on an "unreasonable and vexatious multiplication" theory. 28 U.S.C.A. § 1927.

1 Cases that cite this headnote

[18] **Bankruptcy** Frivolity or bad faith; sanctions

District court did not abuse its discretion in awarding sanctions against Chapter 13 debtor-mortgagors' attorney on an "unreasonable and vexatious multiplication" theory for filing bankruptcy petitions in bad faith, not in legitimate attempt to deal with residential mortgage debt and to save debtors' home from foreclosure, but to thwart rights of holder of debtors' mortgager note while continuing to collaterally attack state court's conclusion that mortgage note was not forged, and that holder of note had standing to foreclose, for continuing to press meritless argument about forged nature of note, in violation of *Rooker*-*Feldman* doctrine, on appeal to district court, and for compounding the delays caused by her meritless filings by filing numerous, last-minute motions for lengthy stays or deadline extensions. 28 U.S.C.A. § 1927.

[19] **Bankruptcy** Frivolity or bad faith; sanctions

Using the automatic stay as litigation ploy to drag out foreclosure proceedings in another jurisdiction constitutes objective bad faith, of kind supporting award of sanctions against attorney on an "unreasonable and vexatious multiplication" theory. 11 U.S.C.A. § 362(a); 28 U.S.C.A. § 1927.

[20] **Attorneys and Legal Services** Suspension

Federal district courts are permitted to rely on state court disciplinary proceedings to suspend attorneys from practicing before them.

[21] **Attorneys and Legal Services** Presumptions, inferences, and burden of proof

Constitutional Law Conduct and discipline

To avoid imposition of reciprocal discipline by federal court in reliance of state court disciplinary ruling, attorney bears burden to identify either a due process violation, insufficient fact findings, or some other grave reason why state court's ruling is not entitled to federal court's respect. U.S. Const. Amend. 14.

[22] **Attorneys and Legal Services** Indefinite Suspension

District court acted properly in suspending attorney from practicing law in the Western District of Wisconsin for periods of six months and then indefinitely until her Wisconsin law license was restored, even without regard to suspension imposed by the Wisconsin Supreme Court, based on attorney's repeated abuse of judicial process, through frivolous tag-team Chapter 13 filings that served no purpose other than to delay residential mortgage foreclosure process, based on her other dilatory tactics, and based on attorney's unprofessional conduct toward opposing counsel in accusing opposing counsel of committing fraud on the court and of multiple federal crimes. U.S.Dist.Ct.Rules W.D.Wis., Rule 83.5(E).

[23] **Attorneys and Legal Services** Federal system

Federal courts have inherent authority to disbar or suspend lawyers for misconduct.

[24] **Attorneys and Legal Services** Impartiality and decorum of tribunal

Attorneys and Legal Services Conduct as to Adverse Parties and Counsel

Attorney's flippant, unfounded accusations of misconduct and fraud by opposing counsel and court officials demean the legal profession and impair the orderly operation of judicial system, and constitute behavior warranting punishment.

2 Cases that cite this headnote

[25] **Costs, Fees, and Sanctions** Discretion

Award of sanctions under Federal Rule of Appellate Procedure for filing frivolous appeal to the Court of Appeals is discretionary with the Court. Fed. R. App. P. 38.

[26] **Costs, Fees, and Sanctions** Frivolousness or delay in general

Award of frivolous appeal sanctions pursuant to Federal Rule of Appellate Procedure is appropriate when appellant simply repeats previously rejected, frivolous arguments or pursues an appeal to harass adversary. Fed. R. App. P. 38.

[27] **Bankruptcy** Frivolity or bad faith; sanctions

Conduct of attorney for Chapter 13 debtor-mortgagors, in connection with her appeal from sanctions imposed on her by district court, in simply regurgitating points which she had unsuccessfully pressed before the bankruptcy court, and which district court had concluded were frivolous, was such as to warrant imposition of sanctions, in amount of appellee's reasonable fees and costs, pursuant to Federal Rule of Appellate Procedure; however, while appellee's request for $2,150 in attorney fees and $446 in costs appeared reasonable, appellee would be required to submit an affidavit or other evidentiary record to support them. Fed. R. App. P. 38.

1 Cases that cite this headnote

[28] **Costs, Fees, and Sanctions** Frivolousness or delay in general

Award of frivolous appeal sanctions pursuant to Federal Rule of Appellate Procedure is appropriate when litigant or attorney presents appellate arguments with no reasonable expectation of success for purposes of delay, harassment, or sheer obstinacy. Fed. R. App. P. 38.

1 Cases that cite this headnote

[29] **Attorneys and Legal Services** Nature and Scope of Duty

Lawyers must represent their clients' interests responsibly, not only zealously.

[30] **Attorneys and Legal Services** Particular Acts and Omissions

Part of being a responsible counselor to one's client is recognizing when the legal battle is lost and advising client how to best handle that outcome.

***632** Appeals from the United States District Court for the Western District of Wisconsin., No. 16-cv-617-wmc —**William M. Conley**, *Judge*.

Attorneys and Law Firms

Reed Peterson, REED PETERSON & ASSOCIATES, LLC, Madison, WI, for Debtor.

Wayne Michael Pressel, Attorney, PRESSEL LAW OFFICE LLC, Carson City, NV, for Appellant.

Kenneth W. Bach, Attorney, JOHNSON, BLUMBERG & ASSOCIATES, LLC, Chicago, IL, for Appellee.

Before Wood, Chief Judge, and Brennan and St. Eve, Circuit Judges.

Opinion

Brennan, Circuit Judge.

Attorney Wendy Alison Nora appeals a decision requiring her and her client to pay damages and costs related to this bankruptcy litigation, as well as an order suspending her from the practice of law in the Western District of Wisconsin. These appeals, unfortunately, are not Nora's first encounter with attorney discipline. *See, e.g.*, *In re Disciplinary Action against Nora*, 450 N.W.2d 328 (Minn. 1990); *In re Disciplinary Proceedings against Nora*, 173 Wis.2d 660, 495 N.W.2d 99 (1993); *In re Rinaldi*, 778 F.3d 672 (7th Cir. 2015); *In re Nora*, 778 F.3d 662 (7th Cir. 2015); *In re Disciplinary Proceedings against Nora*, 380 Wis.2d 311, 909 N.W.2d 155 (2018). While we hope this will be her last such encounter, her serial dilatory, vexatious, and unprofessional litigation practices lead us to affirm the district court's orders. In addition, Nora's frivolous motion practice ***633** and legal arguments in these appeals lead us to lift the suspension of our previous monetary sanction against Nora.

I. Background

Proceedings in multiple venues are relevant to these appeals, including each level of the Wisconsin state court system, two Chapter 13 petitions in federal bankruptcy court, and two bankruptcy appeals in the district court. Because the procedural history is pertinent to resolving Nora's appeals, we detail it below.

A. Wisconsin Foreclosure Action

Steven and Sondra Lisse refinanced their home in 2006, taking out a new mortgage and signing a corresponding note. The Lisses fell behind on their payments, and an entity controlled by HSBC Bank USA, N.A. filed a foreclosure action in Dane County Circuit Court in 2010.[1]

Four years later, HSBC moved for summary judgment. In response, the Lisses asked the court for additional discovery that they hoped would demonstrate HSBC could not enforce its note. The court denied the Lisses' request and awarded HSBC summary judgment on its foreclosure claim. The Wisconsin Court of Appeals affirmed that decision. *HSBC Bank USA v. Lisse*, 367 Wis.2d 749, 877 N.W.2d 650 (Wis. Ct. App. 2016) (unpublished table decision).

B. Chapter 13 Bankruptcy Petitions

Approximately six weeks after the Wisconsin Court of Appeals' affirmance, Steven Lisse (by attorney Nora) filed a Chapter 13 bankruptcy petition in the Western District of Wisconsin. As a result, the Wisconsin Supreme Court extended the Lisses' deadline to petition for review of the foreclosure judgment. Order, *HSBC Bank USA v. Lisse*, No. 2015AP273 (Wis. Apr. 7, 2016).[2] The practical effect was to postpone HSBC's foreclosure on the Lisses' home as long as bankruptcy proceedings remained pending in federal court.

Nora submitted a Chapter 13 plan for Steven Lisse that proposed the Lisses would make their monthly mortgage payments to Nora's trust account while the bankruptcy court conducted an adversary proceeding to identify the entity entitled to the money. HSBC objected, noting it already litigated its claim to judgment in the Wisconsin courts.

After the bankruptcy court held a confirmation hearing, it rejected Nora's proposed plan and *sua sponte* dismissed the case without leave to amend. The bankruptcy court concluded, "[T]his clearly is an opportunity or this plan shows all the earmarks of being an effort to continue a fight, which could be made and was made in the state foreclosure action, in the Bankruptcy Court." Transcript of Final Hearing on Chapter 13 Plan at 51–52, *In re Steven Robert Lisse*, No. 3:16-10935 (Bankr. W.D. Wis. July 18, 2016), ECF No. 84. The bankruptcy judge found the plan improper, citing *In re Schaitz*, 913 F.2d 452 (7th Cir. 1990), "because the purpose ***634** for filing the plan is not to pay the creditor but to thwart paying the creditor." *Id*. at 52. Nora filed an appeal to the district court on behalf of Steven Lisse, challenging HSBC's standing, arguing HSBC's note was a forgery, and accusing HSBC's counsel of fraud on the court.

Five days after the bankruptcy court dismissed Steven Lisse's petition, Nora filed a separate Chapter 13 petition on behalf of his wife, Sondra Lisse. This again extended the Lisses' deadline in the Wisconsin Supreme Court. Order, *HSBC Bank USA v. Lisse*, No. 2015AP273 (Wis. July 28, 2016). Nora's proposed Chapter 13 plan for Sondra Lisse was similar to the one the bankruptcy court had just rejected in Steven Lisse's case. HSBC moved to dismiss the petition for lack of good faith, arguing Nora filed it with the sole intent to delay the final disposition of the Wisconsin foreclosure action. HSBC also sought relief from the automatic stay.

Nora responded by moving for sanctions, claiming HSBC's *Rooker-Feldman* and preclusion arguments were frivolous and accusing HSBC's counsel of "completely desecrating the integrity of these proceedings." Motion for Noncompliance with Discovery at 10, No. 3:16-12556-cjf (Bankr. W.D. Wis. Dec. 7, 2016), ECF No. 59. The bankruptcy court rejected Nora's sanctions arguments entirely. *In re Sondra Kay Lisse*, 567 B.R. 813, 819 (Bankr. W.D. Wis. 2017) (finding "no basis" to grant the motion). It also lifted the automatic stay, noting the Wisconsin foreclosure judgment precluded Nora's arguments that HSBC's note was forged.

After these procedural rulings, Nora filed three appeals to the district court and moved to voluntarily dismiss Sondra Lisse's petition pending resolution of the appeals, which the district court granted. With both bankruptcy cases dismissed (although on appeal), the Lisses filed their petition for review with the Wisconsin Supreme Court—13 months after the Wisconsin Court of Appeals affirmed the foreclosure judgment. Petition for Review, *HSBC Bank USA v. Lisse*, No. 2015AP273 (Wis. Mar. 23, 2017).

C. Bankruptcy Appeals to the District Court

Nora began Steven Lisse's bankruptcy appeal by filing a document accusing HSBC and its counsel (by name) of federal crimes, including bankruptcy fraud under 18 U.S.C. § 157. Next, she asked the district court to order HSBC to "conventionally file" its original note with the clerk of court, as evidence of "criminal misconduct." Shortly thereafter, Nora moved to stay the deadline for Steven Lisse's merits brief, citing HSBC's purportedly "ambiguous and contradictory" record designations. Then, in a motion requesting summary reversal, Nora again accused HSBC and its counsel of perpetrating a fraud on the courts by presenting forged documents.

Following this initial burst of activity, Steven Lisse's appeal lay dormant for almost a year. Finally, on August 23, 2017, HSBC requested dismissal for failure to prosecute. This prompted the district court to set an October 2, 2017 deadline for Nora's opening brief on the merits.

Nora filed a motion to stay the appeal ten days later, citing the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq*.,[3] and a physician's recommendation ***635** that Nora take a leave from practicing law. Despite expressing some skepticism as to Nora's motives—noting her "history of frivolous and dilatory tactics" and efforts to "drag[ ] out the briefing on the merits by satellite skirmishes"—the district court granted a three-month stay. Order, *Lisse v. HSBC Bank USA*, No. 3:16-00617-wmc (W.D. Wis. Sept. 21, 2017), ECF No. 42. It did, however, stress that "[n]o further extensions will be granted to Attorney Nora absent new, extraordinary circumstances." *Id.* Nora later testified that she continued to practice law for other clients in other matters during the three-month stay.[4]

The day after the district court stayed Steven Lisse's bankruptcy appeal, the Wisconsin Supreme Court denied the Lisses' petition to review the foreclosure judgment. *HSBC Bank USA v. Lisse*, 378 Wis.2d 25, 904 N.W.2d 124 (2017) (unpublished table decision). As a result, in December 2017, HSBC began moving forward with a foreclosure sale in Dane County Circuit Court.

With respect to Sondra Lisse's appeal, on December 5, 2017, the district court affirmed the bankruptcy court's rulings. *Lisse v. Select Portfolio Serv., Inc.*, No. 17-cv-206-jdp, 2017 WL 6021316 (W.D. Wis. Dec. 5, 2017). It held that the preclusive effect of the Wisconsin foreclosure judgment defeated Nora's challenges to the note's authenticity and provided HSBC with standing to object to Sondra Lisse's proposed Chapter 13 plan. *Id.* at *7. Also, the district court concluded the "appeal, like the bankruptcy litigation, plainly lacks merit and was wastefully presented." *Id.* at *8.[5] Nora asked the district court to reconsider, but the district court declined. *Lisse v. Select Portfolio Serv., Inc.*, No. 17-cv-206-jdp, 2018 WL 840157, at *3 (W.D. Wis. Feb. 12, 2018) (finding Nora's motion provided "no basis ... to reconsider its decision"). Sondra Lisse did not appeal the district court's rulings to this court.

After the stay expired in Steven Lisse's appeal—and on the eve of Nora's deadline to file an opening brief—the Lisses returned to Dane County Circuit Court to file a flurry of motions seeking to postpone the foreclosure sale.[6] The day before her opening brief was due, Nora moved for another stay pending resolution of her clients' state-court motions. The district court denied Nora's eleventh-hour request, finding "the debtor's sole purpose appears to be to delay an inevitable foreclosure through every legal artifice available both in state and federal court." Order, *Lisse v. HSBC Bank USA*, No. 3:16-cv-00617-wmc (W.D. Wis. Jan. 18, 2018), ECF No. 46. Characterizing Nora's litigation maneuvers as "plainly seek[ing] to continue to postpone [the state-court foreclosure action] ***636** through collateral, tag-team attacks in federal court brought separately by husband and wife," the district court stated it would "no longer be complicit in these transparent efforts." *Id.* at 2. It refused to stay Steven Lisse's bankruptcy appeal further.

The following day, instead of filing an opening brief, Nora moved to voluntarily dismiss Steven Lisse's appeal—more than 16 months after she filed it.

D. Sanctions in the District Court

The district court dismissed Steven Lisse's appeal, but it did not stop there. Due to her "pattern of sharp practice," the district court ordered Nora to show cause "why she should not be sanctioned for her frivolous, or at best vexatious, appeal." Order, *Lisse v. HSBC Bank USA*, No. 3:16-cv-00617-wmc (W.D. Wis. Jan. 22, 2018), ECF No. 49. A week later, Nora asked the district court to vacate its show cause order, alleging that the order violated due process and that the district court had pre-judged the merits of imposing sanctions. The district court scheduled an evidentiary hearing before a three-judge panel consisting of Chief District Judge Peterson, District Judge Conley, and Chief Bankruptcy Judge Furay.[7]

Nora, now represented by her own counsel, filed an answer seeking to "quash" the show cause order, alleging a lack of notice of the "charges" against her, objecting to Judge Conley's participation at the hearing, and challenging the constitutional authority of Chief Bankruptcy Judge Furay to participate. The district court provided Nora with a 13-page "supplemental notice" identifying the bases for the order to show cause. Nora's lawyer followed up with a "rejoinder," objecting to the lack of separate "counts" and arguing the court could not conduct its own attorney discipline proceedings.

The district court held a 90-minute hearing on the show cause order and issued its opinion on March 20, 2018. It grouped Nora's misconduct into three categories: "(1) inappropriately pursuing relief in federal court; (2) dilatory litigation conduct, including numerous, last-minute requests for lengthy extensions; and (3) filing multiple cases or appeals then failing to consolidate or join them." Opinion and Order at 8, *Lisse v. HSBC Bank USA*, No. 3:16-cv-00617-wmc (W.D. Wis. Mar. 20, 2018), ECF No. 88. The court decided, "Nora's advocacy has crossed the line of professional conduct too many times to be tolerated or ignored any longer." *Id.* at 11. The district court fined Nora $2,500 and suspended her from appearing in new matters in the Western District for six months, although it stayed those sanctions if and until Nora submitted another improper filing. *Id.*

Meanwhile, HSBC had filed a motion for $3,675 in costs and attorneys' fees under both Fed. R. Bankr. P. 8020 and 28 U.S.C. § 1927. Classifying the appeal as "frivolous," the district court held Steven Lisse and Nora "jointly and severally liable for $1,837.50." Opinion and Order at 4, 8, *Lisse v. HSBC Bank USA*, No. 3:16-cv-00617-wmc (W.D. Wis. Mar. 22, 2018), ECF No. 89. This monetary sanction was in addition to the suspended fine discussed above.

About a week later, the Wisconsin Supreme Court issued a decision in disciplinary proceedings against Nora—for conduct not connected with this litigation—revoking her law license for at least one year. *In re Disciplinary Proceedings against Nora*, 909 N.W.2d at 167. On April 13, 2018, pursuant to W.D. Wis. LR 83.5, the district court suspended Nora

from practice in the Western District until her Wisconsin law license was restored.

E. Appeals in this Court

[1] Nora now appeals the district court's decisions in her individual capacity.[8] Her opening brief was due on July 30, 2018, but on that date, in violation of Circuit Rule 26,[9] Nora instead filed a motion asking for a sixty-day extension. We pushed the deadline back to September 14, 2018, but when that date arrived, Nora again filed a noncompliant extension motion.[10] Although we again extended Nora's deadline to September 19, 2018, she failed to meet it and filed her opening brief late.

Nora also repeatedly filed documents styled as "Requests for Judicial Notice," asking this court to take judicial notice of various documents filed in other cases (affidavits, deposition transcripts, court orders). After two orders denying Nora's requests, on Nora's third attempt Judge Easterbrook (as motions judge) published an opinion explaining why the requests were procedurally improper. *In re Appeals of Nora*, 905 F.3d 495, 497 (7th Cir. 2018) ("The right place to propose judicial notice, once a case is in a court of appeals, is in a brief.... There's no need to engage in motions practice, require the attention of additional appellate judges, and defer briefing.").

When HSBC submitted its response, Nora moved to strike portions of its brief and supplemental appendix. Nora argued HSBC's citation of documents from the Wisconsin foreclosure action and Sondra Lisse's bankruptcy case—some of which had been filed by Nora as exhibits in Steven Lisse's bankruptcy appeal—made it "unreasonably difficult, if not impossible," for her to file a timely reply. Nora also asked this court to stay the appeal until we ruled on her motions to strike. The court denied Nora's motions as "frivolous," sanctioning her by docking 2,000 words from the limit for her reply. Although our order stated—in no uncertain terms—that "no motion for further time (or additional words) will be entertained," the next day Nora filed a motion for reconsideration asking the court "to restore her full word count limitation ... and to allow [Nora] sufficient time to file her Reply Brief...." Motion for Reconsideration of November 20, 2018 Procedural Order at 11. We denied that motion too.

After the completion of merits briefing, HSBC moved for damages and costs under Fed. R. App. P. 38, arguing Nora's appeals are frivolous. We ordered Nora to respond to the motion, and she (not to be outdone) requested sanctions against HSBC. Finally, failing to heed this court's earlier directives, Nora filed yet another request for judicial notice, which this court denied again.

*638 II. Discussion

Nora appeals two separate rulings by the district court, although her briefs meld them together. First, Nora challenges the district court's March 22, 2018 sanctions order holding her and Steven Lisse jointly and severally liable to HSBC for $1,837.50 under Fed. R. Bankr. P. 8020 and 28 U.S.C. § 1927. Second, Nora appeals the April 13, 2018 order suspending her from practice in the Western District of Wisconsin.[11] Although Nora purports to identify ten issues on appeal, each is a variation on the central theme that she should have been permitted to relitigate the authenticity of HSBC's note in federal court. In addition, we must resolve HSBC's appellate motion for damages and costs under Fed. R. App. P. 38.

A. March 22, 2018 Sanctions Order

[2] A district court may "award just damages and single or double costs" if it determines a bankruptcy appeal is frivolous. Fed. R. Bankr. P. 8020(a); *see also Hill v. Norfolk & Western Ry. Co.*, 814 F.2d 1192, 1201 (7th Cir. 1987) (discussing power to sanction attorneys in addition to parties).[12] An appeal is frivolous "when the result is obvious or when the appellant's argument is wholly without merit." *Goyal v. Gas Tech. Inst.*, 732 F.3d 821, 823 (7th Cir. 2013) (quoting *Spiegel v. Cont'l Ill. Nat'l Bank*, 790 F.2d 638, 650 (7th Cir. 1986)).

[3] Likewise, a court may hold an attorney personally liable for "excess costs, expenses, and attorneys' fees reasonably incurred because of" her unreasonable and vexatious litigation conduct. 28 U.S.C. § 1927. We review a district court's sanctions order for abuse of discretion. *In re Busson-Sokolik*, 635 F.3d 261, 271 (7th Cir. 2011) (addressing Fed. R. Bankr. P. 8020); *Bell v. Vacuforce, LLC*, 908 F.3d 1075, 1082 (7th Cir. 2018) (addressing 28 U.S.C. § 1927).

Under both Fed. R. Bankr. P. 8020 and 28 U.S.C. § 1927, the district court acted well-within its discretion in imposing a monetary sanction on Nora.

1. Sanctions were appropriate under Fed. R. Bankr. P. 8020(a) because the bankruptcy appeal was frivolous.

[4] **[5]** The bankruptcy court found Nora filed Steven Lisse's Chapter 13 bankruptcy petition for the improper purpose of thwarting the Lisses' creditors, rather than paying them. That conclusion was not clearly erroneous. *In re Wiese*, 552 F.3d 584, 588 (7th Cir. 2009) (a bankruptcy court abuses its discretion when its decision is premised on an incorrect legal principle or a clearly erroneous factual finding).

[6] Unlike a Chapter 7 petition, which focuses on liquidating the debtor's assets to satisfy his creditors, Chapter 13 allows a debtor to voluntarily propose a plan to reorganize his debts for repayment out of his future income. Richard I. Aaron, Bankruptcy Law Fundamentals 777 (2013 ed.) ("The central thesis of Chapter 13 is that an individual debtor can dedicate future ***639** income to pay accumulated debts."); *see also* 8 Collier on Bankruptcy § 1300.02 (Richard Levin & Henry Sommer eds., 16th ed. 2018). The focus on repayment is highlighted by the requirement that the debtor begin making payments to the trustee within 30 days after proposing a Chapter 13 plan, even before the plan is confirmed. 11 U.S.C. § 1326(a)(1). The basic premise is to facilitate the debtor's ability to pay his creditors, not to frustrate the creditors' rights. *In re Schaitz*, 913 F.2d 452, 453–54 (7th Cir. 1990); *cf. In re Rimgale*, 669 F.2d 426, 428 (7th Cir. 1982) (describing Congress's idealized Chapter 13 case as one where "the debtor, given time and relief from harassment, is able to pay all or most of his debts").

[7] **[8]** **[9]** A bankruptcy court may dismiss a Chapter 13 petition for cause if it finds the petition was filed in bad faith. 11 U.S.C. § 1307(c); *In re Love*, 957 F.2d 1350, 1354 (7th Cir. 1992); 8 Collier on Bankruptcy § 1307.04[10]; *see also* 11 U.S.C. § 1325(a)(3) (requiring a plan to have been proposed in good faith as a condition of confirmation). Given bankruptcy's historical roots as an equitable remedy, "the good faith standard prevents debtors from manipulating the Code for wrongful purposes." *In re Love*, 957 F.2d at 1359. Whether a debtor filed his petition in good faith is a factual finding to be reversed only when the bankruptcy court's determination, based on the totality of the circumstances, is clearly erroneous. *In re Smith*, 286 F.3d 461, 466 (7th Cir. 2002).

[10] Using a Chapter 13 petition to stave off an impending home foreclosure sale is not necessarily improper. Although Chapter 13 generally prohibits a plan from modifying mortgage lenders' underlying rights, 11 U.S.C. § 1322(b)(2), it expressly allows a debtor to cure defaults with respect to his principal residence "until such residence is sold at a foreclosure sale that is conducted in accordance with applicable non-bankruptcy law." 11 U.S.C. § 1322(c)(1); *see also* 8 Collier on Bankruptcy § 1322.06[1][a]; *id.* at § 1322.16. A debtor, thus, may use a proper Chapter 13 petition to cure past defaults on his mortgage through regular payments to the lender, preventing the foreclosure sale. *See Nobelman v. American Savings Bank*, 508 U.S. 324, 330, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993).

But this is not what Nora proposed for the Lisses. As the bankruptcy court recognized, the object of Nora's plan was not to pay the Lisses' creditors in an orderly fashion but, instead, to relitigate HSBC's foreclosure judgment. Nora suggested directing the Lisses' mortgage payments to her trust account (not to the Chapter 13 trustee) "during the pendency [of an] adversary proceeding to be commenced, in part, for the determination of the identity of the real party in interest entitled to the payment or proceeds...." Such an effort to relitigate a creditor's rights—already established in state-court proceedings—is an improper, bad faith use of a Chapter 13 petition. *See In re Love*, 957 F.2d at 1359 ("[F]iling a Chapter 13 petition in order to thwart the payment of an otherwise nondischargeable income tax debt ... was not one of the intended purposes of the bankruptcy provisions.... [T]he bankruptcy court's finding of lack of good faith is not clearly erroneous.").

In the district court, Nora never presented any argument about why the bankruptcy court's good-faith determination was clearly erroneous. Indeed, Nora never even filed a brief on the merits of the appeal, despite the fact it was pending in the district court for 16 months. *Cf. Klein v. O'Brien*, 884 F.3d 754, 757 (7th Cir. 2018) ("[A]n appellate brief that does not even *try* to engage the reasons the appellant lost has no prospect of success.").

***640** **[11]** Nora now resurrects the argument that HSBC's note is a forgery, so the appeal to the district court was not frivolous. This only confirms the bankruptcy court's conclusion that Nora intended to use the proceedings to thwart

HSBC, rather than to cure the Lisses' mortgage defaults or otherwise satisfy HSBC's claim. Many court decisions have previously in-formed Nora that, under the *Rooker-Feldman* doctrine, federal courts are bound by state-court resolutions of debtors' defenses to mortgage foreclosure. *See, e.g.*, *Nora v. Residential Funding Co.*, 543 Fed. App'x 601, 602 (7th Cir. 2013) ("By alleging that the fraudulent assignment to Residential Funding allowed it to succeed in foreclosing on her property in state court, Nora is impermissibly asking a federal district court to review and reject the state court's judgment of foreclosure of her property."); *Spencer v. Federal Home Loan Mortg. Corp.*, 246 F.Supp.3d 1241, 1245 (W.D. Wis. 2017) ("As previously explained to [Nora], the *Rooker-Feldman* doctrine deprives federal courts of jurisdiction to review a state court decision."); *Spencer v. PNC Bank*, No. 14-cv-422-wmc, 2015 WL 1520912, at *4 (W.D. Wis. Apr. 2, 2015) (noting Nora could challenge the validity of endorsements and notes in state court but that "those arguments do not undermine [the creditor's] standing in the bankruptcy proceeding"); *Schmid v. Bank of America*, 498 B.R. 221, 224–25 (W.D. Wis. 2013) ("The *Rooker-Feldman* doctrine applies to plaintiff's fraud claim because plaintiff's alleged injury is the state court foreclosure judgment that defendant Bank of America is now asserting ... Many other courts have concluded that the *Rooker-Feldman* doctrine bars a litigant from challenging a foreclosure judgment in a subsequent case.").

Throughout the federal proceedings, Nora has repeatedly attacked HSBC's "standing" to oppose Steven Lisse's Chapter 13 plan on the theory that HSBC's note is a forgery. She similarly contends the district court lacked jurisdiction to sanction her due to this alleged Article III defect. Nora is wrong on both counts. The Wisconsin foreclosure judgment established HSBC as the Lisses' judgment creditor. It is the foreclosure judgment, not the note, that gives HSBC standing at this point to object to Steven Lisse's Chapter 13 plan. 11 U.S.C. § 1324(a) (providing that any "party in interest may object to confirmation of the plan"); *cf.* 11 U.S.C. § 1109 (defining a "creditor" to be a "party in interest" for purposes of Chapter 11); *In re Rimgale*, 669 F.2d at 428 (explaining that Congress adopted § 1324 to allow "for creditors to be heard" while giving the bankruptcy judge sole authority to confirm or reject a plan). This makes the authenticity of HSBC's note irrelevant to the analysis in federal court. Even if the note is a forgery, until the Lisses obtain a vacatur of the foreclosure judgment, HSBC's standing as a judgment creditor is unassailable.

[12] Nora manages to flag one potentially legitimate basis to challenge the bankruptcy court's decision: that the court decided *sua sponte* to not only deny confirmation but to dismiss the petition without leave to amend the plan. *Compare In re Terry*, 630 F.2d 634, 636 n.5 (8th Cir. 1980) ("As we read § 1307, a court cannot order dismissal or conversion on its own motion."), *with In re Hammers*, 988 F.2d 32, 34–35 (5th Cir. 1993) (holding *sua sponte* dismissal appropriate under 11 U.S.C. § 105(a)); *see also* 8 Collier on Bankruptcy § 1307.04 (suggesting § 105(a) "presumably would give the court the power to dismiss a case *sua sponte*"). Yet Nora never briefed that argument for the district court. *See CNH Indus. Am. LLC v. Jones Lang LaSalle Am., Inc.*, 882 F.3d 692, 705 (7th Cir. 2018) (noting arguments ***641** not raised below are forfeited). And she fails to adequately do so here, simply quoting a transcript without citing any relevant legal authorities on the topic. *See M.G. Skinner & Assocs. Ins. Agency v. Norman-Spencer Agency*, 845 F.3d 313, 321 (7th Cir. 2017) ("Perfunctory and undeveloped arguments are waived, as are arguments unsupported by legal authority."). The inclusion of one plausible argument—amidst a plethora of frivolous arguments—will not insulate an appellant from sanctions. *Hill*, 814 F.2d at 1200 (holding sanctions may be imposed where most of the appellant's arguments are frivolous, even if not all of them can be classified that way).

[13] Nora's attempt to relitigate HSBC's foreclosure judgment in bankruptcy court was frivolous. Nora's repeated fraud accusations do not change the calculus. *Mains v. Citibank*, 852 F.3d 669, 676 (7th Cir. 2017) (holding *Rooker-Feldman* prohibits federal courts from reviewing whether a lender procured a state-court foreclosure judgment through fraud). If Nora believed she possessed new evidence of fraud, Wisconsin's state courts were the appropriate venue to raise such arguments. Wis. Stat. § 806.07(1)(c) (authorizing motions to reopen judgments due to the "[f]raud, misrepresentation, or other misconduct of an adverse party"); *see also Taylor v. Federal Nat'l Mortg. Ass'n*, 374 F.3d 529, 535 (7th Cir. 2004) (affirming district court's decision to remand a fraud-on-the-court claim to state court on *Rooker-Feldman* grounds). Aside from delay, there was no reason for Nora to file a federal bankruptcy case rather than seek relief in state court. *See Mains*, 852 F.3d at 676 ("The state's courts are quite capable of protecting their own integrity."). Federal courts do not exist to provide disappointed state-court losers a second bite at the apple.[13]

2. Nora's litigation tactics warranted sanctions under 28 U.S.C. § 1927.

[14] **[15]** **[16]** **[17]** Courts may also impose sanctions against a lawyer who "multiplies the proceedings in any case unreasonably and vexatiously." 28 U.S.C. § 1927. A lawyer's subjective bad faith is a sufficient, but not necessary, condition for § 1927 sanctions; objective bad faith is enough. *Hunt v. Moore Bros., Inc.*, 861 F.3d 655, 659 (7th Cir. 2017). Attorneys demonstrate objective bad faith when they pursue "a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound." *Bell*, 908 F.3d at 1082 (quoting *Boyer v. BSNF Ry. Co.*, 824 F.3d 694, 708 (7th Cir. 2016)). Because trial judges are best positioned to detect bad faith litigation conduct, they possess broad discretion in exercising the § 1927 power. *Id.*

[18] Nora's stall tactics are blatant when one looks back at how this litigation unfolded. Although Nora denies intentionally delaying proceedings, the record before us belies her position. Nora herself openly acknowledged the purpose of Steven Lisse's bankruptcy petition was to extend the deadline to petition the Wisconsin Supreme Court. And, as Nora now boasts in her brief, her strategy worked:

> The March 22, 2018 Order [by the district court] concludes that attorneys' fees should be awarded based on "dilatory ***642** conduct" whereby the Losses have maintained possession of their home for six (6) years. Actually, the Losses have remained in possession of their home for over eight (8) years since the fraudulent foreclosure began and they are still in possession of their home, contrary to Judge Peterson's conclusion that the foreclosure of the Losses' home is "inevitable."

Appellant's Response to Motion for Sanctions at 16–17, ECF No. 24.

[19] Using the automatic stay in 11 U.S.C. § 362(a) as a litigation ploy to drag out foreclosure proceedings in another jurisdiction constitutes objective bad faith. *See Hilgeford v. The Peoples Bank*, 776 F.2d 176, 179 (7th Cir. 1985) ("Our review of the briefs and record persuades us that this is vexatious litigation.... We can think of no other reason for this [mortgagor's] appeal other than delay, harassment, or sheer obstinancy.").

The conclusion of intentional delay is supported, not only by the obvious motive, but also by the lack of any substantive merit to the Chapter 13 proceedings. As discussed above, the plan Nora filed on behalf of Steven Lisse (and then again for Sondra Lisse) improperly attempted to use an adversarial proceeding to relitigate the merits of a foreclosure judgment HSBC had already obtained in Wisconsin state court (with HSBC receiving no payments in the interim). Any reasonably careful attorney—let alone an attorney with Nora's familiarity with bankruptcy court—would have known that this type of conduct would not be tolerated. *Bell*, 908 F.3d at 1082; *cf. Carr v. Tillery*, 591 F.3d 909, 920 (7th Cir. 2010) ("Although the suit is not frivolous, or at least not utterly so, it is so lacking in merit ... that its pursuit by the plaintiff indicates a motive to harass.").

Nora then compounded the delays caused by these meritless bankruptcy petitions by filing numerous, last-minute motions for lengthy stays or deadline extensions. For example, in Steven Lisse's appeal in the district court, Nora filed three motions to stay the proceedings. This strategy produced a 16-month delay before the district court refused any further extensions, at which point Nora moved to voluntarily dismiss the appeal without filing an opening brief. Such litigation behavior—even if one assumes pure motives—constitutes objective bad faith warranting sanctions under § 1927. The district court did not abuse its discretion.

B. Nora's Suspension from Law Practice

In addition to awarding HSBC damages and costs against both Nora and Steven Lisse as a monetary sanction, two district court orders imposed professional discipline on Nora. First, on March 20, 2018, the district court fined Nora $2,500 and suspended her right to practice in the Western District for six months, although it stayed the penalties until Nora committed another violation.

Ten days later, however, the Wisconsin Supreme Court suspended Nora's law license for one year. *In re Disciplinary Proceedings against Nora*, 909 N.W.2d at 167–68. As a result, on April 13, 2018, the district court issued another order suspending Nora's right to practice based on W.D. Wis. LR 83.5(E). That local rule automatically imposes reciprocal discipline when another jurisdiction does so, although it permits the attorney to apply "for modification or vacation of the [district court's] discipline."

Although Nora appeals the district court's April 13, 2018 disciplinary order separately from its March 22, 2018 order

awarding HSBC its damages and costs ***643** under Fed. R. Bankr. P. 8020 and 28 U.S.C. § 1927, she does not develop an independent argument for reversing it. To be clear, Nora is currently prohibited from practice in the Western District as reciprocal discipline based on her disbarment by the Wisconsin Supreme Court, not due to her conduct in this litigation.[14] Nora does not provide a reason to reverse that discipline.

[20] **[21]** District courts are permitted to rely on state-court disciplinary proceedings to suspend attorneys practicing before them. *Selling v. Radford*, 243 U.S. 46, 51, 37 S.Ct. 377, 61 L.Ed. 585 (1917). And this case shows why a local rule making reciprocal discipline automatic (while also providing a process for attorneys to challenge that federal discipline) makes sense. Such rules align the procedure with the relevant legal presumptions. Separate federal hearings are not required. *In re Palmisano*, 70 F.3d 483, 486 (7th Cir. 1995). Federal courts give "great weight" to state-court disciplinary findings. *In re Jafree*, 759 F.2d 604, 608 (7th Cir. 1985). The attorney bears the burden to identify either a due process violation, insufficient fact findings, or "some other grave reason" why the state-court's ruling is not entitled to the federal court's respect. *Selling* 243 U.S. at 51, 37 S.Ct. 377. Placing the onus on the attorney to raise such issues in a motion to modify or vacate discipline minimizes the amount of resources diverted to (essentially) collateral attacks on state-court proceedings. *See In re Wick*, 628 F.3d 379, 381 (7th Cir. 2010).[15]

[22] **[23]** Even setting aside the discipline imposed by the Wisconsin Supreme Court, Nora's litigation activity in federal court warrants a suspension itself. Federal courts' inherent authority to disbar or suspend lawyers for misconduct is longstanding and well established. *In re Snyder*, 472 U.S. 634, 643, 105 S.Ct. 2874, 86 L.Ed.2d 504 (1985); *see also Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 531, 6 L.Ed. 152 (1824) (Marshall, J.) (holding the power to suspend attorneys is "incidental to all Courts, and is necessary for the preservation of decorum, and for the respectability of the profession").

Again, Nora used tag-team Chapter 13 bankruptcy filings by a husband and wife—each lacking a good faith basis—to postpone the orderly resolution of state-court proceedings. Nora's behavior in this litigation unfortunately is not an aberration for her. *See, e.g.*, *PNC Bank v. Spencer*, 763 F.3d 650, 654-55 (7th Cir. 2014) ("In sum, this appeal is frivolous, and we are troubled by Nora's conduct in this litigation.... [W]e suspect that the removal was part of a strategy designed to gum up the progress of the case."); *Spencer v. Federal Home Loan Mortg. Corp.*, No. 15-cv-332-wmc, 2015 WL 4509159, at *1 (W.D. Wis. July 24, 2015) (stating that Nora's appeals appeared "motivated by the goal to further delay a warranted state court foreclosure."). Courts have sanctioned Nora for this conduct before, but apparently she has not received the message that it will not be tolerated.

Not only are Nora's litigation tactics inappropriate, her treatment of opposing ***644** counsel and judicial officers is censurable. In the district court, Nora accused HSBC's counsel (by name) of committing "uncontroverted fraud on the Court," as well as multiple federal crimes, by presenting HSBC's claim. She repeats similar attacks in these appeals. *See, e.g.*, Appellants Br. at 47. This behavior is, again, not new for Nora. *PNC Bank*, 763 F.3d at 655 ("Nora has accused the state court judge and court reporter of fraudulently manipulating transcripts, the district court judge of pursuing 'a campaign of libel against her,' and opposing counsel of engaging in 'actionable civil fraud and racketeering that may constitute state and federal criminal misconduct.' "); *Nora v. Furay*, No. 14-cv-527-jdp, 2014 WL 4209608, at *2 (W.D. Wis. Aug. 25, 2014) ("Nora contends that Judge Furay 'acted in reckless haste to place false findings on the public record in order to support the falsely made allegations against her former client ... to make false findings of fact concerning matters which had never been adjudicated, and to damage Nora's character and reputation.' "); *In re Rinaldi*, No. 11-35689-svk, 2017 WL 104749, at *1 (E.D. Wis. Jan. 10, 2017) ("The conversion of the case to Chapter 13 clearly changed the context of HSBC's entitlement to relief from stay, but Attorney Nora ignored the conversion and accused HSBC's attorneys of fraud on the Court.").

[24] Flippant, unfounded accusations of misconduct and fraud by opposing counsel and court officials demean the profession and impair the orderly operation of the judicial system. *In re Palmisano*, 70 F.3d at 487. They also violate the ethical standards for lawyers practicing in this circuit. *See* 7th Cir. Standards for Prof. Conduct, *Lawyer's Duties to Other Counsel* at ¶4 ("We will not, absent good cause, attribute bad motives or improper conduct to other counsel or bring the profession into disrepute by unfounded accusations of impropriety."). Such behavior warrants punishment.

Following Nora's repeated abuse of the judicial process through frivolous filings and dilatory tactics, her unprofessional conduct toward opposing counsel, and the suspension of her Wisconsin law license, "the district court

certainly was entitled to say, 'enough is enough.' " *Salmeron v. Enter. Recovery Sys., Inc.*, 579 F.3d 787, 798 (7th Cir. 2009). We find no fault with the district court's order suspending Nora from practice in the Western District of Wisconsin.

C. Further Appellate Sanctions

[25] **[26]** We must also resolve HSBC's appellate motion for additional sanctions. This court may "award just damages and single or double costs to the appellee" when it deems an appeal frivolous. Fed. R. App. P. 38. Such sanctions are discretionary and appropriate where an appellant simply repeats previously rejected, frivolous arguments or pursues an appeal to harass their adversary. *Arnold v. Villarreal*, 853 F.3d 384, 389 (7th Cir. 2017).

[27] **[28]** Nora's arguments almost entirely regurgitate points she pressed before the bankruptcy court, which the district court concluded were frivolous. As we have explained to Nora previously, "Sanctions are warranted under Rule 38 when a litigant or attorney presents appellate arguments with no reasonable expectation of success for the purposes of delay, harassment, or sheer obstinacy." *In re Nora*, 778 F.3d at 665. That aptly describes Nora's present appeals.

Not only were Nora's arguments on the merits frivolous, she also engaged in meritless and dilatory motion practice before this court. She moved to stay these appeals pending our ruling on a frivolous motion to strike that she filed. When we ***645** denied that motion, Nora immediately filed an equally frivolous motion to reconsider. Similarly, Nora submitted four separate "Requests for Judicial Notice," needlessly clogging this court's motion docket. She continued to lodge these requests, even after this court issued an opinion detailing why they were unnecessary and improper. *In re Appeals of Nora*, 905 F.3d at 497 (7th Cir. 2018).

We find Nora's appeals to have been frivolous and grant HSBC's motion for attorneys' fees and costs. HSBC requested $2,150.00 for attorneys' fees and $446.00 for costs in its motion. Although such figures appear reasonable, HSBC has not submitted an affidavit or other evidentiary record to support them. *See Arnold*, 853 F.3d at 389 (directing moving party to "submit an affidavit and supporting papers specifying the damages" incurred); *Flip Side Prod., Inc. v. Jam Prod., Ltd.*, 843 F.2d 1024, 1037 (7th Cir. 1988) (requiring party seeking sanctions to submit a "verified, itemized statement" of its damages and costs). So, we direct HSBC to provide an accounting of their costs and attorneys' fees within 15 days.

For numerous reasons, including her failure to present "a separately filed motion" in compliance with Fed. R. App. P. 38, we deny Nora's request for attorneys' fees.

Finally, we must revisit our previous sanctions against Nora. Due to "frivolous and needlessly antagonistic filings" by Nora in an appeal back in 2015, we fined her $2,500 but suspended the sanction "until the time, if ever, that Nora submits further inappropriate filings." *In re Nora*, 778 F.3d at 667. Given Nora's frivolous filings in these appeals, we lift the suspension of our previous monetary sanction.

III. Conclusion

[29] **[30]** Lawyers must represent their clients' interests responsibly, not only zealously. *Kapco Mfg. Co. v. C&O Enter., Inc.*, 886 F.2d 1485, 1497 (7th Cir. 1989). Part of being a responsible counselor to one's client is recognizing when the legal battle is lost and advising the client how to best handle that outcome. Frivolous legal arguments, intentionally dilatory tactics, and unprofessional antagonism toward opposing counsel benefits no one and improperly burdens federal courts. Nora's conduct has crossed the boundaries of acceptable conduct for attorneys in this circuit.

For these reasons, we order as follows:

1) On appeal number 18-1866, the district court's March 22, 2018 order holding Steven Lisse and Wendy Alison Nora jointly and severally liable for $1,837.50 is Affirmed;

2) On appeal number 18-1889, the district court's March 20, 2018 and April 13, 2018 orders suspending Wendy Alison Nora's ability to practice in the Bankruptcy and District Courts for the Western District of Wisconsin (and staying an additional $2,500 fine) are Affirmed;

3) HSBC's motion for damages and costs under Fed. R. App. P. 38 is Granted, and HSBC is directed to provide an accounting of its costs and attorneys' fees incurred in these appeals within 15 days;

4) Nora's "Request for Appellant's Attorneys Fees and Costs of Defending against the Motion for Sanctions" is Denied; and

5) We lift the suspension of the monetary sanction imposed in appeal number 13-2676 and order Nora to tender a check payable to the clerk of this court for $2,500 within 60 days of the date of this opinion.

The district court's decisions are Affirmed with Sanctions.

All Citations

921 F.3d 629

Footnotes

1 The prolix name of the entity is HSBC Bank USA, National Association for the Benefit of Ace Securities Corp. Home Equity Loan Trust, Series 2006-NC3, Asset Backed Pass-Through Certificates. For simplicity, this opinion refers to appellee as HSBC.

2 Nora acknowledged the purpose of Steven Lisse's bankruptcy petition was to extend the Lisses' deadline to appeal in state court: “Mr. Lisse's emergency Petition was necessary to preserve his right to file a Petition for Review to the Wisconsin Supreme Court from the decision of the Wisconsin Court of Appeals entered on March 8, 2016 which denied his Motion for Reconsideration.” Motion for Extension of Time to File Schedules at ¶5, *In re Steven Robert Lisse*, No. 3:16-109235-cjf (Bankr. W.D. Wis. Apr. 3, 2016), ECF No. 9.

3 Nora's invocation of the ADA is noteworthy, given that she previously sued a Wisconsin circuit judge in federal court for alleged ADA violations in depriving her of medical accommodations by not granting her deadline extensions. Complaint, *Nora v. Colas*, No. 10-cv-709-bbc (W.D. Wis. Nov. 15, 2010), ECF No. 1. In its decision suspending Nora's Wisconsin law license (discussed later in this opinion), the Wisconsin Supreme Court found that lawsuit “was clearly pursued in an attempt to harass or maliciously injure” the judge. *In re Disciplinary Proceedings against Nora*, 909 N.W.2d at 164.

4 Nora has previously engaged in similar inconsistent behavior. *See, e.g.*, *In re Nora*, 417 Fed. App'x 573, 574 (7th Cir. 2011) (“At the same time that she told the district judge that she was ‘totally disabled’ from litigating, Nora was actively litigating in the bankruptcy court.”).

5 It denied HSBC's request for damages and costs under Fed. R. Bankr. P. 8020 because HSBC did not file a separate motion for such relief.

6 These motions were filed by another attorney. They included a motion to hold HSBC and its counsel in contempt for “falsely represent[ing]” the Lisses' note to be an original and a sanctions motion against HSBC for “fraud on the court.” The state court denied the Lisses' motions and confirmed the foreclosure sale. The Lisses appealed, and the case remains pending. *HSBC Bank USA v. Lisse*, No. 2018AP000557 (Wis. Ct. App.).

7 As the district court noted, it created the three-judge panel “in a good-faith attempt to bend over backwards to accommodate and assuage Nora's concerns about a lack of impartiality.” Opinion and Order at 6 n.3, *Lisse v. HSBC Bank USA*, No. 3:16-cv-00617-wmc (W.D. Wis. Mar. 20, 2018), ECF No. 88.

8 Nora, as an attorney sanctioned for professional misconduct, possesses standing to appeal the district court's decisions in her own name. *Martinez v. City of Chicago*, 823 F.3d 1050, 1053, 1056 (7th Cir. 2016).

9 The rule requires, in part, that a motion for a deadline extension “shall be filed at least seven days before the brief is due, unless it is made to appear in the motion that the facts which are the basis of the motion did not exist earlier or were not, or with due diligence could not have been, known earlier to the movant's counsel.” 7th Cir. R. 26 (computing and extending time).

10 Nora's second extension motion asked for three additional days, and before the court could rule on it, she filed a third motion asking for two more days.

11 The district court's April 13, 2018 order incorporates its March 20, 2018 disciplinary order, specifying the earlier order will remain in force should Nora be reinstated to practice in the Western District.

12 The advisory committee notes to Fed. R. Bankr. P. 8020 make clear that district courts possess the same authority to sanction frivolous bankruptcy appeals that Fed. R. App. P. 38 provides to this court. Fed. R. Bankr. P. 8020 advisory committee's note to 1997 amendment ("[T]his rule recognizes that the authority to award damages and costs in connection with frivolous appeals is the same for district courts sitting as appellate courts, bankruptcy appellate panels, and courts of appeals.").

13 At oral argument, Nora's counsel contended Judge Conley misunderstood Chapter 13 bankruptcy law, citing his passing reference to Steven Lisse's bankruptcy petition as an "appeal" of the Wisconsin foreclosure judgment. But, read in context, Judge Conley's statement was noting that Nora's arguments were only appropriate in a state-court appeal (such that Nora was, as a practical matter, attempting to bring an improper "appeal" in federal court). Judge Conley's thorough and careful opinions in this case dispel any concerns of the type Nora's counsel postulates.

14 The district court's April 13, 2018 order, however, does state that its March 20, 2018 disciplinary order (holding sanctions for Nora's conduct in this litigation in abeyance until further misconduct) will remain in effect should Nora be reinstated.

15 This court's rules take a similar procedural approach. 7th Cir. R. 46(d). Based on the suspension of Nora's Wisconsin law license in 2018, this court ordered Nora removed from its roll of attorneys after she failed to demonstrate why this court should not do so. Order, *In re Nora*, No. D-18-07 (7th Cir. May 23, 2018).

Yes!UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT FOR LOUISIANA

IN RE	§	CASE NO. 20-10846
	§	
THE ROMAN CATHOLIC CHURCH OF THE ARCHDIOCESE OF NEW ORLEANS,	§	CHAPTER 11
	§	
DEBTOR.	§	COMPLEX CASE

ORDER TO SHOW CAUSE

On June 7, 2022, this Court issued an Order, which in pertinent part, adopted the findings of the independent investigation of the Office of the United States Trustee (the "Trustee Report"), [ECF Doc. 1574],[1] that (i) attorney Richard Trahant received confidential information in connection with his representation of individual members of the Official Committee of Unsecured Creditors (the "Committee") that was produced by the Debtor in the course of discovery in this case; (ii) Trahant had read and was bound by the Protective Order issued by this Court to guard against the unauthorized disclosure of highly confidential and sensitive information during the course of discovery in this case; (iii) Trahant knew that he was bound by the Protective Order; and (iv) beginning on December 31, 2021, Trahant provided on multiple occasions confidential information he received to a third party and the media in direct violation of this Court's Protective Order. The Court also found, based on its review of documents appended to the Trustee Report, including Trahant's own sworn testimony, that his disclosures and violation of the Protective Order was knowing and willful.

The Court's June 7, 2022 Order stated that the Court would issue a separate Order To Show Cause to determine appropriate sanctions for Trahant's disclosure of confidential information in

[1] The UST Report is currently filed under seal and remains under seal pursuant to 11 U.S.C. § 107(b)(2), "to protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title."

violation of this Court's Protective Order. This Court holds both "inherent contempt authority and equitable authority under § 105 [of the Bankruptcy Code]." *In re Cano*, 410 B.R. 506, 538 (Bankr. S.D. Tex. 2009). "Federal courts have inherent powers which include the authority to sanction a party or attorney when necessary to achieve the orderly and expeditious disposition of their dockets." *Carroll v. Abide (In re Carroll)*, 850 F.3d 811, 815 (5th Cir. 2017) (citations omitted); *see also In re Spectee Grp., Inc*., 185 B.R. 146, 155 (Bankr. S.D.N.Y. 1995) ("A Court has inherent authority to supervise and control its own proceedings, and to require the payment of the other party's attorney's fees by one who has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" (quoting *Oliveri v. Thompson*, 803 F.2d 1265, 1272 (2d Cir. 1986))).

This Court also has a statutory grant of authority under § 105(a) of the Bankruptcy Code "to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). In addition to granting broad power to implement provisions of the Bankruptcy Code, § 105(a) "has been interpreted as supporting the inherent authority of the bankruptcy courts to impose civil sanctions for abuses of the bankruptcy process." *In re Carroll*, 850 F.3d at 816 (quoting *Walton v. LaBarge, Jr. (In re Clark)*, 223 F.3 859, 864 (8th Cir. 2000); *Friendly Fin. Discount Corp. v. Tucker (In re Tucker)*, No. 99-31069, 2000 WL 992448, at *3 (5th Cir. June 28, 2000)); *see also In re Tabor*, 583 B.R. 155, 177 (Bankr. N.D. Ill. 2018) (citing *In re Volpert*, 110 F.3d 494, 500 (7th Cir. 1997)).

Thus,

IT IS ORDERED that Richard Trahant shall **APPEAR on Monday, July 25, 2022, at 10:00 a.m. AND SHOW CAUSE** before this Court as to why he should not be sanctioned for his willful violation of this Court's Protective Order;

IT IS FURTHER ORDERED that the United States Trustee shall provide the Trustee Report and all exhibits appended to the report to Mr. Trahant and any counsel he may retain to represent him in this matter; **PROVIDED THAT** Trahant's counsel reviews, signs, and agrees to be bound by the Protective Order in this case and submits an executed Protective Order to the United States Trustee and counsel for the Debtor and the Committee. **Mr. Trahant and counsel are reminded that the UST Report is currently filed under seal pursuant to 11 U.S.C. § 107(b)(2) and is considered to be highly confidential Protected Material and subject to the Protective Order.**

IT IS FURTHER ORDERED that counsel for the Debtor and the Committee are instructed to compile invoices identifying attorney and paralegal time spent on services related to the *Debtor's Motion for Entry of an Order: (A) Compelling the Tort Committee and/or Its Counsel to Answer Identified Questions, and (B) Setting an Evidentiary Hearing on Sanctions for Violation of Protective Order,* [ECF Doc. 1256]. Those invoices are to be redacted for privilege and filed into the docket in this case, with unredacted copies delivered by hand to the Court, on or before **Friday, July 1, 2022**.

IT IS FURTHER ORDERED that Mr. Trahant shall file a written response for this Court's consideration regarding impositions of sanctions against him on or before **Monday, July 18, 2022**.

New Orleans, Louisiana, this 13th day of June, 2022.

MEREDITH S. GRABILL
UNITED STATES BANKRUPTCY JUDGE