Consumer Track

Consumer Ethics: Balancing Business and Practice, and the Multiple Roles of Consumer Debtor's Counsel: Can You Simultaneously Be a Watchdog and Counselor and Run Your Law Practice?

Concurrent Session

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And Run Your Own Practice?

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In re Taylor, 655 F.3d 274 (3d Cir. 2011). Reinstating the bankruptcy court's findings and non-monetary sanctions, at 407 B.R. 618 (Bankr. E.D. Pa. 2009), and reversing the district court, at 2010 WL 624909 (E.D. Pa. 2010), the Third Circuit explored an attorney's reliance on information provided by the client and a third-party provider in Rule 9011(b) context. The attorney for HSBC Mortgage had admitted to the bankruptcy court that the law firm had no direct access to its client, having been assigned to file a stay relief motion and response to the debtors' claim objection by NewTrak, a computer information system generated by Lender Processing Services, Inc. (LPS). The attorney only proof-read the motion and response, failing to make reasonable inquiry into accuracy of information, resulting in false statements being made in the pleadings and representations in open court. "This case is an unfortunate example of the ways in which overreliance on computerized processes in a high-volume practice, as well as a failure on the part of clients and lawyers alike to take responsibility for accurate knowledge of a case, can lead to attorney misconduct before a court. . . . [A]n attorney must, in her independent professional judgment, make a reasonable effort to determine what facts are likely to be relevant to a particular court filing and to seek those facts from the client. She cannot simply settle for the information her client determines in advance–by means of an automatic system, no less–that she should be provided with. . . . Rule 11 requires more than a rubber-stamping of the results of an automated process by a person who happens to be a lawyer. Where a lawyer systematically fails to take any responsibility for seeking adequate information from her client, makes representations without any factual basis because they are included in a 'form pleading' she has been trained to fill out, and ignores obvious indications that her information may be incorrect, she cannot be said to have made reasonable inquiry."

In re Lehtinen, 564 F.3d 1052 (9th Cir. 2009). Bankruptcy court has inherent authority to discipline Chapter 13 attorney for failing to properly represent debtor; counsel was appropriately suspended from practice in bankruptcy court for failing to appear at meeting of creditors, for failing to appear at confirmation hearing and for representing a conflicting interest by pressuring debtor to use counsel as a real estate broker.), *aff'g* 332 B.R. 404 (B.A.P. 9th Cir. Oct. 11, 2005) (Discipline of debtor's counsel, for conflict of interest in acting as both bankruptcy attorney and real estate broker and for failure to advise debtor of conflict, is within bankruptcy court's core jurisdiction. Attorney was suspended for three months and required to disgorge fees, but remand ordered for court to consider mitigating and aggravating factors concerning suspension.

In re Withrow, 405 B.R. 505 (BAP 1st Cir. 2009). Bankruptcy court appropriately imposed $3,585 sanction debtor's attorney for violations of § 707(b)(4) and Bankruptcy Rule 9011 for failure to conduct reasonable investigation into accuracy of schedules. Attorney "had an affirmative duty to conduct a reasonable inquiry into the facts set forth in the Debtor's schedules, statement of financial affairs and [other pleadings] before filing them. There is evidence in the record, however, that Attorney . . . violated that obligation. It is undisputed that there were numerous errors and discrepancies in the documents filed by Attorney . . . on the Debtor's behalf."

In re Pagaduan, 447 B.R. 614 (D. Nev. 2011). Debtors' attorney was appropriately sanctioned for impersonating debtors online to obtain prepetition briefing certificates; monetary sanction was within court's discretion, but bankruptcy court did not have authority to extend sanctions imposed on same attorney in earlier case that required attorney to provide copy of sanction order to each client.), *aff'g in part, vacating in part,* 429 B.R. 752, 759, 760 (Bankr. D. Nev. Apr. 12, 2010) (Markell) (Debtors' attorney violated Bankruptcy Rules 9010 and 9011 and Nevada Rules of Professional Conduct by filing Chapter 13 case with credit counseling certificates that debtors did not sign. Crediting debtors' testimony, attorney "or someone in his office, impersonated the Debtors online to complete the [credit counseling] class. This is forgery." Attorney was not authorized to complete credit counseling form without debtors' participation. Bankruptcy Rule 9010 authorizes actions by attorney-in-fact, but debtors' attorney acted as attorney-at-law. "All Rule 9010 does is distinguish between an attorney-at-law, permitted to practice law, and an attorney-in-fact—essentially an agent—who is not permitted to practice law." Referral appropriate to U.S. Attorney to determine whether crime had been committed and whether violation of Nevada Rules of Professional Conduct required sanction. Attorney's testimony revealed commingling of client funds with funds earned from other clients—another violation of ethical rules. Nevada has adopted Model Rule 1.15(c), providing that advance payments for fees and expenses cannot be commingled with lawyer's own funds but must be held in trust and withdrawn only as fees are earned or expenses are incurred. Attorney violated clients' wishes by scheduling home to be surrendered, when they wished to retain home and attorney refused to work on loan modification requested by debtors. Sanctions, in addition to referral to U.S. Attorney, included requiring attorney to return $1,000 to debtors and to pay court $4,920, the expected fee from debtors. For commingling client funds, attorney must bring his practice into compliance with Nevada Rules of Professional Conduct within 60 days and report to court steps taken to remedy violation. As further sanction, opinion will be published, and for five years following publication, attorney shall be required to give copy of opinion to every client in all cases where professional fees exceed $5,000, excluding costs.

In re Plumeri, 434 B.R. 315 (S.D. N.Y. 2010). Attorney's failure to disclose prepetition judgment for possession as required by § 362(*l*)(5) was reckless conduct that violated attorney's duties as an officer of the court and was sanctionable; attorney was ordered to pay landlord $2,500 for attorney fees.

In re Brent, 458 B.R. 444 (Bankr. N.D. Ill. 2011). Debtor's attorney, filing 8,000 cases from mid-1996 to present, violated Rule 9011(b) when fee applications in 317 pending cases contained false representations by alteration of model retention agreements ("MRA"), which provided for $3,500 fixed fees, with undisclosed addendum for additional fees; numerous false applications made attorney "culpably careless," citing *Young v. City of Providence,* 404 F.3d 33, 39 (1st Cir. Apr. 11, 2005) (Boudin, Lynch, Lipez). "No reasonable attorney would have believed he was telling the truth in representing to the court he had entered into the MRA when the attorney had modified the MRA—which permits a single flat fee for the entire bankruptcy case—with an addendum requiring the debtor to pay additional fees. The addendum produces a

different agreement with different terms, terms different in a critical way. The point of the flat fee arrangement is to set a ‘presumptively reasonable fee’ that obviates the need for elaborate fee applications in routine cases. . . . Modifying the MRA to authorize fees beyond the presumptively reasonable fee defeats the purpose of the arrangement.” As sanction, attorney was ordered to pay $10,000 fine to clerk of court, to attend and successfully complete legal ethics course at accredited law school, and censured for misconduct, with opinion forwarded to district court and disciplinary agency.

In re Lichtenberg, 457 B.R. 908 (Bankr. N.D. Ga. 2011). Attorney was ordered to appear and show cause why fees should not be reduced or disallowed, why attorney should not be suspended from practice for six months, and why court should not refer matter to state bar for disciplinary action. Attorney did not appear at confirmation hearing, instead sending attorney who had no opportunity to prepare. "[A]bsent some emergency, the attorney who is counsel of record—the lawyer the client actually hired—has no business putting another lawyer in a situation where the attorney who appears cannot represent the client. Clearly, this does not provide proper representation to the client." Show cause was required because of prior concerns with attorney's practice.

In re Small, 2011 WL 5508825 (Bankr. D. Alaska June 2, 2011). Debtor and his attorney made false statements in motion to convert from Chapter 7, representing debtor was “making more money and intends to keep his real estate and pay arrearage through Chapter 13 payment plan;” debtor was not making additional income, and Schedules I and J were similarly false. Although court declined to dismiss case as overly harsh sanction, court would welcome motion by trustee or U.S. trustee for order to show cause why debtor and his attorney should not be required to pay substantial monetary sanctions.

In re Monroe, 2011 WL 6010280 (Bankr. E.D. N.C. 2011). Attorney was sanctioned for incompetent management of stay relief order and plan modifications. Attorney failed to properly communicate with debtor regarding stay relief consent order, failed to competently negotiate consent order, and negligently failed to timely modify confirmed plan. Attorney ordered to pay sanction in amount of vehicle repossession charge and creditor's attorney fees. "While negotiating the consent order, [debtor's attorney] was aware that the Debtor's plan would need to be modified to account for the Debtor's residence no longer being included in the Chapter 13 plan. However, [attorney] failed to competently handle these matters to the detriment of his client." If plan had been timely amended to reduce plan payments, and if all information had been properly communicated by attorney, debtor would have been current and would not have triggered drop-dead provision in consent order, leading to repossession.

In re Bowen, 2010 WL 7768240 (Bankr. N.D. Ga. 2010). Debtors’ lawyer was sanctioned $1,025 for repeated failures to comply with local rule requiring counsel to timely submit orders granting motions; “‘Debtors’ counsel’s failure to submit proposed orders subjected their clients to denial of the motions or objections for want of prosecution. Pursuant to 11 U.S.C. § 329, the bankruptcy court may review and

determine whether compensation paid or to be paid to a debtor's attorney exceeds the reasonable value of the services provided.'"

In re MacFarland, 2011 WL 5527355 (Bankr. S.D. Fla. 2011). In multiple cases, debtors' counsel were sanctioned for Rule 9011 violations in objecting to claims that had been scheduled in same amounts as proof of claims. "The cases addressed by this sanctions order present essentially baseless claims objections which appear to be shotgun attempts to object to everything and 'see what sticks.' Requiring creditors to attach documentation in response to frivolous claims objections increases abuse in litigation. . . . If there is not *substantive* objection to the claim, the creditor should not be required to provide further documentation because it serves no purpose other than to decrease the likelihood that a valid claim against the estate will be disallowed on specious grounds. . . . The instant cases present objections to claims for debts which were scheduled in amounts substantially identical to (or greater than) the claimed amounts. All of the relevant debts were scheduled as neither contingent, no unliquidated, nor disputed." Sanction was 31 days' suspension from practice, with some attorneys receiving consecutive suspensions for repeat violations. "Debtors' attorneys must carefully consider their ethical obligations under Fed. R. Bankr.P. 9011(b) when objecting to a claim." Section 502(b) provides exclusive grounds for disallowing claims, with failure to attach writing not grounds; failure to attach sufficient documentation may deprive claim of prima facie validity, but "[t]he burden of proof is on the objecting party to provide evidence surpassing the evidence set forth in the claim."

In re Gulley, 400 B.R. 529, 540 (Bankr. N.D. Tex. 2010). A debtor acts in good faith if he objects to a claim that lacks required documentation. "If a debtor objects to a proof of claim for failure to attach supporting documentation and the creditor fails to supply it thereafter, *the court would expect the debtor to request that the claim be disallowed*. In such event, the creditor would have the burden of proof to support its claim." *Cf. In re Armstrong*, 320 B.R. 97 (Bankr. N.D. Tex. 2005)(joint opinion of then-Chief Judge S. Felsenthal, Judge B. Houser, and Judge H. Hale)("A debtor acts in good faith for objecting to a proof of claim that lacks the requisite documentation." In order for credit card proof of claim to be given *prima facie* effect, the creditor "must attach an account statement containing the debtor's name, account number, the prepetition account balance, interest rate, and a breakdown of the interest charges, finance charges and other fees that make up the balance of the debt, or attach enough monthly statements so that this information can be easily determined.") *See also*, *In re DePugh*, 409 B.R. 125 (S.D. Tex. 2009), in which the court sanctioned a creditor and its counsel for, among other things, filing a proof of claim based on a credit card debt without supporting documentation, and then amending its claim after the debtor filed an objection.

In re Pursley, 451 B.R. 213, 233 (Bankr. M.D. Ga. 2011). Court provides extensive analysis of cases on proofs of claims in consumer bankruptcies and objections to such claims, including a discussion of the Tenth Circuit's opinion in *In re Kirkland*, 572 F.3d 838 (10th Cir. 2009). Finding that the "debtors' attorneys were justified in putting up a fight against eCAST," the *Pursley* court noted that the, "[c]ase law is clear that a

claimant *must* supply the underlying documents upon request. That directive is even more important where an assignment is at issue—viewing the underlying documents is a way to neutralize the knowledge disparity. It is the duty of debtors' attorneys to examine proofs of claim and ferret out potential discrepancies. This protects the debtor and the bankruptcy estate from frivolous or sloppy claimants."

In re Menton, 2011 WL 2038976 (Bankr. N.D. N.Y. 2011). Debtors' attorney was sanctioned $2,000 with referral to district court for disciplinary consideration. Errors included Rule 2016(b) statement of no fee when plan provided for $2,000 fee, which had been paid. Attorney failed to complete filings or timely request adjournment of confirmation hearing, and improperly filed motion to dismiss without clients' knowledge. New York Rules of Professional Conduct were violated and attorney had been sanctioned previously for similar actions.

In re Smith-Canfield, 2011 WL 1883833 (Bankr. D. Or. 2011). Bankruptcy court had core jurisdiction in action against attorney who represented debtor and acted as real estate broker for debtor. Attorney recommended purchase of real estate prior to bankruptcy filing in order to obtain Oregon homestead exemption and reduce income available to creditors in Chapter 13. Attorney was negligent, as both attorney and broker, for failure to advise debtor of risk involved in purchasing property that had defective retaining wall. Attorney knew that seller was in financial distress and might be unable to repair defect. Breaches of duty caused $5,266.30 in damages for engineering costs related to repair of retaining wall, and attorney was ordered to disgorge $4,000 of attorney fees.

In re Torres-Jimenez, 2011 WL 1758640 (Bankr. D. P.R. 2011). Attorney's practice of depositing monies received from debtors into "sort of trust account" did not comply with Model Rule 1.15(a) requirement to hold client property separately. Attorney admitted that commingling of funds was wrong but that account had been used to deposit payments from debtors for disbursement to trustee when debtors did not have bank accounts. Attorney was enjoined from using trust account "as a vehicle to channel payments from chapter 13 debtors to the chapter 13 trustee."

In re Burnett, 450 B.R. 116 (Bankr. E.D. Ark. 2011). Attorney neglected responsibility to debtors by failing to provide legal advice or explore options outside of bankruptcy, failing to timely file petition to prevent foreclosure, and permitting paralegals to practice law. Debtors filed bankruptcy two weeks after foreclosure sale when debtors had $6,000 tax refund that would have cured mortgage arrearage. "As a direct result of [attorney's] failure to provide legal services: the debtors lost their home; got behind on car payments; used their $6,000 tax refund for purposes other than paying their mortgage arrearage; filed a bankruptcy; and ultimately, ended up living in a borrowed camper in an RV park. [Attorney] failed to meet with his clients prior to filing the bankruptcy case, failed to provide them with legal advice, and ignored them in spite of his first-hand knowledge of the harm he had inflicted on them. [Attorney] acted purposefully to conceal his errors and shield himself from liability by removing documents from the Debtors' file, and by making misleading statements in his letters to the Debtors and in

his sworn testimony before this Court." $526 fee was excessive in light of services provided and must be disgorged, and attorney was suspended from appearing before bankruptcy court until review by Arkansas Supreme Court Committee on Professional Conduct.

In re Lott, 2011 WL 1398995 (Bankr. S.D. Fla. 2011). Attorney who had not satisfied prior $500 sanction was in contempt; to purge contempt, attorney must pay prior $500 sanction and additional $1,000 sanction within seven days to clerk of court, disgorge $3,500 fee to client, reimburse client for $274 filing fee, and pay $500 to client for "troubling Ms. Lott to come to the courthouse more often than she should have." Attorney was also prohibited from practicing in bankruptcy court in district until petitioning "*within this bankruptcy case* for reauthorization."

In re Jackson, 2011 WL 768098 (Bankr. D.D.C. 2011). Debtor's attorney violated Bankruptcy Rule 9011 by filing third case while second case was pending, and schedules contained gross inaccuracies. Third case was unnecessary when debtor scheduled only Capital One, which had foreclosed prepetition. Attorney had primary blame for filing schedules and statement of financial affairs that falsely stated debtor owned real property. Petition stated that estimated liabilities were between $500,001 and $1,000,000, which attorney knew could not be true, in violation of Bankruptcy Rule 9011(b)(3). Reasonable inquiry would have led attorney to conclude that filing was for improper purpose—to circumvent triggering of § 362(c)(4) had second case been dismissed prior to third filing.

In re Seidel, 443 B.R. 411 (Bankr. S.D. Ohio 2011). Stay pending appeal is denied based on public interest and unlikelihood of success after debtor's attorney was sanctioned for violations of § 526 and Ohio Rules of Professional Conduct. Attorney had been ordered to disgorge fees and costs received through credit card charge. No-look fee for Chapter 13 cases filed by attorney had been suspended, and attorney was required to complete six hours of bankruptcy ethics instruction.

In re Carpenter, 2011 WL 250746 (Bankr. S.D. Cal. 2011). Since debtor's spouse's case had been dismissed based on statutory debt limits, any potential conflict for debtor's firm in representing both spouses evaporated; law firm was not disqualified in instant case.

In re Harmon, 2010 WL 3788052 (Bankr. E.D. N.Y. 2010). Electronic filing privileges and access were revoked for 90 days as sanction for attorney who filed numerous cases without paying filing fees through Pay.gov as required by local procedures for electronic filing. Further hearing was required concerning disgorgement of fees paid by debtor. Attorney had been filing incomplete petitions and then failing to meaningfully prosecute the cases.

In re Kim, 2010 WL 2816213 (Bankr. N.D. Cal. 2010). Newly admitted attorney who heavily advertised bankruptcy and "foreclosure defense" was ordered to return $4,000 charged for worthless Chapter 13 services. Attorney charged debtor $15,000, of which

$4,000 was allocated to bankruptcy services under Rule 2016 disclosure. Services were of no value for foreclosure prevention, and Chapter 13 filing was "an exercise in futility," since attorney did not schedule $1.9 million secured debt that rendered debtor ineligible. "There is no sin in being a new lawyer; everyone has to start some time, and there is a shortage of good bankruptcy attorneys these days. However, some of [attorney]'s conduct is of serious concern to the court. . . . [Attorney]'s Chapter 13 services were worthless due to a fundamental mistake of law. The court will accordingly order [attorney] to return to Kim the sum of $4,000.00, which Kim paid for Chapter 13 services." Allegations referred to State Bar of California included that attorney began to practice law before admission to bar, that she misled debtor and public as to experience level, and that she may have taken advance fee for loan modification services in violation of California Business and Professions Code.

In re Ross, 2010 WL 2509939 (Bankr. N.D. Cal. 2010). Law firm that did not appear as counsel of record for pro se debtor, but did prepare skeletal Chapter 13 petition, provided bankruptcy services and was obligated to disclose bankruptcy-related fees. Firm admitted that it accepted fees and advised debtors of availability of bankruptcy. That firm claimed to be performing foreclosure avoidance services did not change bankruptcy content.

In re Harmon, 435 B.R. 758 (Bankr. N.D. Ga. 2010). Attorneys and firm violated Bankruptcy Rule 9011 and local bankruptcy rules by failing to obtain new client signatures on documents that changed between the time of review by the client and electronic filing. Electronic filing of changed documents with electronic indication of client signatures was violation of attorneys' responsibilities to court. Attorneys' and managing partner's misconduct was imputed to law firm. "As this Court relies heavily on electronic filings, the adherence of attorneys to the local rules regarding electronic signatures is imperative." $5,000 sanction was imposed, and firm was ordered to provide action plan addressing its practices. Attorneys were required to attend five hours of continuing legal education in ethics and professionalism.

In re Glenn, 422 B.R. 469 (Bankr. S.D. N.Y. 2010). Debtor's attorney sanctioned $250, payable to clerk of court, and ordered to pay $4,503 to debtor's landlord when attorney failed to disclose in petition that landlord had obtained prebankruptcy judgment for possession, thereby removing leasehold from automatic stay.