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Professor Gabel has given international and national presentations on various issues in business law, bankruptcy, trial strategy, criminal law, and forensic science. She has written on a wide-range of topics, among them: bankruptcy fraud, lender liability, legal ethics, the validity of forensic evidence, DNA accuracy, trial and jury tactics, and bioethics.

Professor Gabel is also frequent contributor of opinion pieces for various publications. In addition being the author of the *Treatise on Lender Liability*, she is co-author of the *Bankruptcy Appeals Manual*, published by the American Bankruptcy Institute. She is also the editor of the American Bar Association’s book on bankruptcy claims, and she serves as the publications chair for the ABA Business Bankruptcy Committee. In 2009, she received the American Bar Association’s Kathryn R. Heidt Memorial Award for her service, scholarship and practice, and in 2010 received a publication award from the American Bankruptcy Institute.

Professor Gabel consults on various bankruptcy and criminal and has engaged in numerous pro bono criminal defense representations. Recently, she successfully appealed a conviction and death sentence in Mississippi, resulting in her client’s freedom.
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PASSING THE SMELL TEST: AVOIDING ETHICAL QUAGMIRES IN CONSUMER BANKRUPTCY CASES

I. RECENT CASE LAW AND DISCIPLINARY ACTIONS

A. Overview

While all attorney conduct is governed by ethical rules and standards of professional conduct, bankruptcy attorneys are subject to a complex web of intertwining regulations. In bankruptcy cases, the potential for disciplinary action stems not only from local, state, and federal rules, but also provisions in the Bankruptcy Code, and the court’s inherent authority to sanction – the latter of which is arguably expanding. This discussion illustrates common perils faced in consumer bankruptcy practice as well as emerging issues implicating professional responsibility.

B. Worst Practices, or “What Not to Do”

Recent case law demonstrates that disciplinary actions against bankruptcy attorneys are on the uptick, perhaps because of the overall increase in bankruptcy cases resulting from the Great Recession. Attorneys face ethical procedures as a result of failure to fully explain fee agreements, sloppy paperwork, and unlawful practice of law by staff, and impermissibly limiting the scope of representation. The case of In re Brunett illustrates several of these epic, ethical failures.

1 For example, sections 321 through 331, govern administration, establish a practitioner’s duties to the court and other attorneys, and determine the rules of hiring and compensation. 1–8 COLLIER ON BANKRUPTCY 8.02. The Federal Rules of Bankruptcy Procedure 2013 though 2017 elaborate on these Code provisions. Id.

2 Id.

3 See Braucher on 9th Circuit’s Interpretation of Inherent Power to Sanction Attorneys [2010] Emerging Issues 4877 (MB) (arguing that the Ninth Circuit ruling in Price v. Lehtinen (In re Lehtinen), 564 F.3d 1052 (9th Cir. 2009) expanded the bankruptcy court’s inherent authority to sanction by holding that an implied finding of bad faith was sufficient grounds upon which to impose disciplinary sanctions, including disgorgement of all fees, and a three month suspension of practice before the Northern District of California).

4 See, e.g., In re Lawson, 437 B.R. 609, 674-75 (Bankr. E.D. Tenn. 2010) (imposing “enhanced sanctions” against a bankruptcy firm in the consolidated cases of fifteen debtors because the firm used “less than creative methods to circumvent” a prior ruling against the firm for failure to fully disclose fees by splitting the fees into pre- and post-petition payments, and requiring debtors to tender post-dated checks which the firm cashed post-petition; filing compensation disclosure statements that were not accurate; and failing to fully disclose to clients that unpaid attorneys' fees were potentially dischargeable). See also In re Harwell, 439 B.R. 455, 459-60 (Bankr. W.D. Mich. 2010) (holding that attorney violated the requirements of 11 U.S.C. § 329(a) and Fed. R. Bankr. P. 2016(b) by paying a contract attorney to attend the debtor’s section 341 hearing and failing to disclose the fee splitting arrangement). Statement, which contained other discrepancies and inaccuracies, as well as M.R.P.C. 1.6 by unnecessarily disclosing information that may have been privileged, the court also noted that the firm’s typos and general informality, “confirm the very same inattention to this case that likely prompted the Debtor to seek the court's assistance”).

5 See Acclaim Legal Serv., P.L.L.C. v. Allard (In re Yong Mi Shannon), 2010 U.S. Dist. LEXIS 28439, at *6-*7 (E.D. Mich. March 25, 2010) (upholding sanctions for the firm’s “sloppy practice” indicated by the failure to disclose a debtor’s anticipated yearly tax refund, as well as the firm’s “troubling practice” of apportioning each stage of the debtor’s case to a different attorney, as a result of the “sloppy practices” supported the finding of bad faith and subsequent imposition of sanctions).

6 See In re Nguyen, 447 B.R. 268, (B.A.P. 9th Cir. 2011)(upholding sanctions suspending the attorney from practice in the District until he completed a minimum of 10 hours of CLE and permanently enjoining the attorney from filing bankruptcy cases or schedules in any court unless he conducted the client interviews, where the attorney who had been practicing in good standing for nearly 20 years, and half of his practice was representing consumer debtors, because the attorney violated Fed. R. Bankr. P. 9011, by delegating intake-interviews to his non-attorney wife, or (other non-lawyer staff) and often allowed her to determine whether a Chapter 7 or 13 was appropriate, the court also held that Bankruptcy courts are “free to consult the ABA standards when formulating sanctions” but they are not required to do so).

7 See In re Minardi, 399 B.R. 841, 848, 848 n.4 (Bankr. N.D. Okla. 2009) (holding that an attorney’s attempt to exclude representation in section 524(c) negotiation of reaffirmation agreements was not permissible because deciding to reaffirm a debt was “so critical” a decision, and noting that the opinion was not intended as a criticism of the attorney or his law practice, but was intended to correct an apparently “mistaken belief” as to appropriateness of this limitation on the scope of representation).

1. Let the Paralegal Run the Show

The Debtors contacted the law firm after receiving notice of an impending foreclosure. The foreclosure was set for April 30, 2009. The couple’s initial meeting with counsel (a generous term) took place March 25, 2009. At that meeting the Burnetts consulted with a firm paralegal, explaining to her that they wished to keep the home. At the time of that initial meeting, the Burnetts were full-time workers, current on all their other debts, had a net income that outpaced their expenses, and had a $6000 tax return in their bank - which they intended to put toward the past-due mortgage. The paralegal advised the Burnetts that they could only save their home by filing a Chapter 13 bankruptcy. The paralegal also directed the couple to withdraw the $6000 and allow their car payments to go into arrears. Mrs. Burnett testified that they complied with the advice, and gave the firm all of the requested documentation within a week of the initial meeting. The couple also promptly paid the firm an $800 filing fee.

With the foreclosure sale scheduled for April 30, the couple attempted to reach the firm several times throughout the month in order to check the status of their case. Frustrated with the firm’s failure to return her calls, Mrs. Burnett scheduled another meeting. This meeting was also with a paralegal, who blamed the filing delay on the Burnetts’ failure to submit the requisite paperwork. The paralegal, however, had the wrong file. After Mrs. Burnett called this to her attention, the paralegal apparently consulted the correct file and advised Mrs. Burnett that everything was “fine,” – except things were far from fine. One can only speculate Mrs. Burnett’s horror when shortly thereafter she received a letter advising her that her home of seven years had been sold, and that she had to move in three days. Upset, Mrs. Burnett again visited the office. On this visit, she happened to catch the attorney in the lobby, this was her first interaction with an actual attorney, and it was short-lived. After angrily showing the letter to the attorney of record and explaining that she was, in fact, his client, she was quickly brushed off to yet another paralegal.

Finally, after learning of the foreclosure, the firm filed the Burnetts’ bankruptcy on May 14, 2009. On June 9 the mortgage company filed a motion seeking to enforce its right to possess the property. Though this filing was sent to eight separate email accounts belonging to the law firm, the attorney failed to act upon them. The day before the June 25th hearing, the lender asked the court to remove the hearing, because the parties had settled the Motion for Relief. The attorney for the mortgage company sent a proposed order on the settlement agreement and the debtor’s attorney had ten days in which to object before the company would submit the order to the court. Debtors’ attorney did not file any such objection within the ten day window; however, he directed a paralegal to email the Courtroom Deputy requesting the court to delay the filing, and set a hearing for August 27. The court responded that debtors’ attorney would have to file a motion requesting the matter be set for hearing, to which the court received no response.

Meanwhile, the next contact between the firm and the Burnetts occurred on June 18. At this meeting the couple finally consulted with their attorney. Approximately a week later, the couple was asked to return to the firm, at which point the paralegal with whom the Burnetts had initially met advised them that they could not keep their house. According to Mrs. Burnett’s testimony the paralegal said, “well, you just need to look at this like something good, you’re out from under the house now, and you can cancel your Chapter 13 and everything will be alright . . . we know lots of people who rent houses.”

Not surprisingly, the Burnetts sought new legal counsel. The substituted counsel filed a July 13th response to the mortgagee’s Motion for Relief, arguing that the foreclosure was void and unenforceable. Sadly for the Burnetts, the court granted the mortgage company’s Order Striking Relief, in which the court specifically referenced the email from the paralegal “the Debtors’ use of email to communicate a substantive matter raises concerns regarding the lawyer’s professional obligation to his client and the court.”

In August the Burnetts sent a letter to their former counsel requesting a refund of the $800 fee, as well as $38,000 to compensate them for lost equity in their home. The attorney responded by claiming that the Burnetts had changed their mind, and decided to surrender their home throughout the representation. The couple vehemently denied ever wanting to lose their home. The court cited the utter lack of evidence to substantiate any of the attorney’s defenses and found for the Burnetts – determining the attorney’s claims to be “misleading and untrue.” Indeed, the court held that the attorney “acted deliberately and purposefully to conceal the inadequacies of legal representation . . . in an attempt to shield himself from liability.”

Further, the court determined that the representation fell below even minimum standards because he allowed his paralegals to dispense legal advice, and failed to explore any alternatives to bankruptcy, despite the Burnetts favorable financial situation. Ultimately, the attorney was ordered to disgorge all of the and was banned from appearing before, filing any documents in bankruptcy court pending a review by the Arkansas Supreme Court’s Committee on Professional Conduct.

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9 Id. at 51-52.
2. Insult the Judge

Another cautionary tale is the en banc disciplinary proceedings against a Florida debtor’s attorney. In this bankruptcy proceeding, the attorney filed a claim to exempt proceeds that his client admitted owing the Plan Administrator, and which the judge had previously ordered sequestered and disbursed. A creditor’s attorney motioned for sanctions pursuant to Bankruptcy Rule 9011, arguing that the Claim was baseless and that debtor’s attorney was attempting to interfere with Bankruptcy Judge Olson’s prior orders. Though the court agreed, Judge Olson was obliged to deny the motion because intervening legal holidays resulted in an extension to the mandatory twenty-one-day safe harbor provided by Rule 9011. Noting the court’s ability to impose sanctions pursuant to Bankruptcy Rule 9011(b), the judge deemed the claim “frivolous, absurd, and not warranted by existing law,” and directed debtor’s attorney to show cause the court should not impose sanctions for filing the Claim. The attorney’s explosive written response to the show-cause order has enthralled the Florida legal blogosphere. The response reportedly contained inflammatory comments such as: “It is sad when a man of your intellectual ability cannot get it right when your own record does not support your half-baked findings.” In addition he asserted that the judge’s conclusions were drawn “from the ether,” and upbraided the judge for failing to cite “any authority for the propositions that your jurisdiction is never ending and without geographic bounds; your unconditional releases are meaningless; and pronouncements of the United States Supreme Court are mere suggestions.” The attorney also cited four prior cases with Judge Olson to establish what he termed a policy toward him of “readyfireaim.”

The court, displeased with that response, entered an order declaring that both the Claim for exemption and the written response to the show cause violated Rule 9011(b). The court also found that the “nature” of the response was such that the show-cause hearing would be en banc. The hearing, originally scheduled for June was postponed to August 18, 2011. Unfortunately, insulting judges and ignoring clients are not the only ethical issues in bankruptcy practices. Instead, ethical issues go beyond creditor/debtor attorneys to include those attorneys that are or represent trustees.

3. Borrow Pilfer Cash from Cases

In two recent cases (also in Florida) individuals selected to protect estates pled guilty to criminal charges resulting from abuse of their fiduciary duties. Lewis B. Freeman was sentenced to 100 months in prison, 21 months of house arrest, and three years of supervision after pleading guilty to conspiracy to commit mail fraud. For at least a decade, Mr. Freeman served as a fiduciary in various capacities, including receiver and trusteeships. Rather than securing and overseeing the assets, Mr. Freeman was instead misappropriating the funds, or put more bluntly, stealing. He admitted to writing checks to both himself and his accounting firm, as well as using assets to replace money apparently “borrowed” from other accounts, including a client’s retiree account. In fairness, the stolen money did not all go to Mr. Freeman’s lifestyle, apparently some of the funds were given to charity – to promote his firm. Similarly, Marika Tolz, a twenty year veteran of Chapter 7 trustee panels, pled guilty to conspiracy to

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12 Id. at 3.
13 Id. at 6-7.
14 Id. at 7-9.
15 Pacenti, supra note 10.
16 Id.
17 Id.
18 Id.
20 Id.
21 Pacenti, supra.
commit wire fraud. Ms. Tolz and her cohorts also wrote checks from the assets she was entrusted to oversee, using the money to benefit herself, and to replace funds “on loan” from other fiduciary accounts. Combined, Mr. Freeman and Ms. Tolz’s bad behavior resulted in losses of around $5 million.

4. Make “Friends” with Opposing Parties
Finally, there are ethical issues that arise as a result of new media that affect attorneys in all areas of practice. Ethics Committees are taking up the issue of professional responsibility in the context of social networking sites, and warning attorneys about potential liability in “friending” third parties in order to mine data from their social media pages. The factual scenario explored in one opinion envisions an attorney representing a former employee in an action for wrongful discharge. The employer is represented by counsel. The client/former employee informs her attorney of a few higher ranking officials which she feels are disgruntled with the defendant/former employer. The attorney, wary that the officials may be less candid in an interview or formal deposition, decides to send them friend requests to see if their social media pages contain information that would be helpful to prosecute his client’s case. Assuming the officials are high ranking enough to constitute “represented parties” within the organization, the question is whether the friend request violates the prohibition of ex parte contact with represented parties.

The opinion argues that the friend request, when combined with the motivation to data mine for the case, at a minimum, violates the ethical prohibition on indirect contact with represented parties. Further, given the broad scope of permissible discovery, all of the information the attorney may hope to obtain by “friending” the client’s former coworker is precisely the sort of ex parte contact professional rules are designed to curtail. Additionally, acquiring information after gaining access through a request on a social media site is fundamentally different than combing a public website for information. In the latter case, the information is public, in the former, the data requires permission to access, and it is the very private nature of the intel that makes it potentially valuable. Indeed, even if the information sought and obtained is not protected by privilege, the data on a private site still falls within the ambit of the rule. This is so because the prohibition on ex parte contact is not solely to protect privilege, but also to prevent overreaching by opposing counsel. Lastly, in addition to the potential for ex parte communication with represented parties, there is a strong argument that friend requests with ulterior motives violate an attorney’s duty not to deceive unrepresented parties.

II. EMERGING ISSUES AFFECTING THE RULES OF DISCIPLINE
A. Bankruptcy Attorneys are “Debt Relief Agencies”
The Supreme Court’s 2010 ruling in Milavetz, Gallop & Milavetz, P.A. v. United States has far-reaching implications for bankruptcy practitioners. In Milavetz the Court held that attorneys providing assistance in bankruptcy actions qualify as debt relief agencies under the Bankruptcy Abuse

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28 Id.

29 Ms. Tolz was reported to cost estates $2.4 million. Id. Mr. Freeman’s total losses were estimated at $2.6. Receiver Sentenced to Jail for Theft of Fiduciary funds, supra.


31 Id.

32 Id. at 1-2.

33 See MODEL RULES OF PROF’L RESPONSIBILITY R. 4.2 (2010) (prohibiting communication with a represented party absent either consent of the other lawyer, or a court order, or other law that permits the communication).


35 Id. at 5.

36 Id. at 6.

37 Id.

38 Id. at 7.

39 Id. at 7-8.

40 Id. at 10.

41 See MODEL RULES OF PROF’L RESPONSIBILITY R. 4.1(a) (2010) (prohibiting a lawyer from concealing, or failing to disclose, a material fact to third person through the course of representation).

Prevention Act of 2005 (BAPCPA).\textsuperscript{43} The court reasoned that Congress gave no indication that attorneys were exempt from BAPCPA, and legislative history indicated concern over abusive practices by attorneys.\textsuperscript{44} Accordingly, the court held that attorney/client communications are now governed by the provisions of the Act.\textsuperscript{45} In addition to requiring certain disclosures in bankruptcy attorney advertising, the ruling also implicates the advice an attorney may give a client prior to filing.\textsuperscript{46} BAPCPA prohibits a debt relief agency from “advising an assisted person . . . to incur more debt in contemplation of filing.”\textsuperscript{47} Milavetz argued (and the Eighth Circuit agreed) that the Act’s prohibition on advising a client to incur new debt would necessarily chill attorney/client communication because a lawyer would be barred from advising a client as to the legal implications, and/or possible advantages or disadvantages of taking on additional debt.\textsuperscript{48}

The Court disagreed, and adopted a more narrow reading of the statute: that the statute only prevented a debt relief agency from “advising a debtor to incur more debt because the debtor is filing for bankruptcy, rather than for a valid purpose.”\textsuperscript{49} The Court also reasoned that the prohibition still allowed an attorney to discuss the implications of incurring more debt; practitioners were merely prohibited from “encouraging” a client to take on additional obligations.\textsuperscript{50} The Court concluded that the provisions governing the necessary disclosures in advertising, including identifying the firm as a “debt relief agency,” were legitimate, as the provisions “were reasonably related to the Government’s interest in preventing deception in consumers.”\textsuperscript{51}

These restrictions are problematic. As Professor Kenneth N. Klee astutely notes, “a debtor's counsel's advice will be viewed \textit{ex post}, and what might seem like prudent advice \textit{ex ante} for the debtor to take out a third mortgage or refinance an automobile loan might be viewed as abusive \textit{ex post}.”\textsuperscript{52} Consequently, the Milavetz holding presents a “trap for the unwary.”\textsuperscript{53}

Professor Klee goes on to advise practitioners to document any advice regarding the acquisition of new debt in order to substantiate later the legitimate reason for such advice.\textsuperscript{54}

\section*{B. Impermissible Fee Sharing by Outsourcing}

Another emerging issue involves increasing litigation over practices in what are commonly referred to as “foreclosure mills.”\textsuperscript{55} These foreclosure practices implicate two major issues of professional responsibility. First, the firms may be engaging in illegal fee-splitting\textsuperscript{56} by outsourcing many of their back-office operations to private equity firms.\textsuperscript{57} Second, ethical watchdogs are concerned that many of these same outsourced operations include aiding banks in the “robo-signing” of invalid affidavits, as well as other sloppy, illegal practices that result in invalid foreclosures.\textsuperscript{58} The typical model involves a private equity firm purchasing certain back-office and/or administrative operations such as title searches, document preparation, accounting, etc. from foreclosure practices.\textsuperscript{59} The private equity firm then turns around and sells those same operations back to the law practice.\textsuperscript{60} The profit driven model of equity firms raises concerns that professional work product is sacrificed in order to lower costs and increase profits.\textsuperscript{61}

Several suits are pending on behalf of homeowners that charge these firms with illegal fee sharing, and the aforementioned unlawful

\begin{flushright}
\textsuperscript{51} \textit{Id.}
\textsuperscript{54} \textit{Id.}
\textsuperscript{56} See MODEL RULES OF PROF’L RESPONSIBILITY R. 5.4 (a),(b),(d) (2010) (prohibiting a lawyer from sharing legal fees with a non-lawyer, except in limited instances; and prohibiting a lawyer from forming a partnership or corporation with a non-lawyer that engages in the for-profit practice of law).
\textsuperscript{57} Meier, supra.
\textsuperscript{58} \textit{Id.}
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} Meier, supra note.
\end{flushright}
foreclosures. One suit in Mississippi also alleges that the equity firms and law firms work in tandem to inflate the fees and administrative costs charged to homeowners in foreclosure. A Georgia suit alleges that large, real-estate firm McAlla Raymer engaged in fraud as well as illegal fee-splitting. In addition to the Georgia homeowners’ suit, the U.S. Trustee’s Office has expressed concern over the legality of bank foreclosures in the state, including foreclosures actions by clients of McAlla Raymer.

Finally, state attorneys general are also investigating firm outsourcing. For example, the Florida attorney general’s office is investigating attorney David J. Stern (who formerly had the largest foreclosure practice in the state) over concerns that documents were falsified in order to expedite the foreclosure process. Mr. Stern converted his back-office operations to the publicly traded company DJSP in early 2010. Though DJSP is not one of the companies named by homeowners in these illegal fee-splitting suits, certain DJSP regulatory filings acknowledge that a court could find the fee sharing arrangement unethical. In sum, given the increasing number of private equity firms seeking to provide outsourced services following the collapse of the housing market, firms may be tempted to either outsource or sell certain firm operations. However, law practices should be cautious, as using outsourced labor, or capitalizing on firm operations could result in a lower quality of work, an impermissible fee sharing agreement – or even allegations of fraud.

III. CONCLUSION

Bad lawyers sometimes give us more instruction than good ones – and more incentive to keep our profession above board. Many of the foregoing behaviors are clearly wrong, and do not require a Rule, statute, or court ruling to proscribe the offensive behavior. And yet, these cases still occur. Perhaps if the aforementioned attorneys had heard it one more time they would not have become the cautionary tale. Other rules, such as Milavetz serve as a potent reminder that bankruptcy practitioners, in particular, are subject to a morass of rules and regulations, which can pose pitfall for the non-vigilant. In short, always double check the Rules and do not underestimate the value of the “smell test.”