ESSAY

THROUGH GRITTED TEETH AND CLENCHED JAW: COURT-INITIATED SANCTIONS OPINIONS IN BANKRUPTCY COURTS*

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I. INTRODUCTION

I'm a former Chapter 11 bankruptcy lawyer, and I study the behavior of lawyers in Chapter 11 cases. As such, I'm lucky enough not to have encountered too many bad[1] or incompetent[2] lawyers, either in practice or in my research, but I know that they're out there.

So do bankruptcy courts. These courts see more bad and incompetent lawyers than they'd wish to see,[3] and they have only a few options for dealing with problem lawyers. A court could punish a bad lawyer by finding a procedural or substantive irregularity in the lawyer's pleadings, but that choice also penalizes the lawyer's client, who may have chosen the lawyer by happenstance. A court could rule against the lawyer, choosing not to believe the lawyer—an application of the "fool me once, shame on you; fool me twice, shame on me" theory. Again, though, that strategy punishes the lawyer's client, who might be an innocent bystander. Alternatively, nothing stops a judge from giving a bad

1. By "bad," I mean lawyers who behave in ways that subvert the legal system; lawyers who are malicious for the sake of maliciousness. Lawyers are not supposed to, among other things, torment third parties. *See* MODEL RULES OF PROF'L CONDUCT R. 4.4 (2009) (stating that a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person). In addition, lawyers should not lie to the opposing side or obstruct its access to evidence. *See* MODEL RULES OF PROF'L CONDUCT R. 3.4 (2009) (stating that a lawyer shall not unlawfully obstruct another party's access to evidence and shall not falsify evidence or assist a witness to testify falsely). Also, lawyers should not lie to the court. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3 (2009) (stating that a lawyer shall not make a false statement of fact or law to a tribunal). Finally, lawyers should not behave dishonestly. *See* MODEL RULES OF PROF'L CONDUCT R. 8.4 (2009) (stating that it's professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

2. Lawyers who are incompetent just flat-out don't know what they are doing. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2009) (declaring that a lawyer shall provide competent representation to a client). Sometimes, even competent lawyers are not diligent, often because they are overworked. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 (2009) (stating that a lawyer shall act with reasonable diligence and promptness in representing a client). However, just because the pace of work is often crushingly hard, that does not excuse lawyers from the basics of diligence, such as returning clients' phone calls and emails and from filing pleadings on time.

3. For a recent scandal, see Mark Hamblett, *Former Mayer Brown Partner Gets 7 Years for Refco Fraud*, 241 N.Y. L.J. 11 (2010), *available at* 2010 WLNR 1116436, for a description of the conviction and sentencing of a lawyer who defrauded investors out of $2.4 million, enriching his own firm in the process.

lawyer a dressing-down in court. The transcript would reveal that the court was unhappy with the lawyer's performance, but unless someone else ordered a copy of the transcript, no particular ramifications would come of that dressing-down. (My educated guess is that most misbehavior in court gets the dressing-down treatment, as a court's way of enforcing norms quickly and efficiently.)

In addition, a court could decide to hand down a sanctions opinion, either because one party requests that the court consider sanctions or because the court, on its own motion, believes that a lawyer's behavior is serious enough to merit a written order. In this Essay, I address that subset of sanctions opinions that arise from this latter alternative: when a court, on its own motion, decides to discipline a lawyer for serious misbehavior.

I will explore the types of behavior that trigger court-initiated sanctions opinions and what happens to some of these opinions on appeal. Based on my non-exhaustive review of court-initiated sanctions orders, I believe that most of these orders are written after the lawyer in question has stepped so far over the line of "reasonable lawyer behavior" that he can't even see "reasonable behavior" in his rear-view mirror.[4] Some of these sanctions orders will cover one-shot mistakes that the lawyer—had he or she been thinking clearly—would have realized were genuinely awful things to do. Other sanctions orders will discuss cumulative egregious misbehavior by lawyers.[5] On appeal, the treatment of these court-initiated sanctions orders tend to fall into the categories of "good point but bad procedure" remands or reversals, "I don't understand bankruptcy law" remands or reversals, or orders affirming the bankruptcy court's sanctions order.

There are countless ways to organize these cases, but because

4. *Cf.* JURASSIC PARK (Universal Pictures 1993) (depicting a scene in which a Tyrannosaurus rex is chasing a car and appears in the car's side-view mirror above the warning, "Objects in mirror are closer than they appear").

5. Most ethics rules require a lawyer who witnesses misconduct to report that conduct to the state bar. *See* MODEL RULES OF PROF'L CONDUCT R. 8.3 (2009) (stating that if a lawyer knows of another lawyer who has committed a violation of the Model Rules and has questionable honesty, trustworthiness, or fitness, she should inform the appropriate authorities). Yet, it seems as if lawyers who sit in court watching their colleagues step way over the ethical line often forget their own duty to report. *Cf.* Joel Cohen & Katherine A. Helm, A New Year's Resolution for Lawyers, Jan. 4, 2010, http://www.law.com/jsp/article.jsp?id=1202437340930 (suggesting lawyers have a collective obligation to keep the profession responsible and ethical).

this Symposium issue is likely to go to print around the time of Passover, I'm going to organize the cases around the theme of the "four children" (originally known as the "four sons"),[6] a classic component of the Passover Seder. Shortly after the youngest child at the Seder asks the Four Questions,[7] initiating the retelling of the Passover story, there is a segment of the Seder at which four different children ask, in essence, why are we going through this whole rigamarole? There's a wise child, a wicked child, a simple (untutored) child, and a child who doesn't even know to ask.[8] (Yes, if you're paying attention, there are three children asking and one child for whom we're voluntarily telling the story.)

For the wise child, we retell the facts of Passover, and not just the laws associated with it, because facts are important to the understanding of why we celebrate the holiday—a mere understanding of the rules, without an understanding of the facts giving rise to the rules, cheats us (and the child) of the richness of the

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6. *See, e.g.*, Dovid Gottlieb, The Four Sons, http://ohr.edu/yhiy/article.php/805 (last visited May 11, 2010) (analyzing who exactly the four sons really are). Here is a version of the "four sons" part of the Seder:

> The Torah spoke about four sons, one wise, one wicked, one simple and one who cannot formulate a question.
>
> What does the wise son say? "What do the testimonies, and the statutes, and the judgments, mean, which Hashem our God has commanded you?" You should also say to him the laws of the [Korban] Pesach, [up to the law] that we do not eat any dessert after the Pesach.
>
> What does the wicked son say? "What does this Avodah (worship) mean Lakhem (to you)[?]" "To you" [meaning] and "not to him[.]" Since he excluded himself from the community, he has denied the basic principle. You should also set his teeth on edge and say to him: "It is on account of this that Hashem did for me when I left Egypt" "for me" and not "for him"— had he been there, he would not have been redeemed.
>
> What does the simple son say? "What is this?" "[T]hat you shall say to him, By strength of hand Hashem brought us out from Egypt, from the house of slavery;"
>
> Regarding the one who cannot formulate a question, you must open up the discussion, as it says: "And you shall tell your son in that day, saying, This is done because of that which Hashem did to me when I came forth out of Egypt."

Yitzchak Etshalom, Haggadah Shel Pesach (II): The "Four Sons," http://www.torah.org/advanced/mikra/5757/va/dt.60.3.04.html (last visited May 11, 2010).

7. *See, e.g.*, Tracey R. Rich, Pesach Seder: How Is This Night Different?, http://www.jewfaq.org/seder.htm (last visited May 11, 2010) (explaining how the youngest person at the table usually asks, "Why is this night different from all other nights?" in an attempt to understand the Seder).

8. Dovid Gottlieb, The Four Sons, http://ohr.edu/yhiy/article.php/805 (last visited May 11, 2010).

story.[9] For the wicked child, who wants to know what Passover means to everyone else at the table, but not to him, we're supposed to relate an understanding of what it means to be in the group that is affected by, and follows, the rules.[10] Because the wicked child has deliberately excluded himself from the group, we're supposed to exclude him from that same group in the retelling.[11] For the untutored child, we're supposed to help her understand the story, perhaps not at the same level of sophistication that the wise child would understand it, but to the best of her ability to understand.[12] For the child who doesn't know to ask, we begin the retelling without needing to be prompted at all.[13]

How does this analogy[14] play out when reading bankruptcy sanctions opinions? The lawyers who don't get into trouble are like the "wise child"—they "get" the ethics rules, and so perhaps they read sanctions opinions, if at all, to make sure that they don't run afoul of anything unusual. My guess is that most good attorneys don't spend a lot of time reading sanctions opinions unless they happen to know the lawyer(s) involved.

The lawyers who do get into trouble will fall into one of two camps: the "wicked child" or the "child who doesn't know to ask." The "wicked child" thinks that the rules don't apply to him, while

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9. *See* Tracey R. Rich, Pesach Seder: How Is This Night Different?, http://www.jewfaq.org/seder.htm (last visited May 11, 2010) (discussing how the Haggadah deliberately provokes young children to question the rituals of the Pesach Seder in order to differentiate it from other holidays).

10. Dovid Gottlieb, The Four Sons, http://ohr.edu/yhiy/article.php/805 (last visited May 11, 2010).

11. *See id.* (stating the wicked son is excluded from the retelling because he is too proud and that discussing the story with him is pointless).

12. *See id.* (explaining that the simple son's questioning lacks sophistication but shows a sincere desire to learn and understand).

13. *See id.* (stating that the son who does not know how to ask lacks cleverness and therefore remains silent).

14. There are other analogies at play here. For example, as I was coming up with the title for this essay, I kept hearing, in the back of my mind, another theme in the Seder: "The Lord brought us out of Egypt with a mighty hand and outstretched arm, with great awe, miraculous signs and wonders." *See, e.g.*, Barry Dov Lerner, *Jewish Family Education Passover Haggadah: A Complete Haggadah*, Feb. 21, 2010, http://www.jewishfreeware.org/downloads/folder.2006-01-07.0640323187/5770COMPLETEMASTERHaggadahPaginated3-8-10WITHOUT%20SONGS.pdf (alterations in original) (quoting Deuteronomy 26:8). Maybe a judge's gritted teeth and clenched jaw is not the Almighty's mighty hand and outstretched arm (OK, it's not even close), but I'm trying to convey a feeling of powerfulness here.

the "child who doesn't ask" doesn't even know what he doesn't know. I tend to write for those who know the rules and just need some support for what they want to say (the "wise child" lawyers) or for those who have an idea of what's right and wrong but who need some help getting through the steps (the "simple child" lawyers). Judges who write sanctions opinions are writing for the "wicked child" or the "child who does not know to ask."

When judges write sanctions opinions, they're writing them after very long days, and they're writing them very carefully. After all, if a lawyer is on the wrong side of a court-initiated sanctions opinion and decides to appeal, the lawyer gets to write a brief, designate the record, and argue the appeal. The judge who wrote the sua sponte sanctions opinion, however, only stands on the opinion—there is no advocate automatically arguing for the judge's view of what happened.[15] It's not an accident, then, that these opinions are among the most meticulously crafted that I've read; it's the judge's only shot at explaining the rationale for initiating the sanction. If the judge doesn't do a good job of explaining why the sanction was necessary (and assuming that the sanction *was* necessary), then the opinion will be reversed on appeal, and the misbehaving lawyer will learn nothing from the experience.[16]

Due to the serious nature of sanctions opinions, judges also tend to be careful in the problems that they're addressing. The significant ethics breaches that a court might describe in a sanctions opinion could trigger state bar disciplinary proceedings. Keeping this synergy in mind, the judge must provide a careful record of the lawyer's transgressions.[17] I have never found a judge who looked

15. *See generally* Greenfield v. First City Bancorporation of Tex., Inc. (*In re* First City Bancorporation of Tex., Inc.), 270 B.R. 807 (N.D. Tex. 2001) (explaining the standard of review for a bankruptcy opinion), *aff'd*, 282 F.3d 864 (5th Cir. 2002).

16. Worse yet, the misbehaving lawyer may well discover that whatever he did is worth more to him (e.g., charging clients for incompetent advice, representing multiple clients with clear conflicts of interest, or allowing a client's ire to run roughshod over a non-client) than any potential punishment his misbehavior might cost him. *Cf. id.* at 809–10 (detailing the actions that led the bankruptcy court to impose sanctions, and noting that lesser sanctions had failed to have an effect on the defendant's behavior).

17. *See* Susan M. Freeman, *Ethical Dilemmas—How to Avoid Them (Sorry Counsel, You Signed It: Ethics Rule 9011, and Inadequate Filings)*, 8TH ANN. ROCKY MTN. BANKR. CONF. § VI (2003) ("The bankruptcy court or appellate court may refer its sanctions determination to the state professional disciplinary authority, commencing a state disciplinary process."); *see also In re Fahey*, No. 09-00501, 2009 WL 2855728, at *1 (Bankr.

forward to writing a sanctions opinion. There are many parts of a judge's day that can be challenging and some that can be satisfying, but no judge enjoys having to sanction a bad lawyer.

II. "WICKED CHILD" OPINIONS (IGNORING THE RULES)

If a lawyer wants to set a judge's teeth on edge, the fastest way to do that is to flout the law—either bankruptcy law or the ethics rules. *In re Fahey*[18] is a great example of a court sanctioning a lawyer whose exploits were so bad that they were actually statistically significant.[19]

In *In re Fahey*, the bankruptcy court opened a miscellaneous matter to consider whether or not the sanctioned lawyer should be disciplined for:

> a clear and consistent pattern of (1) failure to file information required by Bankruptcy Code § 521 when he files petitions commencing cases under the Bankruptcy Code, (ii) inadequate representation of clients, (iii) lack of expertise in bankruptcy law, (iv) unreasonable delegation of authority and responsibility to a contract paralegal that resulted in substantial harm to bankruptcy debtors, (v) filing pleadings containing false statements, and (vi) failure to comply with the Bankruptcy Code, Federal Rules of Bankruptcy Procedure (FRBP), and local rules.[20]

In arriving at the reasonable conclusion that the lawyer's behavior was egregious, the court reviewed three years of Chapter 13 cases that the lawyer had filed and compared his results with those of other lawyers practicing in his region.[21]

S.D. Tex. Sept. 1, 2009) ("The Court will also forward this memorandum . . . to the State Bar of Texas for such disciplinary action as they might deem appropriate.").

18. *In re* Fahey, No. 09-00501, 2009 WL 2855728 (Bankr. S.D. Tex. Sept. 1, 2009).

19. *See id.* at *1–3 (reviewing defendant's case history before the bankruptcy court and providing statistical breakdowns of the percentage of dismissed cases that were the result of his mistakes).

20. *Id.* at *1.

21. *Id.* at *2–3.

	Mr. Fahey	Other Attorneys
Number of Chapter 13 Cases Filed 1/1/2006 to 3/31/2009	62	226
% of cases that were dismissed	92%	28%
% of cases dismissed for failure to file § 521 information	47%	2%
% of cases dismissed within 90 days after petition was filed	61%	6%

[22]

The Chapter 13 trustee in Laredo, where the sanctioned lawyer's cases were based, conducted an independent analysis that confirmed the court's findings.[23] The United States Trustee also reviewed the sanctioned lawyer's results in the lawyer's Chapter 7 and Chapter 11 filings, with similar results.[24] As if the results were not reason enough to call for sanctions,[25] the sanctioned lawyer admitted to the court that none of his petitions actually had his clients' signatures.[26] Because the lawyer had ignored warnings about his behavior in prior cases, the court banned the lawyer from practicing bankruptcy law until the lawyer could demonstrate that he knew what he was doing in bankruptcy cases. In addition, the court referred the lawyer for further discipline by the district court and the State Bar of Texas.[27]

Willful ignorance of the practice of bankruptcy law is one thing. The failure to abide by the rules of common decency and the basics of professionalism is quite another. In *In re Martinez*,[28] the bankruptcy court sanctioned a creditor's lawyers—and the creditor itself—for insisting that a scrivener's error be enforced as filed.[29]

The debtors in the case had three houses, and Wells Fargo Bank

22. *Id.* at *2.

23. *See In re Fahey*, 2009 WL 2855728, at *2–3 (summarizing the independent analysis conducted by the Chapter 13 trustee).

24. *Id.* at *3–4.

25. In keeping with my Passover theme, *Dayenu* (Hebrew for, in essence, "that would have been enough"). GreatJewishMusic.com, Learn to Sing Dayenu, http://www.greatjewishmusic.com/Midifiles/Passover/Dayenu.htm (last visited May 11, 2010) (providing the translation of *Dayenu*).

26. *In re Fahey*, 2009 WL 2855728, at *5.

27. *Id.* at *1.

28. *In re* Martinez, 393 B.R. 27 (Bankr. D. Nev. 2008).

29. *Id.* at 41–42.

had several liens on all of the houses.[30] The debtors agreed to stipulate to relief from stay on one of the houses—a house in which they weren't living.[31] Although both sides (the bank's lawyers and the debtors' lawyer) thought that the house, which was the subject of the stipulation, was one of two other houses that the debtors were voluntarily surrendering, the legal description of the house in the stay relief stipulation was actually the one house that the debtors did not want to surrender.[32] Here's what happened next:

> When the mistake was pointed out to the lawyer from [Wells Fargo's outside law firm], he ultimately acknowledged it. When asked to sign a stipulation vacating the order on the mistaken stipulation, the lawyer refused. He claimed that his client, Wells Fargo, would not consent to vacating the mistaken stipulation. As a result, on March 17, the debtors sought an order shortening time for the court to hear a motion to vacate the stipulation. The reason shortened time was requested was simple: if Wells Fargo would not consent to vacating the mistaken stipulation, then Wells Fargo presumably intended to take advantage of the mistake and foreclose on the debtors['] residence. The court agreed to hear the motion on March 24.
>
> [Wells Fargo's outside law firm] did not oppose the debtors' request for a hearing on shortened time. Despite being ordered to file a written response, it did not do so. A lawyer from [Wells Fargo's outside law firm] did, however, appear at the hearing. His appearance consisted primarily of his statement that his client, Wells Fargo, would not allow him to consent to vacate the stipulation.
>
> After hearing the evidence, the court vacated the order on the stipulation. It then issued an order to show cause why the lawyer from [Wells Fargo's outside law firm], the [outside] law firm [itself], and Wells Fargo should not be sanctioned for their individual and collective conduct in refusing to aid the debtors in rectifying the admitted mistake.[33]

To borrow a phrase from humorist Dave Barry,[34] "I am not

30. *Id*. at 30.
31. *Id*. at 30–31.
32. *Id*. at 31.
33. *In re Martinez*, 393 B.R. at 31.
34. *See* Dave Barry—Biography, http://www.davebarry.com/about.html (last visited May 11, 2010) ("Dave Barry is a humor columnist. For twenty-five years he was a syndicated columnist whose work appeared in more than 500 newspapers in the United

making this up": lawyers for Wells Fargo preferred to force a hearing to fix a scrivener's error rather than tell their client that its refusal to put the correct legal description of the house into an amended stipulation was outrageous.[35] In an opinion that spanned everything from contract law (why the lawyers could have reformed the stipulation) to bankruptcy rules (Rule 9011) to ethics rules, the court explained just how awful the lawyers' behavior had been:

> Clients may not demand unethical or unlawful conduct from their lawyers and expect compliance. As established above, [Wells Fargo's outside law firm] and its lawyers knew, or should have known, that Wells Fargo had no reasonable or nonfrivolous basis to oppose setting aside the stipulation. At a minimum, they had a duty to tell this to Wells Fargo, and to withdraw from the representation or take some other action if Wells Fargo insisted on opposing. They neither withdrew nor did they offer any evidence of compliance with Rule 1.4.
>
> The court understands that lawyers do not give away their services, and that good business and good lawyering each require that the lawyer serve the client's business needs. But law is a profession as well as a business. Because of this status, lawyers must not allow the interests or dictates of a client to control their professional judgment. . . .
>
> This court is concerned that [Wells Fargo's outside law firm] and its lawyers sacrificed their professional independence to the demands of a large institutional client. They should have counseled Wells Fargo to agree to vacate the mistaken stipulation, and informed them that any other course of conduct was unreasonable and one in which they could not participate. Instead, they followed Wells Fargo's instructions without apparent regard to their professional obligations. In short, rather than remain as independent professionals counseling Wells Fargo, [Wells Fargo's outside law firm] and its lawyers instead chose to become unthinking agents for Wells Fargo's ends.
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> The smooth functioning of the courts and the interests of justice always trump a client's unreasonable demands.[36]

States and abroad.").

35. *See In re Martinez*, 393 B.R. at 34 (explaining that Wells Fargo's outside law firm and its lawyers chose to follow Wells Fargo's orders, despite knowing they were without basis).

36. *Id*. at 36–37 (citations and footnotes omitted).

So far, the "wicked child" cases involve lawyers who are stubbornly incompetent in their practice of bankruptcy law and lawyers who persist in furthering their clients' unreasonable demands. Sometimes, though, the "wicked child" case will involve some wildly temperamental lawyer behavior. In *Greenfield v. First City Bancorporation of Texas, Inc. (In re First City Bancorporation of Texas, Inc.)*,[37] the sanctioned lawyer was accused, among other things, of:

- characterizing other attorneys, including an Assistant United States Attorney, as "stooges," "puppet," a "weak pussyfooting 'deadhead'" who "had been 'dead' mentally for ten years," "various incompetents," "inept," "clunks," "falling all over themselves, wasting endless hours," "a bunch of starving slobs," an "underling" who graduated from a 29th-tier law school, and "in mortal fear of taking a lie detector test";
- calling the chairman of First City a "hayseed" and "washed-up has been" and other directors "scoundrels";
- referring to attorneys as having been fired by their former firms; . . .
- referring to the work of other attorneys as "garbage," demonstrating "legal incompetence," and involving "ludicrous additional time and expenses"; . . .
- alleging fraud, cover-ups, payoffs, and bribes with (apparently) little if any evidence to support the characterizations; and
- referring to extraneous and prejudicial matters, such as a "scandal" at a Houston hospital that was another client of one of the opposing attorneys.[38]

Although the bankruptcy court had tried a variety of other sanctions to "curb . . . [the lawyer's] contumacious conduct,"[39] none of those sanctions seemed to work.[40] The lawyer eventually appealed the order of significant monetary sanctions, and the district court affirmed.[41]

The lawyer's arguments on appeal had chutzpah: his statements

37. Greenfield v. First City Bancorporation of Tex., Inc. (*In re* First City Bancorporation of Tex., Inc.), 270 B.R. 807 (N.D. Tex. 2001), *aff'd*, 282 F.3d 864 (5th Cir. 2002).

38. *Id.* at 810 (footnotes omitted).

39. *Id*.

40. *Id.* (noting that the bankruptcy court had imposed "lesser sanctions" such as "oral and written admonitions and warnings," to no avail).

41. *Id*. at 807–08.

were true; he had seen worse behavior pass without sanction; his tactics were effective; the recipients of his remarks had, in essence, asked for it; and the judge had made plenty of other bad decisions.[42] Nice try, but no cigar. The district court observed that the Northern District of Texas had set forth certain standards of conduct for litigators, and that this lawyer's behavior fell well below those standards:

> If anything, Appellants' brief provides further evidence of Greenfield's inability to conform to the standards expected in this district. In the briefs, he emphasizes that an opposing attorney attended Brooklyn Law School (Greenfield graduated from Harvard Law School) and offers the two schools' respective rankings by *U.S. News & World Report*, apparently as evidence that the other attorney is inferior in support of Greenfield's statement that the lawyer had been fired by another law firm. He also brings up what he characterizes as errors by the bankruptcy judge in other rulings, apparently as evidence that the judge's conclusions as to evidence are untrustworthy. Both of these remarks are arguably additional violations of the *Dondi* standards.[43]

With an aside that the lawyer might want to consider an anger management course, the district court affirmed the bankruptcy court's sanctions order.[44]

My guess is that not all outbursts come from lawyers with anger issues. Some outbursts may well come from the fact that bankruptcy lawyers have ample opportunity to interact with bankruptcy judges at meetings, CLEs, and conferences—in addition to any cases in which they interact—and sometimes that familiarity can bring contempt.[45] Even a well-regarded lawyer can

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42. *See In re First City*, 270 B.R. at 812 (describing improper sanctions arguments).

43. *Id*. at 813–14. The court, citing to *Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n*, 121 F.R.D. 284 (N.D. Tex. 1988) (en banc), listed some of the standards that lawyers are expected to follow. *In re First City*, 270 B.R. at 812.

44. *Id*. at 814.

45. Take the famous "few French fries short of a Happy Meal" comment that one bankruptcy lawyer made to a bankruptcy judge during a hearing. *See* Posting of Ronald V. Miller, Jr. to The Maryland Injury Lawyer Blog, A Few French Fries Short of a Happy Meal, http://www.marylandinjurylawyerblog.com/2007/05/a_few_french_fries_short_of_a_happy_meal.html (May 29, 2007) (noting a comment made by a lawyer to a judge in a bankruptcy court and its possible consequences). As this blog pointed out:

> "I suggest to you with respect, Your Honor, that you're a few French fries short of a Happy Meal *in terms of what's likely to take place*." This is probably directed to the way the details of the bankruptcy plan would unfold. Moreover, although she later

find himself facing an order to show cause for treating the judge with too much informality, although garden-variety informality likely will not trigger an order to show cause.

What can we learn from "wicked child" situations? We can conclude that, eventually, a lawyer's repeated misbehavior can be so clearly beyond the pale that even the most patient of judges will say, "Enough."

III. "UNMINDFUL CHILD" OPINIONS (UNAWARE OF THE RULES)

It's not just experienced lawyers who can anger a court to the point where the court takes the time to write a lengthy sanctions opinion. Bankruptcy novices—at least those who clearly have not taken the time to learn the fundamentals of bankruptcy practice and policy—can find themselves on the wrong end of a sanctions opinion as well.

In re Aston-Nevada[46] is a good example. Bankruptcy cases are supposed to be collective actions, designed to bring all of the debtor's creditors together in one forum to determine equitable treatment. Therefore, a bankruptcy case that is a one-creditor, one-debtor dispute is typically not an appropriate use of the Bankruptcy Code's collective treatment. Lawyers for debtor Aston-Nevada either didn't understand this fundamental point or chose to ignore it when they began their representation of a Chapter 11 debtor who had filed for bankruptcy protection on the eve of state court litigation.[47] The debtor had only one asset: a liened-up Porsche.[48] The debtor's lawyers managed to bollix up the case in a variety of ways. For example, they attempted to dismiss the case without notice and a hearing, and they sent

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> *su[a] sponte* calls for a show cause hearing as to why the lawyer should be permitted to continue to practice before her, the judge did not stop the hearing to address the issue. She simply asked counsel to proceed. Obviously, tone is lost when you are reading a transcript. We have no idea how this really happened.
>
> The way to avoid this issue in the first place is for lawyers to bear in mind that there is [a] tran[s]cript being generated. It is also a good idea for lawyers, particularly in this kind of venue, to save [their] Jerry Seinfeldlike efforts [for another venue]. For every time you get a laugh or someone thinks you a[re] witty, someone else thinks you are silly or disrespectful. For the latter, this is certainly Exhibit A.

Id.

46. *In re* Aston-Nevada Ltd. P'ship, 391 B.R. 84 (Bankr. D. Nev. 2006).
47. *Id*. at 90.
48. *Id*.

someone to appear at a Rule 2004 examination who had no knowledge regarding the whereabouts of the debtor's Porsche.[49] Not willing to miss a step, the debtor's lawyers also filed a response to the court's separate order to show cause regarding sanctions against them.[50] That response managed to insult the judge on several different levels:

> Their joint response, filed April 29, 2005, described the language in the court's prior memorandum as "outlandish, improper, unfounded and boorish" as well as "false" and "reckless." The court's reasoning was based, [the law firm] asserted, "on flimsy threads of inference and guess-work," and it exceeded the "reason and decorum expected of a judicial officer." For good measure, [the law firm] stated that the prior memorandum was "offensive, distasteful, crude, untrue, and should never [have been] issued by any judiciary or judicial officer administering equity and justice . . . [.]"[51]

Not satisfied with lobbing insults at the court, the debtor's lawyers also threatened to seek judicial discipline.[52] At the show-cause hearing, the court gave the lawyers a chance to retract some of their allegations.[53] They refused.[54] In doing so, they gave new meaning to the concept of cluelessness.

In explaining why the lawyers deserved to be sanctioned for their conduct, the court divided the ethics lapses into two categories: errors caused by a lawyer's inexperience in bankruptcy practice and errors caused by crossing the line from zealous advocacy to bad faith.[55] Most troubling about the lawyers'

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49. *Id*. at 91.

50. *Id*.

51. *In re Aston-Nevada*, 391 B.R. at 95; *see also id.* at 95 n.18 (describing the "soft-footed[ness]" of the court's prior memorandum regarding sanctions). I have no idea what "soft-footed" means in this context, but it can't be good.

52. *Id*. at 95–96.

53. *Id*. at 96.

54. *Id*.

55. *In re* Aston-Nevada Ltd. P'ship, 391 B.R. 84, 96 (Bankr. D. Nev. 2006). On the latter point, the court observed:

> The court's refusal to characterize [the law firm's] and [the individual's] actions as merely hapless is further supported by their collective reaction to the order to show cause. The court considered separately sanctioning the response, since it clearly contains inappropriate and sanctionable language, but instead chooses to view it as a part of [the law firm's] and [the individual's] general approach to litigation, an approach that is unacceptable under any reasonable view of modern lawyering.

Id. at 97.

behavior was their failure to use their own legal judgment to dissuade their client from impermissible actions:

> [The law firm's] and [the individual lawyers'] prevarications and misstatements were deliberate and not careless. They were part of a concerted effort to delay the inevitable through pettifoggery and evasion. In short, their misrepresentations were designed to mislead the court. For the reasons set forth above, each of them independently constitutes a violation of Rule 9011.
>
> Even if [the law firm] had not affirmatively misled the court, its conduct nonetheless violated Rule 9011. In particular, when [the law firm] learned of the meager facts related to Aston-Nevada and its filing, it should have declined to file an opposition. And these facts could have (and should have) either come out during the initial client consultation or soon thereafter by checking PACER for Aston-Nevada's docket information. Instead, [the individual lawyer] and [the law firm] took the passive approach to client representation, that of doing anything and everything the client requests, regardless of its questionable nature.
>
> This a lawyer may not do.[56]

In sanctioning the lawyers, the court pinpointed the essence of their misbehavior:

> To act on such frivolous claims, then, without independent investigation, was to succumb to the so-called "butler-style" of representation, under which the sequaciously servile lawyer does whatever the client wants and then cites that client's command as a shield to the improper actions. This style of lawyering, however, has no place in bankruptcy court or, for that matter, in any court.[57]

When I first read *Aston-Nevada*, I knew that the court was going to come up with some creative sanctions as soon as I saw "sequaciously servile."[58] Such a phrase, elegant in its alliteration, signals that the court has passed any point of tolerance for misbehavior. And I wasn't disappointed. The sanctions included, in addition to monetary sanctions:

A public reprimand, by virtue of the opinion's publication;[59]

A requirement that each of the law firm's attorneys must, before

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56. *Id*. at 102 (footnotes omitted).

57. *Id.* at 103.

58. *Id*. The court's use of "splenetic and threatening" wasn't bad either. *In re Aston-Nevada*, 391 B.R. at 109.

59. *Id*.

appearing before the court or filing any document with the court, first file a declaration with the following components:

> [T]hat, during the twenty-four months immediately preceding the desired filing or appearance, the person has: (A) taken eight hours of continuing legal education regarding the practice of bankruptcy; (B) taken at least four hours of continuing legal education regarding ethics or professional responsibility; *and* (ii) attaches to the declaration, for filing in the case in which the person desires to appear, (A) a copy of this opinion; and (B) a copy of the brochure or other similar writing indicating the scope of the continuing legal education program attended.[60]

Removing from the firm's website any indication that the firm has expertise in bankruptcy law "unless and until at least one partner of the firm meets the continuing education requirements set forth" in the sanctions order.[61]

Who can't appreciate a sanction that closely tied to the lawyers' misbehavior? I love this case for its reasoning regarding the sanctions:

> The notion that any action requested by a client should be taken so long as some argument, no matter how tenuous, can be made for it, has a corrosive effect. If unchecked, it spreads in the form of "tit-for-tat" reciprocity that lowers the level of practice, and multiplies litigation needlessly.[62]

In "unmindful child" types of cases, it isn't that the lawyers didn't know how to say no to their clients. Instead, they didn't know the underlying substantive law—in this context, bankruptcy law—or why knowing the law gave them a good legal footing for refusing to do their clients' inappropriate bidding.

IV. "WARNING SHOT" OPINIONS

In any taxonomy, there are some opinions that defy classification, and there are some that aren't, strictly speaking, sanctions opinions. There are even pre-opinion warnings, such as Judge Jaroslovsky's open letter to lawyers filing individual Chapter 11 cases:

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60. *Id*. at 110.
61. *Id*.
62. *Id*. at 109.

NOTICE TO BAR REGARDING INDIVIDUAL CHAPTER 11 CASES

> There has been a recent spate of individual Chapter 11 cases filed by attorneys who have neither the experience nor the education nor the competence to venture into Chapter 11. I believe that there are very few bankruptcy lawyers other than State Bar certified specialists who should be contemplating representation of Chapter 11 debtors in possession.
>
> I see rampant errors being made in issues relating to cash collateral, conflicts of interest, and compensation.
>
> A Chapter 11 is not just a big Chapter 13. If you represent a Chapter 11 debtor in possession, your client is the *estate*, not the debtor personally. Failure to understand this results in serious liability exposure.
>
> Forget about trying to fix your compensation. You will be paid what I allow, period. I suggest you not spend retainers until your fees are allowed to avoid having to return money you have already spent.
>
> I see frequent malpractice in individual Chapter 11 cases and I am quick to note it on the record. Your employment will not be approved unless you have substantial current malpractice insurance. If you are going "bare," don't even think about taking a Chapter 11 case.[63]

My guess is that Judge Jaroslovsky was tired of seeing incompetent lawyers make multiple missteps in cases that needed lawyers who were well-versed in Chapter 11 practice. The world of business bankruptcy is sufficiently different from the world of consumer bankruptcy so that experts in one are not automatically experts in the other. There is no shame in being good in one world but not the other. Hubris shouldn't tempt a lawyer into reaching far beyond her competency level.

In terms of a case that doesn't involve sanctions but does involve unwise behavior by professionals, you can't beat my favorite "you're on thin ice" opinion. In *In re Energy Partners, Ltd.*,[64] the court warned two investment banking firms seeking employment

63. Alan Jaroslovsky, *Notice to Bar Regarding Individual Chapter 11 Cases*, Sept. 9, 2009, http://www.canb.uscourts.gov/files/notice%20re%20chapter%2011.pdf.

64. *In re* Energy Partners, Ltd., 409 B.R. 211 (Bankr. S.D. Tex. 2009).

under the more liberal 11 U.S.C. § 328 terms[65] that their requested compensation was over-the-top greedy.[66] In denying their application for an order approving their retention, the court began the opinion with an ode to the tone-deafness of the application:

> Oblivious to recent congressional and public criticism over executives of publicly-held corporations who are paid monumental salaries and bonuses despite running their companies into the ground, two investment banking firms now come into this Court requesting that they be employed under similarly outrageous terms. They do so because two committees in this Chapter 11 case have filed applications to employ these investment banking firms to perform valuation services even though two other independent firms have already performed similar valuations. These investment bankers, who wish to have their fees and expenses paid out of the debtor's estate, have sworn under oath that they will render services only if they immediately receive a nonrefundable fee aggregating $1.0 million. This Court declines the opportunity to endorse such arrogance. The purse is too perverse.[67]

In a written opinion that reminded me of my favorite part of Monty Python's Argument Clinic,[68] the court reiterated its earlier

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65. Section 328(a) provides:

> The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

11 U.S.C. § 328(a) (2006). Once a professional has been appointed under § 328, the bankruptcy court will find it extremely difficult to alter the terms of the professional's compensation because finding that the terms and conditions of compensation were unforeseeably improvident is nearly impossible.

66. *In re Energy Partners*, 409 B.R. at 227.

67. *Id*. at 215.

68. Argument Clinic:

> Man: Ah, Is this the right room for an argument?
> Mr Vibrating: I told you once.
> Man: No you haven't.
> Mr Vibrating: Yes I have.
> Man: When?
> Mr Vibrating: Just now.
> Man: No you didn't.

oral ruling regarding an emergency motion to employ these two professional firms.[69] Apparently, neither of the professional firms was willing to take "no" for an answer.

Here's what the two firms wanted. Tudor Pickering wanted

> (a) a nonrefundable advisory fee of $500,000.00 payable pursuant to the Court's Procedure for Professionals Order; (b) a nonrefundable expert witness fee of $25,000.00 per day, payable each day that a Tudor Pickering Holt & Co. Securities, Inc. (Tudor Pickering) employee is requested, and made available, for the purpose of deposition or testimony; (c) a nonrefundable extended assignment fee of $100,000.00 per month, payable beginning September 1, 2009, and each month thereafter; and (d) any out-of-pocket expenses. According to the Tudor Pickering Application, the services Tudor Pickering will render to the Equity Holders' Committee include, but are not limited to, the following: (a) analyzing the Debtor's assets and liabilities, the valuation of the Debtor's businesses and objecting to the plan of reorganization; (b) attending meetings and negotiating with representatives of the Debtor and creditors; (c) assisting in the review, analysis, and negotiation of the plan of reorganization; (d) appearing before this Court and other courts and protecting the Equity Holders' Committee's interests; and (e) performing all other necessary valuation services in this case.[70]

Houlihan Lokey wanted roughly the same arrangement, minus the $25,000 per day witness fee, for assisting the Unsecured

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Mr Vibrating: Yes I did.
Man: You didn't[.]
Mr Vibrating: I did!
Man: You didn't!
Mr Vibrating: I'm telling you I did!
Man: You did not!!
Mr Vibrating: Oh, I'm sorry, just one moment. Is this a five minute argument or the full half hour?
Man: Oh, just the five minutes.
Mr Vibrating: Ah, thank you. Anyway, I did.

Monty Python's Flying Circus: Argument Clinic, *available at* http://orangecow.org/pythonet/sketches/argument.htm (last visited May 11, 2010). In both of the *Energy Partners* opinions, the court clearly stated, not just once but several times, that the requested compensation terms were simply not going to fly. *In re Energy Partners*, 409 B.R. at 215; *In re* Energy Partners, Ltd., No. 09-32957-H4-11, 2009 WL 2970393, at *1 (Bankr. S.D. Tex. Sept. 15, 2009). The parties nonetheless went around and around, seeking approval anyway.

69. *In re Energy Partners*, 409 B.R. at 216.

70. *Id*. at 218–19 (citations and footnotes omitted).

Noteholders' Committee.[71] In rejecting the two employment applications, the court noted that neither Tudor Pickering nor Houlihan Lokey could prove that it would provide valuation services that were superior in kind to other professionals, including other professionals who were already employed in the case at substantially lower fees.[72]

In finding that the testimony supporting the applications was conclusory and self-serving, the court also pointed out the inappropriateness of a $25,000 per day witness fee:

> [A]side from the unreasonableness of expecting to be paid an up-front, nonrefundable $500,000.00 fee, the Court is also extremely discouraged that Tudor Pickering has also requested a $25,000.00 per day witness fee. It is noteworthy that this fee is to be paid regardless of whether the witness testifies for one hour or eight hours, or somewhere in between. In these dire financial times, a request to be paid a $25,000.00 per day witness fee out of the coffers of a publicly traded company in bankruptcy is not only excessive, but unconscionable—particularly when the amount of this *daily* fee is compared to the *annual* compensation earned by certain Americans who provide arguably more essential services to society.[73]

Just in case the two professional firms missed the point of the opinion, the court concluded with some very clear language:

> At some point, this Court must draw the line between what is reasonable and what is not. To quote the Fifth Circuit: "'[W]hen a pig becomes a hog it is slaughtered.'" "As the finder of fact, the bankruptcy court has the primary duty to distinguish hogs from pigs." Although the Fifth Circuit expressed this sentiment under a different set of facts than those in the case at bar, this Court sees good reason why this maxim applies here with equal force. These two investment banking firms have become hogs. Indeed, the investment bankers in the case at bar appear to have embraced the outlook expressed by Michael Douglas's character, Gordon Gekko, in the film *Wall Street* that "Greed—for lack of a better word—is

71. *See id*. at 219 (listing the proposed fees for Tudor Pickering and Houlihan Lokey).

72. *Id*. at 227.

73. *Id*. at 230–31 (footnotes omitted). Footnote 16 is classic, concluding with this line: "The per annum salaries of the military personnel, nursing-aides, and public school teachers [all of whom may make $25,000 a year], compared with the requested daily fee of $25,000.00, speaks volumes about the level of hubris among some members of the investment banking community." *In re Energy Partners*, 409 B.R. at 231 n.16.

> good. Greed is right. Greed works." That may be how Wall Street views the world, but it is not how this Court sees things. In this Court, Greed is not good; Greed is wrong; and Greed does not work. Rather, the Court refers the parties to the words of Frederick Douglass, a prominent and compelling figure in American history who knew something about hard work: "People might not get all they work for in this world, but they must certainly work for all they get."[74]

If you were on the losing end of this opinion, you would likely experience many emotions: anger, certainly; perhaps chagrin; maybe embarrassment. But would you move the court to reconsider the language of the opinion? Houlihan Lokey did,[75] and the court responded in the second round with this language:

> They are unhappy because, among other things, the Opinion referred to the investment bankers as greedy, arrogant hogs. Their motion to amend requests this Court to unsay what it said and to unwrite what it wrote. This, the Court will not do. . . .
>
> . . . In this Court's eyes, Houlihan Lokey attempted to raid the debtor's coffers by suddenly swooping in and swiftly scooping out unseemly sums of cash from the estate. In other words, Houlihan Lokey was a greedy hog. The Court declines to amend the Opinion.[76]

Oops. At least, "oops" from Houlihan Lokey's point of view. Perhaps the better part of valor would have been to decide not to file the motion for reconsideration.

Leaving *Energy Partners* aside as a warning shot about overreaching, there's a clear thread running through all of these court-initiated sanctions opinions: in these cases, the judge is so fed up that he or she sits down to write a detailed account of what the lawyer did wrong in order to provide the appellate court with a sufficient rationale for the opinion when the lawyer appeals.

Consider the workload of the average bankruptcy court today.

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74. *In re* Energy Partners, Ltd., 409 B.R. 211, 237 (Bankr. S.D. Tex. 2009) (alteration in original) (footnotes and citations omitted).

75. *In re* Energy Partners, Ltd., No. 09-32957-H4-11, 2009 WL 2970393, at *1 (Bankr. S.D. Tex. Sept. 15, 2009).

76. *Id*. Just in case Houlihan Lokey missed the point, the court reiterated: "[B]ecause this Court finds Houlihan Lokey's proposed fees to be facially exorbitant, and the Movants provided woefully insufficient evidence to convince this Court otherwise, the Court made no manifest error of fact characterizing Houlihan Lokey as greedy hogs." *Id.* at *10.

It's insane.[77] In order to sit down and write a sanctions opinion, a bankruptcy judge must add hours and hours of documentation and explanation to that already overwhelming workload. So why do the judges even bother?

In part, they do it because they're trying to send a signal—to the lawyer whose conduct falls beyond the pale and to all of his colleagues who practice before that court—that certain behavior will cost the lawyer more than any perceived advantages that the lawyer might get from cutting those ethical corners. They do it because lesser means, such as sidebars and in-chambers conversations, haven't worked to curb the behavior. They do it because it's their job to enforce the law.

Suffice it to say that no bankruptcy judge issues a sanctions opinion without first thinking long and hard about all of the consequences. Not only is there extra work, but because there's no one designated to represent the bankruptcy court's rationale for the sanctions on appeal, any judge writing a sanctions opinion also knows that he or she is helpless to designate the record going up on appeal or to argue that the sanctions order was correctly decided.[78]

I know that every judge faces these problems—extra work and no representation on appeal—when writing a court-initiated sanctions opinion. The problem isn't limited to bankruptcy judges. One factor, though, does make the bankruptcy judge's decision even more difficult: the fact that, on appeal, the reviewing court often doesn't understand the sanctioned lawyer's behavior in the context of normal bankruptcy law practice.[79]

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77. S*ee, e.g.*, Posting of Bob Lawless to Credit Slips, http://www.creditslips.org/creditslips/2008/12/bankruptcy-filings-in-2009.html (Dec. 18, 2008, 15:11 PST) ("For 2009, I am expecting a little under 1,400,000 bankruptcy filings [up from about 1.1 million]."); *see also* Arnold M. Knightly, *Bankrupt in Nevada? Many Are: Court Records Reveal Filings Jump 58.6 Percent in 2009*, LAS VEGAS REV.-J., Jan. 15, 2010, at D1, *available at* http://www.lvrj.com/business/bankrupt-in-nevada-many-are-81666032.html (detailing the dramatic increase in bankruptcy filings in Nevada and other states); AM. BANKR. INST., ANN. BUS. AND NON-BUS. FILINGS BY ST. (2007–09), http://www.abiworld.org/AM/AMTemplate.cfm?Section=Home&CONTENTID=60253&TEMPLATE=/CM/ContentDisplay.cfm (last visited May 11, 2010) (showing an increase in total bankruptcy filings from 2007 to 2008 in every state).

78. *See generally* Greenfield v. First City Bancorporation of Tex., Inc. (*In re* First City Bancorporation of Tex., Inc.), 270 B.R. 807 (N.D. Tex. 2001) (explaining the standard of review for a bankruptcy opinion), *aff'd*, 282 F.3d 864 (5th Cir. 2002).

79. There are, of course, times when the reviewing court does understand the bankruptcy court's reason for issuing a court-initiated sanctions opinion and simply

V. "I DON'T UNDERSTAND BANKRUPTCY LAW" REVERSALS

Even when a case involves a party's motion for sanctions, rather than a sua sponte sanctions order by a bankruptcy court, a district court can wholly miss the severity of the sanctioned lawyer's behavior. It's clear in those situations that someone has dropped the ball in explaining the bankruptcy court's reasons for sanctions to the district court. Take *In re Cochener*.[80] After the debtor's first lawyer, Hawks, filed the debtor's Chapter 7 petition, the Chapter 7 trustee asked Hawks for additional information after it appeared that the debtor's initial schedules were incorrect and that the debtor may have concealed some of her assets.[81] Hawks, feeling out of his league, affiliated a second, board-certified bankruptcy lawyer, Barry, to help him with the case.[82] Barry moved to dismiss the case on June 18, 2001, alleging that "'[n]o creditor in this case would suffer any legal prejudice by its dismissal;' and '[t]he interests of the creditors and Debtor would be better served by the dismissal of this bankruptcy proceeding rather than its continuation and adjudication.'"[83] Given that Barry was aware that the debtor may have been concealing assets,[84] his motion to dismiss was outside the standard of care of a bankruptcy lawyer—and certainly outside the standard of care of a board-certified bankruptcy lawyer. To make matters worse, Barry instructed the debtor not to attend a Section 341 meeting of creditors, even though the debtor's case hadn't yet been

disagrees with the statutory underpinning used to justify the sanctions. For example, in *Price v. Lehtinen* (*In re Lehtinen*), the bankruptcy court had sanctioned a debtor's lawyer for, among other things, failing to show up at the debtor's Chapter 13 confirmation hearing, lying to the debtor about the status of her case, and pressuring the debtor to use the lawyer as a real-estate broker for the sale of her home. Price v. Lehtinen (*In re* Lehtinen), 332 B.R. 404 (B.A.P. 9th Cir. 2005), *aff'd*, 564 F.3d 1052 (9th Cir. 2009), *cert. denied*, 78 U.S.L.W. 3065 (U.S. 2009) (mem.). The Bankruptcy Appellate Panel of the Ninth Circuit agreed with the bankruptcy court's conclusion that the lawyer deserved sanctions and was accorded due process, but the BAP remanded the case because the bankruptcy court had not applied the ABA standards regarding sanctions, which the BAP had previously adopted. *Id.* at 411–17.

80. *In re* Cochener, 360 B.R. 542 (Bankr. S.D. Tex.), *aff'd in part, rev'd in part sub nom.* Barry v. Sommers (*In re* Cochener), 382 B.R. 311 (S.D. Tex. 2007), *rev'd per curiam*, 297 F. App'x 382 (5th Cir. 2008).

81. *Id*. at 549.

82. *Id.* at 550–51.

83. *Id.* at 552.

84. *Id*.

dismissed.[85] Barry also instructed the debtor not to turn over certain documents that the Chapter 7 trustee had requested when Hawks was representing her.[86] Even worse, Barry opposed another document request from the trustee in connection with a Rule 2004 examination of the debtor on the grounds that the document request sought information about possible fraudulent conveyances that were more than a year old and thus outside the trustee's reach.[87] (Any decent bankruptcy lawyer—and certainly a board-certified bankruptcy lawyer—would have known that Barry's argument was spurious.) Finally, in a burst of chutzpah, Barry sought to withdraw from the debtor's case.[88] Although the bankruptcy court allowed the withdrawal, it was clear that the withdrawal was to be "'without prejudice to any claims, ethical or otherwise, held by the [Chapter] 7 trustee.'"[89] Eventually, the trustee was able to recover just over $90,000 from the debtor and her relatives because of the fraudulent transfers.[90] In a fit of pique, the debtor also ruined some real property that belonged to the estate.[91]

After a variety of other activities in the case (not relevant to the sanctions issue), the trustee moved for sanctions against Barry,[92] and the court awarded sanctions under its inherent powers pursuant to 11 U.S.C. § 105 and under 28 U.S.C. § 1927 (vexatious litigation).[93] If one were to poll a random grouping of knowledgeable bankruptcy lawyers, my guess is that 100 percent of them would conclude that Barry's behavior in the case was shockingly bad.

The district court, however, would (and did) disagree, finding in part that:

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85. *In re Cochener*, 360 B.R. at 552.

86. *Id.* at 554.

87. *Id.* at 555.

88. *Id*. at 556.

89. *Id*. at 557.

90. *In re* Cochener, 360 B.R. 542, 560 (Bankr. S.D. Tex.), *aff'd in part, rev'd in part sub nom.* Barry v. Sommers (*In re* Cochener), 382 B.R. 311 (S.D. Tex. 2007), *rev'd per curiam*, 297 F. App'x 382 (5th Cir. 2008).

91. *See id*. at 563 (laying out the destruction of the trustee's real property after the debtor moved out).

92. *Id*. at 564–65. By this time, other bankruptcy judges in the Southern District of Texas had already sanctioned Barry for his misbehavior in other cases. *Id*. at 565–66. The court in *Cochener* took judicial notice of these other sanctions. *Id.*

93. *In re Cochener*, 360 B.R. at 586.

> Although willful misrepresentation of the facts and/or the law in a submission to the court constitutes bad faith, the Bankruptcy Court failed to cite any law or evidence from which it could plausibly have found that the two statements it characterized as "blatantly false" misstated the law or the facts, or represented anything other than a good faith attempt to dismiss a case that even the trustee's attorney agreed should not have been filed.[94]

The district court just couldn't have been more wrong, on a variety of grounds, regarding Barry's behavior. The district court judge who wrote the opinion is extremely intelligent, so it's difficult to figure out the disconnect between what the bankruptcy court thought of the misconduct and what the district court thought of it. The denouement of the case? In a per curiam opinion, the Fifth Circuit reversed the district court and affirmed the bankruptcy court.[95] Lesson? If the briefing on appeal doesn't put the behavior of the sanctioned bankruptcy lawyer into context, a non-bankruptcy-trained judge may not understand why the behavior merited sanctions. That failure to understand, in turn, may allow serial misbehavior to go unchecked.

VI. "WHAT THE HEY?" REVERSALS

There is another category of reversals: those that defy understanding. I call these the "what the hey?" reversals. Where the reversing court's explanation of its reasoning is so lacking that it provides zero guidance as to the reversing court's reasoning, then those reversals have to fall within the "what the hey?" category.

Take the case of *Rossana v. Momot* (*In re Rossana*).[96] Beller, the attorney sanctioned in the case, originally represented one of the Rossanas in a civil lawsuit against a lawyer named Momot, involving ownership of a bar, as well as in the criminal action when

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94. Barry v. Sommers (*In re* Cochener), 382 B.R. 311, 332 (S.D. Tex. 2007), *rev'g In re* Cochener, 360 B.R. 542 (Bankr. S.D. Tex.), *rev'd per curiam*, 297 F. App'x 382 (5th Cir. 2008).

95. Sommers v. Barry (*In re* Cochener), 297 F. App'x 382, 384 (5th Cir. 2008) (per curiam). In its opinion, the Fifth Circuit emphasized the importance of "enforc[ing] the integrity of the process by policing the accuracy of debtors' schedules and representations to the court." *Id.*

96. Rossana v. Momot (*In re* Rossana), 395 B.R. 697 (Bankr. D. Nev. 2008), *rev'd in an unpublished opinion sub. nom.*, Beller v. Momot, No. 2:08-CV-1139-RCJ-PAL (D. Nev. Sept. 3, 2009) (on file with the *St. Mary's Law Journal*).

Mr. Rossana was charged with assault on Mr. Momot after Mr. Momot had won the civil suit.[97] Beller eventually became the bankruptcy lawyer for Mr. and Mrs. Rossana.[98] As part of the Rossanas' bankruptcy case, Beller filed a complaint against Momot for having executed on too much of the Rossanas' property to satisfy the civil judgment.[99] Beller won the over-execution complaint, and in 2003, he garnished Momot's bank account to satisfy the judgment.[100] In 2007, without withdrawing from the Rossanas' representation,[101] Beller moved to set aside that same judgment on behalf of Momot.[102]

It's safe to say that Beller's actions were clearly wrong under either the rule involving conflicts of interest with current clients[103] or the rule involving conflicts with former clients.[104] It's even safe to say that law students, when faced with a similar fact pattern in their basic Professional Responsibility course, would understand how wrong Beller's actions were.[105] In sanctioning Beller with a public reprimand and a referral to Nevada's disciplinary counsel, the court reasoned:

> [T]hat this [was] an egregious violation of the Nevada Rules of Professional Conduct that [fell] outside all accepted norms of the legal profession. Indeed, Beller's conduct discredit[ed] the work of all attorneys before this court and in the state of Nevada by calling into question whether attorneys will faithfully and loyally serve the interests of their clients.[106]

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97. *Id.* at 699.

98. *Id.*

99. *Id.* at 699–700.

100. *Id.* at 700.

101. Not that withdrawal would have mattered. Beller could never have represented Momot on the Rossanas' judgment under Nevada's version of Model Rule 1.9, which provides, "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 unless the former client gives informed consent, confirmed in writing." NEV. RULES OF PROF'L CONDUCT R. 1.9(a) (2006).

102. *Rossana*, 395 B.R. at 700.

103. *See* NEV. RULES OF PROF'L CONDUCT R. 1.7 (2006) (defining a concurrent conflict of interest to exist when "(1) [t]he representation of one client will be directly adverse to another client; or (2) [t]here is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client").

104. NEV. RULES OF PROF'L CONDUCT R. 1.9 (2006).

105. I know that it's safe to say that. I've asked them.

106. *Rossana*, 395 B.R. at 707.

Having read this opinion, I would have expected the district court to have affirmed the sanctions on appeal. I would have been wrong. In reversing the bankruptcy court's decision, the district court provided this explanation of where the bankruptcy court's reasoning ran aground:

> [This] Honorable Court . . . finds and concludes as follows:
> 1. No act or omission on the part of Appellant Beller constitutes a violation of NEV. RULES OF PROF'L CONDUCT R. 1.7;
> 2. No act or omission on the part of Appellant Beller constitutes a violation of NEV. RULES OF PROF'L CONDUCT R. 1.9;
> 3. No act or omission on the part of Appellant Beller constitutes the representation, concurrent or otherwise, of parties having materially adverse interests;
> 4. No act or omission on the part of Appellant Beller constitutes a conflict of interest;
> 5. No act or omission on the part of Appellant Beller constitutes an egregious violation of the Nevada Rules of Professional Conduct that fall[s] outside all accepted norms of the legal profession;
> 6. No act or omission on the part of Appellant Beller breaches any duty, expressed or implied, of attorney loyalty or faithfulness; and
> 7. The conduct of Neil J. Beller at issue constitutes a mere professional courtesy and in no way, actual or potential, threatened harm to any represented party.[107]

Ah, the old "mere professional courtesy" exception to the ethics rules![108] Of course that would explain what the Bankruptcy Court had gotten wrong—if only there were such an exception, anywhere, in any state's ethics rules, let alone in Nevada's. If any opinion reversing an order for sanctions deserves the "what the hey?" moniker, this one does.

There are four basic positions that the reviewing court can take when the sanctioned lawyer takes his case up on appeal:[109] it can

107. Beller v. Momot, No. 2:08-CV-1139-RCJ-PAL, at 3–4 (D. Nev. Sept. 3, 2009) (unpublished opinion on file with the *St. Mary's Law Journal*).

108. If I were reading this paragraph aloud, I'd be impersonating Maxwell Smart's voice in the *Get Smart* series. If you're old enough to remember this series, you'll remember that Agent Smart would typically respond to a countermeasure by an agent of the archenemy CHAOS by saying, "Ah, the old [fill in the blank by describing the countermeasure] trick!" Catchphrases, The Get Smart Web Page, http://www.wouldyoubelieve.com/phrases.html (last visited May 11, 2010).

109. There are many good articles and treatises that discuss the powers of a bankruptcy court to sanction lawyers who practice before it. *See generally* 1 COLLIER ON BANKRUPTCY ¶ 8.07 (Alan N. Resnick & Henry J. Sommers eds., 16th ed. 2009); 2

affirm the bankruptcy court's decision (which leaves open the possibility for the sanctioned lawyer to appeal up the chain of reviewing courts); it can reverse the bankruptcy court's decision on procedural grounds (right idea, wrong rule); it can so wholly misunderstand the wrongful behavior of the sanctioned bankruptcy lawyer (or just not care about it) that it reverses the bankruptcy court's decision for completely inappropriate reasons (depending on whether the court misunderstands the behavior or just does not care, we'd have either an "I have no idea" or the "what the hey?" reversal); or it can, on a close call, just disagree with the bankruptcy court and give the benefit of the doubt to the sanctioned lawyer.[110]

All but the first position create a disincentive for bankruptcy judges to even bother initiating a sanctions order in the first place. Maybe that disincentive is good for lawyers generally, given how miserable sanctions opinions can make their lives, with the possible disciplinary proceedings, increased malpractice premiums, and general embarrassment that can follow from sanctions.

However, given the egregious nature of the misbehavior that triggers court-initiated sanctions, disincentives that follow from a misunderstanding of why the bad behavior was, in fact, bad are worse. Especially when we talk about sanctioning lawyers in consumer bankruptcy cases—either debtor-side or creditor-side—we're talking about lawyers who have made real people's lives miserable enough to catch the attention of the bankruptcy court. We're talking about debtors' lawyers who botch up debtors' cases and deprive them of legitimate relief that the Bankruptcy Code can provide. We're also talking about creditors' lawyers who take

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COLLIER ON BANKRUPTCY ¶ 105.02(6)(b) (Alan N. Resnick & Henry J. Sommers eds., 16th ed. 2009); 10 COLLIER ON BANKRUPTCY ¶ 8020.05 (Alan N. Resnick & Henry J. Sommers eds., 15th ed. rev. 2007). In addition, there are several useful articles that discuss how the appeals process works in bankruptcy cases. *See, e.g.*, Judith A. McKenna & Elizabeth C. Wiggins, *Alternative Structures for Bankruptcy Appeals*, 76 AM. BANKR. L.J. 625, 626–32 (2002) (providing an executive summary and findings of a Federal Judicial Center study of the bankruptcy appellate process and mentioning possible areas of reform under discussion since 1999); Bernard Trujillo, *Self-Organizing Legal Systems: Precedent and Variation in Bankruptcy*, 2004 UTAH L. REV. 483, 492–99 (describing the bankruptcy appellate structure and discussing its shortcomings). Therefore, I won't discuss those two issues here.

110. I have a sneaking suspicion that district court judges, who probably don't see a lot of lawyer misbehavior in their own courts, may have a hard time believing how awful some lawyers appearing in bankruptcy court can be.

advantage of mistakes to bully people who, by definition, are virtually defenseless. My guess, then, is that we don't want to deter judges from ridding the system of bad lawyers.

VII. CONCLUSION

As with court-initiated sanctions opinions in non-bankruptcy cases, no party represents the court's reasoning on appeal. The lawyer appealing the sanction designates the record; the appellate court reviews the case and renders a decision. If, for example, a debtor's lawyer gets sanctioned and appeals the sanction, the debtor himself isn't likely to retain a lawyer to argue on appeal that what the debtor's lawyer did was very, very bad. Therefore, an order requiring the debtor's lawyer to refund all fees to the debtor can be reversed on appeal without the appellate court hearing from either the bankruptcy court or the injured debtor, leaving the debtor himself whipsawed: bad lawyer behavior; no one to argue on the debtor's behalf. There are two injured parties when a lawyer's behavior is egregiously bad: someone in the case has suffered actual damage, and the legal system has suffered from the sanctioned lawyer's failure to live up to some minimal professional standards. Perhaps the injured party will have a voice on appeal, but there's an empty chair in the appellate courtroom for the legal system's own representative.

The empty chair in the appellate courtroom happens in non-bankruptcy cases involving court-initiated sanctions, too. Perhaps what the legal system needs is an amicus curiae process to help reviewing courts understand the standard of care in all court-initiated sanctions cases. Maybe we should start with court-initiated sanctions appeals in bankruptcy cases, where the practice of bankruptcy law is so specialized that not every reviewing court can know when a lawyer's behavior is beyond the pale.

I like the idea of amicus briefs to help reviewing courts understand bankruptcy lawyer misbehavior. But unless a lawyer somehow finds out about the misbehavior, I'm not sure how to initiate the amicus's participation on appeal. We wouldn't need amicus briefs in every appeal. For appeals that go to a bankruptcy appellate panel (BAP)—a three-judge panel composed of bankruptcy judges—the judges on the BAP will be all too familiar with the standard of care in bankruptcy cases. However, not all

appeals go through a BAP; some go straight to a district court.[111] What we really need is a system for educating courts that have Article III judges (district courts and above). Most Article III judges don't see enough bankruptcy cases to know the difference between not-great behavior and downright scandalous behavior.

Another option might be to give the Office of the United States Trustee[112] more of a role in court-initiated sanctions appeals.[113] United States Trustees certainly have the right to appear in such hearings, but the U.S. Trustee system is overworked as it is, and I can't imagine that many U.S. Trustees or Assistant U.S. Trustees would want to add this duty on a regular basis.

A third option is for the court to appoint an expert to represent the court's position on appeal. Like the amicus option, the expert would likely have to do the work pro bono; there just isn't enough money to go around, especially in most consumer cases, to pay an expert to appear in a sanctions appeal. At least the court-appointed expert option has the advantage of being a systematic way for the bankruptcy court to make sure that the reviewing court understands the significance of the sanctioned lawyer's behavior.

Finally, speeding up the appeals process with some sort of a fast-track program for sanctions appeals would provide a better link between the lawyer's misbehavior and the review of that misbehavior. The longer the lag between the sanction and the finality of appeals, the more damage a bad lawyer can do to his clients. A fast-track option could work because, typically, the facts of a sanctions opinion aren't disputed—just the interpretation of those facts.

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111. *See* 1 COLLIER ON BANKRUPTCY ¶ 5.01(Alan N. Resnick & Henry J. Sommers eds., 16th ed. 2009) (giving a full description of the process). Here is the nutshell: appeals go to the United States district court or, if a Bankruptcy Appellate Panel has been created and the parties haven't opted out, to the BAP. *See* 28 U.S.C. § 158 (2006) (establishing the appellate jurisdiction of the United States District Courts and providing that "the judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges . . . to hear and determine, with the consent of all the parties, appeals").

112. For more about the powers of the Office of the United States Trustee, see DEPT. OF JUSTICE, U.S. TRUSTEE PROGRAM, ABOUT THE UNITED STATES TRUSTEE PROGRAM & BANKRUPTCY, http://www.justice.gov/ust/eo/ust_org/about_ustp.htm (last visited May 11, 2010).

113. I know of at least one bankruptcy judge who, in some sanctions opinions, includes a request or requirement (depending on the case) that the Office of the U.S. Trustee appear in any appeal of the sanctions.

We could, of course, do nothing: leave the system as it is, knowing that the behavior of some execrable lawyers will ultimately be rewarded by persistent appeals and well-crafted briefs.[114] If we leave the system as it is, there will still be courts that initiate sanctions opinions in certain circumstances. But the system will stay tilted in favor of lawyers who shouldn't be practicing as they do. The unethical lawyers win twice: once by gaming the system in the first place, which gives them an advantage over the lawyers who play by the rules, and again by using their exploits to take clients away from lawyers who can promise to do only what the rules let them do.[115]

In keeping with my Passover theme, I'd describe the one-sidedness of appeals of court-initiated sanctions as akin to leaving the leverage all on Pharaoh's side. (Of course, the lawyers facing sanctions believe—with some justification—that all of the leverage is on the judge's side, but I'm more concerned with the system's one-sidedness at this point.) When Moses kept telling Pharaoh to "let my people go," Pharaoh kept coming up with all sorts of excuses. None of the excuses were particularly good (at least not from *my* people's point of view), but Pharaoh had all of the power,

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114. For example, see the long and storied disciplinary history of a lawyer named Smyth. *E.g.*, *In re* Brooks-Hamilton, 400 B.R. 238, 252 (B.A.P. 9th Cir. 2008) (stating that the bankruptcy court found, and the Ninth Circuit agreed, that Smyth's objections were frivolous, implausible, and filed for an improper purpose); Smyth v. City of Oakland (*In re* Brooks-Hamilton), 329 B.R. 270, 291 (B.A.P. 9th Cir. 2005) ("The bankruptcy court did not abuse its discretion in finding that Smyth had violated Rule 9011 in filing the objection to the city's claim, or in imposing a sanction of a six-month suspension from practice before the bankruptcy courts . . . ."), *aff'd in part, rev'd in part*, 271 F. App'x 654 (9th Cir. 2008); *In re* Kellander, 10 F. App'x 585, 586 (9th Cir. 2001) ("The bankruptcy court sanctioned Smyth for filing a frivolous 11 U.S.C. § 522(f) motion to avoid a judgment lien and for filing the motion for an improper purpose.").

115. By making it so difficult to have sanctions "stick," what is happening to good lawyers is akin to what is happening to athletes who do not use steroids:

> Joe Morgan, a Hall of Famer and vice chairman of the National Baseball Hall of Fame, feels bad for players who didn't use performance-enhancers.
>
> "Those guys are being penalized twice," he said. "First, the guys who did steroids had all those great numbers, made all the money, and the guys who didn't do steroids and just had good years, didn't make as much money. So they get hurt there. Now at the end of their careers when you have to compare those numbers to the guys who did do steroids, they're going to get hurt again as far as the Hall of Fame is concerned. So I can't in my own mind excuse what happened, whatever the reason."

Ronald Blum, *Gossage Wants Dopers Barred from Hall of Fame*, YAHOO! SPORTS, Jan. 12, 2010, http://sports.yahoo.com/mlb/news?slug=ap-mcgwire-doping&prov=ap&type=lgns.

and he used that power in all sorts of bad ways: enslaving a people and generally acting the way that people can act when all of the incentives favor them (and when they are kings). It took divine intervention to level the playing field. Is it really so much to ask that we figure out a less-divine way to level the playing field when it comes to helping courts keep bad lawyers from contaminating the system? *Dayenu.*[116]

116. *See* n.25 *supra*.