

## Scholarly Commons @ UNLV Boyd Law

---

Scholarly Works

Faculty Scholarship

---

1996

### Avoiding Judicial Wrath: The Ten Commandments for Bankruptcy Practitioners

Nancy B. Rapoport

*University of Nevada, Las Vegas – William S. Boyd School of Law*

Follow this and additional works at: <https://scholars.law.unlv.edu/facpub>



Part of the [Bankruptcy Law Commons](#)

---

#### Recommended Citation

Rapoport, Nancy B., "Avoiding Judicial Wrath: The Ten Commandments for Bankruptcy Practitioners" (1996). *Scholarly Works*. 131.

<https://scholars.law.unlv.edu/facpub/131>

This Article is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact [youngwoo.ban@unlv.edu](mailto:youngwoo.ban@unlv.edu).

# Avoiding Judicial Wrath: The Ten Commandments for Bankruptcy Practitioners

NANCY B. RAPOPORT\*

One would think that bankruptcy practitioners, who typically combine the skills of litigators and business lawyers, would be savvy enough to know how to behave in front of bankruptcy judges. Many do, of course. But many practitioners lack even basic social skills, let alone lawyering skills. For those who make the practice of bankruptcy law sheer misery for all who come in contact with them, I offer this primer in Bankruptcy Litigation Behavior 101.<sup>1</sup>

---

\* Associate Professor of Law and Associate Dean for Student Affairs, The Ohio State University College of Law. Special thanks go to the following people who, on very short notice, helped me rethink and refine the ideas expressed in this essay: John D. Ayer, the Hon. William T. Bodoh, John D. Dilenschneider, Daniel P. Hercl, Adam A. Lewis, Pamela N. Maggied, Ronald J. Mann, Michelle Morgan, the Hon. Steven W. Rhodes, and Jeffrey D. Van Niel. Any missteps after I came down from Columbus's equivalent of Mount Sinai, are, of course, mine alone.

<sup>1</sup> For a good primer on how *not* to behave as a bankruptcy lawyer, see Debra J. Landis, Annotation, "Negligence, Inattention, or Professional Incompetence of Attorney in Handling Client's Affairs in Bankruptcy Matters as Ground for Disciplinary Action—Modern Cases," 70 ALR 4th 786 (hereinafter Landis).

I don't necessarily blame only the offending practitioners for today's lack of professionalism. Many of those "bad apples" practice in an atmosphere that encourages "scorched earth" litigation tactics. See Hon. Marvin E. Aspen, U.S. District Judge, Northern District of Illinois, Chairman, Interim Report of the Committee on Civility of the Seventh Judicial Circuit (1991) (decrying the rise in "scorched earth" tactics and a general meanness among attorneys). Unless judges, partners, and community leaders at the top of the pyramid exert pressure to behave appropriately, this inappropriate—and downright nasty—behavior will continue, precisely because it is being rewarded in terms of salary and partnership offers. As the court said in *In re Armwood*, 175 BR 770, 790–791 (Bankr. ND Ga. 1994):

A debtor's attorney has a professional duty to the Bar, to the court and to the integrity of the legal system which is higher than the duty to the client.

Ignoring the bad faith filings and neglecting to take appropriate action harms the bankruptcy system. When one or more attorneys allow one or more clients to abuse the system, the harm which devolves is not limited to the affected creditors. By example and word of mouth, the "technique" spreads until it is no longer perceived by the Bar and by debtors as an abuse but as a permissible manipulation of the system. In the meantime, respect for the bankruptcy system, including attorneys who wish to assist honest debtors, deteriorates. When public respect for any part of the legal system falters, it harms everyone involved in the system, which must rely on honest participation.

## I. Thou Shalt Remember the Purposes of the Bankruptcy Code.

Given the enormous pressure that lawyers face to bill more hours and increase their rates—all in the name of increasing their profits—it's not surprising that some lawyers have lost sight of the simple economics of bankruptcy law: Every party in interest in a bankruptcy case is already losing money. The debtor doesn't have enough money to go around, and the creditors haven't been paid what the debtor owes them.<sup>2</sup> The more money spent on lawyer fees, the less money there is for the parties in interest themselves. Whether you prefer the creditor-oriented view of the purpose of the Bankruptcy Code (replacing the "first come, first served" system in favor of a more equitable, more orderly distribution) or the debtor-oriented view (the "fresh start") or even a broader view (bankruptcy law as a way of protecting competing societal needs),<sup>3</sup> the basic economics are still the same. Unless the anticipated benefits of recovery from a particular motion, complaint, or other action, discounted by the possibility of failure, exceed the anticipated legal fees, the lawyer should not even file the papers to commence the action. Professionals should not churn fees.<sup>4</sup>

<sup>2</sup> I suppose that fully secured creditors have the least to lose, but even they have to spend money on such things as valuation fights, stay relief, and the like, and the interest payment under 11 USC § 506(a) probably doesn't really compensate them for the transaction costs associated with problem loans.

<sup>3</sup> The classic debate on the purpose of the Bankruptcy Code is represented by such luminaries as Dean Douglas Baird and President Thomas Jackson, on the one hand, and Professor Elizabeth Warren, on the other hand. See, e.g., Elizabeth Warren, "Bankruptcy Policy," 54 U. Chi. L. Rev. 775 (1987), and Douglas G. Baird, "Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren," 54 U. Chi. L. Rev. 815 (1987). For two enjoyable takes on this debate, see Ronald J. Mann, "Bankruptcy and the Entitlements of the Government: Whose Money Is It Anyway?" 70 NYU L. Rev. 993, 1011, 1056 n.228 (1995); James W. Bowers, "The Fantastic Wisconsin Zero-Bureaucratic-Cost School of Bankruptcy Theory: A Comment," 91 Mich. L. Rev. 1773 (1993).

<sup>4</sup> For a whopper of a fee-churning case, see *United States v. Mason*, 1994 U.S. App. LEXIS 19198 (9th Cir. 1994) (plaintiffs' and defendants' lawyers conspired to, among other things, perpetuate discovery expenses until the defendants' insurance companies would no longer fund litigation; then the lawyers settled almost immediately).

As a matter of fact, the best lawyers will often write off fees that can't be justified. One close friend of mine had a very small consumer bankruptcy case with an IRS-related issue that went all the way to the Sixth Circuit. She stopped charging fees after the cost of her services exceeded the amount in controversy. As she puts it, "one does what one must to avoid injustice, regardless [of compensation]." Correspondence from Pamela N. Maggied, Esq., to author (approximately mid-March 1996) (hereinafter Maggied Correspondence) (notes on file with author).

Courts have played a significant role in reminding lawyers that professionalism comes before fees by refusing to let counsel withdraw merely because the client was unable to pay those fees. See, e.g., *In re Meyers*, 120 BR 751 (Bankr. SDNY 1990); *In re Edsall*, 89 BR 772 (ND Ind. 1988) ("[W]here the attorney-client relationship is unimpaired by the actions of the client, so that counsel is still able to effectively represent the debtor, the debtor's failure or inability to pay the attorney's fees does not constitute cause justifying withdrawal, unless the unpaid fees are so great as to impose an unreasonable financial burden upon counsel."); cf. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 347 (1981) (discussing the ethical obligation of lawyers to clients of legal services offices when those offices lose funding).

## II. Thou Shalt Know Both the Facts and the Law.

I have seen too many lawyers in court tell the judge, "Gee, Your Honor, I don't know the answer to that." The "that" in question typically could be located, with minimal effort, in the case file or from basic legal research. Lawyers sometimes go into court without knowing the balance due on a loan, or the identity of their client's chief executive officer, or the manner by which a security interest in an automobile is perfected. Although some circumstances truly do call for an "I don't know" answer, most don't. The lawyer's duty of competence<sup>5</sup> requires better preparation than most judges are seeing in their courtrooms. Even though preparation is expensive, it is far more cost-effective than ignorance—and less embarrassing.<sup>6</sup>

Nowhere is ignorance more costly than in the situation where a lawyer passes herself<sup>7</sup> off as having significant bankruptcy expertise when, in fact, she is a virtual Bankruptcy Code novice. Although scores of nonbankruptcy lawyers have concluded that the Bankruptcy Code's relative youth<sup>8</sup> is ample reason to think that the Code is easy to master, bankruptcy lawyers know better.<sup>9</sup> We have a phrase for those less experienced: "lambs to the slaughter."<sup>10</sup> Ethical lawyers have two choices: learn bankruptcy law before charg-

<sup>5</sup> See Model Rules of Professional Conduct Rule 1.1 (1994) (hereinafter Model Rules) (requiring "competent representation," which it defines as having "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); see also Model Code of Professional Responsibility DR 6-101(A)(1) (1981) (hereinafter Model Code) (a lawyer may not handle a matter, knowing that she is not competent to handle it, without first affiliating a competent lawyer); Model Code DR 6-101(A)(2) (requiring "preparation adequate in the circumstances"); Model Code DR 6-101(A)(3) (prohibiting the "[n]eglect of a legal matter").

<sup>6</sup> Cf. *In re Remington Dev. Group, Inc.*, 168 BR 11, 17-18 (Bankr. DRI 1994) (awarding Rule 9011 sanctions against an attorney based on the attorney's "carelessness and inattention [regarding the preparation of] the schedules, statements, petition and Rule 2016(b) statement ... [and the] unthinking execution of [those documents].").

<sup>7</sup> Law journals are all over the board when it comes to the use of "he" vs. "she" and the like. Although the technical rule of grammar is that the default pronoun is "he," many writers try to use "she" so that they do not alienate their female readers. Having grappled with this question before, my default rule is that I use "she" for lawyers (because I'm a female lawyer, and "she" rings true for me) and "he" for clients (because I think that using "she" as the default pronoun for an entire article is as unfair as just using "he").

<sup>8</sup> The Bankruptcy Code of 1978 replaced the former Bankruptcy Act in October 1979. 11 USC §§ 101-1330 (enacted by act Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549). Because the Code differed significantly from the Act, relatively young lawyers were able to learn the Code, bypass the former Act, and still be competent bankruptcy practitioners.

<sup>9</sup> See, e.g., *In re Maruko Inc.*, 160 BR 633 (SD Cal. 1993) (court reduced the fees for one attorney from a well-known New York firm by 77 percent because the court perceived that the attorney was inexperienced and inefficient). Partners are responsible for writing down excessive time caused by inexperience, but often those partners need to be "reminded" by the court to scrutinize bills for inefficient work. See *In re Pettibone Corp.*, 74 BR 293 (ND Ill. 1987).

<sup>10</sup> "Idiots" also works here.

ing clients for your alleged bankruptcy law expertise, or warn clients beforehand that you're learning the law as you go.<sup>11</sup>

### III. Thou Shalt Spend Time Crafting Thine Arguments.

The best lawyers, in any field of practice, remind me a bit of ducks: gliding calmly above the water while paddling furiously below.<sup>12</sup> What seem like off-the-cuff arguments or fortuitous turns of phrase in a brief are neither spontaneous nor lucky. Good lawyers spend time making sure that they say exactly what they mean.<sup>13</sup> Good litigators also make sure that, when they say what they mean, they do so using words that portray their position in the best possible light.

For the best lawyers, this attention to detail and quest for excellence comes naturally. For the rest, though, the ethics rules serve to remind us that lawyers must be more than mere hacks. Our duty of competency<sup>14</sup> requires us to turn out the best possible product, even if the cost of turning out that product exceeds the amount that the client can afford to pay.<sup>15</sup>

I think that most lawyers would prefer to do the best possible job for their clients. Sometimes, though, the pressure to bill efficiently sends another sig-

---

<sup>11</sup> These bankruptcy novices have two typical types of errors in their practice: they can't extrapolate from the "basics" of bankruptcy law to those problems that fall in the cracks, and they can't recognize when an issue isn't basic in the first place. The client of such a novice is unlikely to recognize when either type of error has occurred.

One thing is clear: a lawyer shouldn't tell a client that she knows more about bankruptcy law than she really does. See Model Rules Rule 7.4 and Model Code DR 2-105(A) (governing a lawyer's permissible communication regarding her fields of practice). Charging a premium fee for learning the law on the client's dime—especially if the client hasn't consented to such expensive lessons—is gouging, plain and simple, and the ethics rules don't permit it. See Model Rules Rule 1.5(a) ("A lawyer's fee shall be reasonable."); Model Code DR 2-106(A) (prohibiting a lawyer from "enter[ing] into an agreement for, charg[ing], or collect[ing] an illegal or clearly excessive fee."); Model Code DR 2-106(B) (a fee is "clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee."); *Dodrill v. Executive Director*, 824 SW2d 383 (Ark. 1992) (court found a one-year suspension appropriate where the attorney in question, who admitted his incompetence in bankruptcy matters, pursued a futile, abrasive, and accusatory course of litigation with his client's former bankruptcy attorneys).

<sup>12</sup> There is nothing undignified about calling a lawyer "ducklike." I'd rather be a duck than a wolf (as in "you creditors are all a pack of wolves"), a snake, a weasel, or a part of the human anatomy.

<sup>13</sup> Good business lawyers and litigators share this skill. I've seen business lawyers spend time trying to decide what to call a particular agreement or debt offering because they wanted to set the appropriate tone from the beginning. And I've seen litigators spend significant amounts of time wording and reording the captions within briefs.

<sup>14</sup> See *supra* note 5.

<sup>15</sup> The fees in the example that I mentioned in *supra* note 4 were \$12,000 more than the amount that the client paid. That's uncompensated time that the lawyer was willing to absorb. Yet we have to be careful that we don't go too far in the other direction. No one can survive if *all* of her income is based on pro bono cases.

nal: cut corners or you won't eat.<sup>16</sup> It's difficult to think or write well under such pressure. But lawyers are supposed to be professionals, and what distinguishes professionals from other workers is their willingness to suppress their mercenary instincts if it interferes with their ability to perform their craft well.<sup>17</sup>

#### IV. Thou Shalt Not Lie.<sup>18</sup>

The fastest way to offend a judge or a colleague is to lie.<sup>19</sup> To make matters worse, judges and colleagues have long memories. If a lawyer's word is meaningless, that lawyer will soon find herself outside the loop, both in and out of the courtroom. No judge will give her the benefit of the doubt in a legal argument, and no colleague will agree to anything that the lawyer wants unless that agreement is in writing. Law is a system of repeat players, and those who don't play by the rules soon have to move to another playground to survive.<sup>20</sup>

<sup>16</sup> Or make partner, or have a vacation, etc.

<sup>17</sup> Moreover, a lawyer who can take satisfaction in a job well done is on her way to avoiding the angst that time-pressured lawyers feel. That satisfaction goes a long way toward consoling us through the long nights and the take-out food. A war story: When I was a young associate, a case heated up while the partner in charge was on vacation. I had twenty-four hours to write and file a brief to persuade the bankruptcy court that the debtor's motion, requiring the court to balance some factors in its favor, should lose. All of the cases that the debtor cited referred to a balancing test, but none of the cases was clear as to exactly what should be balanced. Whether I was inspired or possessed, I don't know, but I managed to say in my brief that "[t]he problem with the debtor's balancing test is that it sets the fulcrum in the wrong place." I'm no physics maven, and to this day, I don't know how I managed to come up with that language, but it worked. I still remember that sentence with pride. And I'm still hoping to come up with something that tops it some day.

<sup>18</sup> Obviously, I took this commandment directly from another, higher source. Exodus XX:13 (reprinted in Pentateuch and Haftorahs (2d ed. Soncino 1990). When it's applied to lawyers in particular, it means that lawyers shouldn't lie to judges, clients, or colleagues.

<sup>19</sup> The issue of why law and morality is, at best, an intersecting Venn diagram has been addressed by several scholars. See, e.g., Deborah L. Rhode, "Moral Character as a Professional Credential," 94 Yale LJ 491 (1985).

<sup>20</sup> See, e.g., Ronald J. Mann, "Explaining the Pattern of Secured Credit," 110 Harv. L. Rev. —, Wash. U. School of Law Working Paper No. 95-8-1 at 43-44 & n.123, 73 & ns. 204-205 (1996) (working paper version on file with author) (considerations of repeat players in the banking industry); Ronald J. Gilson & Robert H. Mnookin, "Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation," 94 Colum. L. Rev. 509 (1994) (considerations of repeat players in litigation); Nancy B. Rapoport, "Seeing the Forest and the Trees: The Proper Role of the Bankruptcy Attorney," 70 Ind. LJ 783, 834 (1995) (hereinafter Role) (considerations of repeat players in bankruptcy cases). For another take on the tension between the lawyer's role as advocate and her role as officer of the court, see Daisy Hurst Floyd, "Candor Versus Advocacy: Courts' Use of Sanctions to Enforce the Duty of Candor Toward the Tribunal," 29 Ga. L. Rev. 1035 (1995).

Although there are infinite numbers of things about which a lawyer could lie, most lies fall into one of two categories: lying about conflicts of interest, and lying about case law.<sup>21</sup>

### Duty to Screen for Conflicts of Obligations and Conflicts of Interest

Before a lawyer may represent a client, she has to make sure that her obligations to herself and to other clients won't affect her representation of the potential client. Although the ethics rules tend to lump the two types of conflicts together, Professor Kenneth Kipnis has come up with a far more workable distinction: conflicts of *interest* arise when a lawyer's *obligations to herself* or her colleagues conflict with those of a potential or current other client;<sup>22</sup> conflicts of *obligation* arise when a lawyer's duty to *one* client conflicts with the duty she would owe to a potential or current *other* client.<sup>23</sup> A lawyer must check both types of conflicts before she agrees to represent a potential client. That checkout must be more than cursory. The reporters are replete with cases requiring disqualification or disgorgement of fees, all because the lawyer didn't think hard enough about conflicts before she took on the representation.<sup>24</sup> It's not that the ethics rules are unclear about conflicts,<sup>25</sup>

---

<sup>21</sup> Of course, lawyers can also lie about such things as plan feasibility, qualifications of expert witnesses, or a client's intent to defraud. But most representations about facts, as opposed to representations about case law or other authority, can just as easily be of the "reasonable minds can differ" variety. What I'm discussing in this section of the essay is the type of representation about which reasonable minds cannot differ, such as whether a particular quote in a brief removed the "not" from the quoted case and replaced it with "..."—that is a lie, not a disagreement about facts.

<sup>22</sup> For an excellent discussion on conflicts of interest driven by the issue of attorney fees in particular, see Jay Lawrence Westbrook, "Fees and Interest Conflicts of Interest," 1 Am. Bankr. Inst. L. Rev. 287 (1993).

<sup>23</sup> Kenneth Kipnis, "Conflict of Interest and Conflict of Obligation," in *Ethics and the Legal Profession* 283, 285-286 (Michael Davis & Frederick A. Elliston eds., 1986). There are several key articles dealing with conflicts of interest in general and conflicts of interest in bankruptcy cases in particular. See, e.g., John D. Ayer, "How to Think About Bankruptcy Ethics," 60 Am. Bankr. LJ 355 (1986); John S. Dzienkowski, "Positional Conflicts of Interest," 71 Tex. L. Rev. 457 (1993); Richard A. Epstein, "The Legal Regulation of Lawyers' Conflicts of Interest," 60 Fordham L. Rev. 579 (1992); Landis, *supra* note 1.

<sup>24</sup> See, e.g., Nancy B. Rapoport, "Turning and Turning in the Widening Gyre: The Problems of Potential Conflicts of Interest in Bankruptcy," 26 Conn. L. Rev. 913 (1994) (hereinafter *Turning*) (providing an overview of the types of conflicts that can arise in bankruptcy cases).

<sup>25</sup> Actually, the conflicts rules are pretty clear—in the abstract. What makes the application of the rules difficult is that the rules were designed with the traditional litigation prototype (a plaintiff, a defendant, and no side-switching) in mind. Not all practice fields follow that prototype. See *Turning*, *supra* note 24, at 965-975.

Here's an extremely short primer on the ethics rules governing conflicts of interest. For rules governing conflicts of interest, see, e.g., Model Rules Rule 1.8(a) (restricting the types of business transactions that a lawyer and a client may conduct); 1.8(d) (prohibiting a lawyer

although I've argued that the ethics rules don't fit the bankruptcy rubric well.<sup>26</sup> It's that too many lawyers skirt the issue when faced with the possibility that they might have to turn down lucrative representation. These lawyers hope that they won't get caught, even though—in many close cases—disclosure to the court at the onset would have been sufficient to protect the interests of all

---

from cutting a deal with a client on media rights until the representation of the client has concluded); 1.8(f) (prohibiting a lawyer from accepting compensation for representing a client from someone other than the client unless the client has consented, the compensation won't interfere with the lawyer's "independence of professional judgment," and the confidentiality of client information is protected); 1.8(g) (preventing a lawyer who represents two or more clients in the same matter from making an aggregate settlement of the claims of or against the clients, unless all the clients consent after disclosure); 1.8(j) (prohibiting a lawyer from acquiring a proprietary interest in the cause of action in which the lawyer is representing the client, unless the proprietary interest is a lien permitted by law to secure the payment of fees or is a contingency fee); Model Code DR 5-104(A) (a lawyer "shall not enter into a business transaction with a client if they have different interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client," absent client consent); Model Code EC 5-5 (a lawyer should not suggest to a client that the client make a gift to the lawyer or for the lawyer's benefit); Model Code DR 5-104(B) (prohibiting a lawyer from being granted "publication rights" before the representation has concluded); Model Code DR 5-107(A)(1) (similar to Model Rules Rule 1.8(f)); Model Code DR 5-106 (similar to Model Rules Rule 1.8(g)); Model Code DR 5-103(A) (similar to Model Rules Rule 1.8(j)).

Rules governing conflicts of obligation fall into two categories: those involving conflicts among *current* clients, see, e.g., Model Rules Rule 1.7 (setting forth a two-part test: the lawyer must reasonably believe that the simultaneous representation will not adversely affect either client, and each client must consent to the simultaneous representation after consultation); Model Rules Rule 2.2 (the lawyer as intermediary for multiple clients); Model Code DR 5-105 (multiple representation of clients is permissible if "it is obvious" that the lawyer "can adequately represent the interest of each and if each consents to the representation after full disclosure. . . ."), and those involving conflicts between a *potential* client and a *former* client, see, e.g., Model Rules Rule 1.9(a) ("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 interest of the former client unless the former client consents after consultation."); Model Rules Rule 1.9(b) (governing conflicts that travel with the lawyer from law firm to law firm); Model Rules Rule 1.10 (imputed disqualification); Model Code DR 5-105(D) (imputed disqualification); cf. Model Rules Rule 1.9(c) (protecting information that the lawyer obtained from the former client).

All of these conflicts rules are based on the simple premise that a client who hires a lawyer deserves that lawyer's undivided loyalty. See, e.g., Model Rules Rule 1.6 (preserving a client's confidences); Model Rules Rule 1.7 cmt. 1 ("Loyalty is an essential element in the lawyer's relationship to a client."); Model Code Canon 5 (governing a lawyer's exercise of independent professional judgment, which, in the accompanying Ethical Considerations and Disciplinary Rules, also covers—among other things—conflicts of interest); Model Code EC 4-6 (preserving client confidences and secrets even after termination of the representation); cf. Model Code Canon 9 (requiring lawyers to avoid even the appearance of impropriety). Keeping that premise in mind would go a long way toward helping lawyers resolve conflicts dilemmas.

<sup>26</sup> See Turning, *supra* note 24, at 940–965.



concerned.<sup>27</sup> When in doubt, if it's possible, let the bankruptcy court decide if there's a conflict.<sup>28</sup>

### Duty to Report Holdings Accurately and to Cite Contrary Controlling Authority

Judges and their law clerks, who are already overworked, must rely on the integrity of those lawyers who appear before them. Even though law clerks can pore over briefs looking for inaccuracies, they often don't have the time to double-check every citation. If a lawyer misrepresents a holding or a quote or fails to cite contrary controlling authority, the lying lawyer has a decent chance of getting away with the lie unless the judge or clerk has some independent knowledge about the case or the contrary authority.<sup>29</sup> Of course, if the lawyer is caught, there's a 100 percent chance of a very harsh penalty.

---

<sup>27</sup> See, e.g., *In re Guard Force Management, Inc.*, 185 BR 656, 665 (Bankr. D. Mass. 1995) (court found that debtor's attorney "egregiously failed to disclose information pertinent to authorize his employment [as debtor's counsel]" and revoked the attorney's appointment as counsel; furthermore, due to the attorney's failure to make full disclosure, the court denied the attorney's fee application and required him to disgorge fees).

<sup>28</sup> That's easier said than done if the lawyer is representing a creditor or another party who does not have to obtain court approval for the representation. Compare 11 USC § 327 (1994) (requiring court approval for professionals representing the estate) with Bankruptcy Rule 2019 (only requiring the lawyer representing more than one creditor or equity security holder—in certain chapters—to file a statement setting forth the nature of that representation). A lawyer representing only one creditor has only the ethics rules, not court approval, to guide her.

<sup>29</sup> I've seen more than one "reputable" firm alter quotes by substituting ". . ." for the word "not." I was shocked at first, then disheartened. I sincerely doubt that the law firms that got away with this practice in the 1980s have changed their policies in the 1990s.

Sanctions are necessary to teach counsel to cite contrary controlling authority. For a very efficient discussion of why sanctions are appropriate when a lawyer fails to cite contrary authority, see *Hendrix v. Page* (*In re Hendrix*), 986 F2d 195 (7th Cir. 1993); see also *Jorgenson v. County of Volusia*, 846 F2d 1350, 1351-1352 (11th Cir. 1988) (court sanctioned attorney for failing to cite "clearly relevant" cases relating to an application for a temporary restraining order); *Rodgers v. Lincoln Towing-Serv.*, 771 F2d 194, 205 (7th Cir. 1985) (sanctioning counsel for "refus[ing] to recognize or to grapple with the established law of the Supreme Court and of this Circuit that defeats several of the claims at issue."); *Katris v. INS*, 562 F2d 866, 869-870 (2d Cir. 1977) (sanctioning counsel for "deliberately fail[ing] to cite a controlling adverse decision . . . in which he, himself, participated").

Nothing in the ethics rules, however, requires an attorney to do the other side's thinking for her. See, e.g., *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F2d 1531, 1538, 1542 (9th Cir. 1986) ("[N]either Rule 11 nor any other rule imposes a requirement that the lawyer, in addition to advocating the cause of his client, first step into the shoes of opposing counsel to find all potentially contrary authority, and finally into the robes of the judge to decide whether the authority is indeed contrary or whether it is distinguishable"). Still, the line between failing to cite contrary *controlling* authority and failing to cite *potentially* contrary authority from *other* jurisdictions is wide and clear.

Both formal and informal sanctions try to deter this misconduct.<sup>30</sup> The ethics rules give some bite to the availability of formal sanctions, but only if courts decide to apply the rules.<sup>31</sup>

## V. Thou Shalt Deal Respectfully and Fairly With the Court, With Opposing Counsel, and With Third Parties.

Scholars and practitioners alike have been lamenting the decrease in civility among lawyers for years.<sup>32</sup> Not only are lawyers behaving unprofessionally, they're not even behaving with simple courtesy toward their colleagues—let alone with the judges who are evaluating their arguments.<sup>33</sup> Even courteous

<sup>30</sup> Too little is said about the old practice of shunning those who breach the rules, but in bankruptcy law, where there aren't that many "players," shunning can be quite effective—if those with power choose to do it.

<sup>31</sup> For ethics rules governing misstatements in general, see Model Rules Rule 3.3(a)(1) (the lawyer "shall not knowingly . . . make a false statement of material fact or law to a tribunal"); Model Rules Rule 3.3(a)(4) (the lawyer "shall not knowingly . . . offer evidence that the lawyer knows to be false" and must take remedial measures if, later, the lawyer finds out that the evidence was in fact false); Model Rules Rule 4.1 (the lawyer "shall not knowingly . . . make a false statement of material fact or law to a third person; or . . . fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless [that disclosure is protected by the rules regarding confidentiality]."); Model Code DR 7-102(A)(5) (similar to Model Rules Rule 3.3(a)(1)); Model Code DR 7-102(A)(4) (a "lawyer shall not knowingly use perjured testimony or false evidence"); Model Code DR 7-102(A)(5) (prohibiting misrepresentations of law or facts during the representation of a client); see also Model Rules Rule 3.3(d) ("In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse").

For ethics rules requiring the lawyer to cite adverse authority, see Model Rules Rule 3.3(a)(3) (a lawyer "shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel"); Model Code DR 7-106(B)(1) (similar to Model Rules Rule 3.3(a)(3)).

<sup>32</sup> See, e.g., William I. Weston, *Ethical Pitfalls for Even the Ethical Lawyer*, at 6–7 (CLE course sponsored by the Professional Ethics Committee of the Columbus Bar Association (December 14, 1995)) (hereinafter Weston) (manuscript on file with the author). As Professor Weston explains:

This radical change has occurred over the past twenty years. . . . [E]veryone associated with the practice of law today is acutely aware of the significant change in practice attitudes—a hardening of the way lawyers conduct themselves; a decline in respect for historical and traditional practice values and institutions as well as a fundamental distrust. Instead of reserving the extreme practice techniques for the rare case, such techniques are all too frequent. This process of change has been coupled with a general decline in ethical conduct among the general population and among lawyers in particular[,] especially regarding the care for client property.

For a list of examples of name-calling paralleled only in John Barth's book, *The Sot-Weed Factor*, see Lydia P. Arnold, Note, "Ad Hominem Attacks: Possible Solutions for a Growing Problem," 8 *Geo. J. L. Ethics* 1075 (1995) (hereinafter Arnold).

<sup>33</sup> Many judges are particularly frustrated with lawyers who fail to respect judicial authority by interrupting, by sneering, or by otherwise attempting to promote their (undeserved?)

counsel are all too often guilty of wasting judges' time by such gaps in competency as asking a judge to make a decision properly left to counsel, calendaring every little discovery dispute for hearing, and spending time during trials leafing through evidence to decide which ones to mark as exhibits (and how to mark them).<sup>34</sup> Perhaps newly minted lawyers have some small excuse for not behaving professionally; certainly more seasoned ones do not.<sup>35</sup>

I've spoken with far too many judges who say that they'd enjoy their jobs more if they didn't have to act as "schoolroom monitors," keeping bullies and cheats in line. As judicial annoyance grows, lawyers can expect more judges to look to the ethics rules to sanction the unnecessary impoliteness that masquerades as toughness.

### Behaving As an Officer of the Court

A lawyer has a dual role: she represents her client, and she acts as an officer of the court.<sup>36</sup> Often, those two roles conflict.<sup>37</sup> But they need not conflict all

---

self-respect by belittling the judge. One of Judge Bodoh's favorite lines to unruly counsel is, "Counselor, I hope that you'll excuse me for talking while you're interrupting." Conversation with the Honorable William T. Bodoh, United States Bankruptcy Court for the Northern District of Ohio (Apr. 3, 1996) (notes of conversation on file with the author).

<sup>34</sup> Conversation with the Hon. Steven W. Rhodes, Chief Judge, United States Bankruptcy Court for the Eastern District of Michigan (March 29, 1996) (hereinafter Rhodes Conversation) (notes on file with author).

<sup>35</sup> One partial fix for the decline in civility is a more structured mentoring program by the local bar. Not too long ago, the more well-established lawyers in the community mentored those lawyers who were still wet behind the ears. In the law firm environment, especially, formal and informal mentoring structures used to flourish. These days, lawyers point to the increased demands on their time and their need for efficient billing as excuses for not taking the time to train young lawyers. That excuse is very short-sighted, and we are now starting to experience the result of unmentored lawyers wreaking havoc on the collegiality of legal communities.

Another fix is for those with power—managing partners, judges, community leaders—to reward civil behavior and punish unprofessional conduct. Decrying the lack of civility alone won't change anything, but a carrot-and-stick approach might help. See *supra* note 1 and accompanying text.

Let's make clear what I am and am not advocating. I don't want to return to the days when only "gentlemen" (with an emphasis on the "men") practiced law, and access to the profession (and to its practitioners) was extremely restricted. As Professor Weston puts it, "[w]e should not mistake elitism and exclusionism for professionalism." Weston, *supra* note 32, at 9. What I do advocate—and obviously I'm not alone—is that we keep in mind what a great trust we are privileged to hold. We represent our clients, and we represent what is best in our legal system. For that privilege, we should have the decency to be grateful—and respectful.

<sup>36</sup> See Role, *supra* note 20. Exactly where to draw the line between a lawyer's duty to her client and her duty to the system as a whole is not easy, cf. *In re Bonneville Pac. Corp.*, 1996 Bankr. LEXIS 565 (Bankr. D. Utah 1996) (lambasting counsel for the debtor-in-possession for failing to uncover the causes of the debtor-in-possession's myriad financial problems), and although I'm a little on the Pollyanna end of things, reasonable minds can differ. In a back-and-forth E-mail conversation that I had with Professor John D. Ayer, Professor Ayer suggested a reasonableness standard that balances the two duties. Although I haven't played around with that idea enough to decide if I really like it better than my "Pollyanna ethics," the reasonableness standard is significantly better than one that promotes zealous advocacy above all other considerations.

<sup>37</sup> See Role, *supra* note 20, at 787–806.

the time: the ethics rules guide the lawyer by reminding her that she has a duty to help the court system function optimally. The lawyer must expedite litigation, instead of letting it drag out to boost her fees.<sup>38</sup> She must take pains to avoid roadblocks to evidence or the presentation of frivolous claims.<sup>39</sup> She must not step on the toes of third parties.<sup>40</sup> And she can't be too much of a pit bull: Although she has a duty to zealously represent her client, she can't abuse opponents, witnesses, or the system in general under the guise of simple zeal-

---

<sup>38</sup> See Model Rules Rule 1.3 (requiring the lawyer to act diligently and promptly); Model Rules Rule 3.2 ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."); cf. Model Code DR 7-101; Model Code DR 7-102; *supra* note 11 and accompanying text.

It's been a long time since the lawyer for R.J. Reynolds made the mistake of putting in writing his strategy for defeating product liability lawsuits: "To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds' money, but by making that other son of a bitch spend all his." Morton Mintz, "Blunt Memo by Attorney for R.J. Reynolds Is Leaked," *Wash. Post* (May 21, 1988) at D12. But that strategy hasn't disappeared in the meantime. It's just gotten more sophisticated. See, e.g., *United States v. Mason*, 1994 U.S. App. LEXIS 19198 (9th Cir. 1994) (plaintiffs' and defendants' lawyers *cooperated* in manipulating discovery requests in a scheme to churn fees).

<sup>39</sup> See Model Rules Rule 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."); Model Rules Rule 3.3 (requiring lawyers to exercise candor toward the tribunal); Model Rules Rule 3.4 (prohibiting the obstruction of access to evidence, the falsification of evidence, the making of a frivolous discovery request, the raising of irrelevant matters at trial, and the "leaning on" of certain witnesses not to give relevant information); cf. Model Code DR 7-102(A)(2) (permitting a lawyer to argue for a good faith extension, modification, or reversal of existing law); see also *In re TCI Ltd.*, 769 F.2d 441, 446 (7th Cir. 1985) ("When lawyers yield to the temptation to file baseless pleadings to appease clients . . . they must understand that their adversary's fees become a cost of *their* business.") (emphasis in original); Steven W. Rhodes, "The Responsibilities of the Debtor's Attorney in a Personal Bankruptcy Case" (manuscript on file with the author); *In re Remington Dev. Group, Inc.*, 168 BR 11 (Bankr. DRI 1994) (sanctioning a lawyer who filed a Chapter 11 petition merely to delay when the lawyer knew that his prepetition representation of the debtor would disqualify him from representing the debtor-in-possession).

It's not unheard of for bad lawyers to keep searching for experts who will only testify in ways that help the client's case and to fire ones who don't come up with the "appropriate" analysis—hence, all of the jokes about what M.A.I. means for appraisers ("Made As Indicated"). There's nothing wrong with deciding not to use an expert with whom you disagree. But that doesn't mean that it's ethical to fire each and every expert whose honest opinion is that your client is wrong.

<sup>40</sup> See Model Rules Rule 4.4 ("In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."); Model Code DR 7-106(C)(2) (a lawyer shall not "[a]sk any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person"); Model Code DR 7-102(A)(1) (a lawyer shall not take action "merely to harass or maliciously injure another").

ousness.<sup>41</sup> There are definite boundaries: Zealousness does not encompass viciousness.<sup>42</sup>

---

<sup>41</sup> See Model Rules Rule 1.2(d) (prohibiting a lawyer from counseling a client to engage in fraudulent or criminal behavior); Model Rules Rule 1.16 (requiring a lawyer to refuse representation or to withdraw from representation if, among other things, "the representation will [violate] the rules of professional conduct or the law" and suggesting withdrawal if, among other things, "the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; . . . the client has used the lawyer's services to perpetuate a crime or fraud; [or the] client insists upon pursuing [a repugnant or imprudent] objective. . . ."); Model Rules Rule 3.4 (listing a variety of ways in which the lawyer must behave fairly toward the opposing party and the tribunal); Model Rules Rule 3.5 ("A lawyer shall not . . . seek to influence a judge, juror, prospective juror or official by means prohibited by law; . . . communicate ex parte with such a person except as permitted by law; or . . . engage in conduct intended to disrupt a tribunal."); Model Rules Rule 4.4 (proper behavior when dealing with third persons); Model Code DR 7-102(A)(1) (a lawyer can't take action "when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another"); Model Code DR 7-108 (governing communications with judge or jury); Model Code DR 7-106(C)(6) (a lawyer shall not engage in "undignified or discourteous conduct which is degrading to a tribunal"); Model Code DR 7-109(A) (attempting to suppress evidence); Model Code DR 7-109(B) (advising witnesses to make themselves unavailable); Model Code DR 7-102(A)(6) (creating or preserving false evidence).

<sup>42</sup> Model Code Canon 7 requires a lawyer to represent her client "[z]ealously [w]ithin the [b]ounds of the [l]aw." The general Disciplinary Rule implementing this Canon is Model Code DR 7-101, which says, in essence, that a lawyer should do everything in her power to "seek the lawful objectives of [her] client through reasonably available means permitted by law and the Disciplinary Rules. . . ." The rule goes on to temper that broad statement with some provisos: zealousness does not require the lawyer to refuse the "reasonable requests of opposing counsel [that] do not prejudice the rights of [her] client," nor does zealousness eschew punctuality, the avoidance of "offensive tactics," or "courtesy." Model Code DR 7-101(A); see also Model Code DR 7-106(C)(5) (a lawyer shall not "[f]ail to comply with known local customs of courtesy or practice"); cf. Model Rules Rule 1.3 (requiring diligence); Model Rules Rule 3.2 (a lawyer must expedite litigation); Model Rules Rule 3.5(c) (prohibiting conduct "intended to disrupt a tribunal"); Model Rules Rule 4.4 (requiring a lawyer to respect the rights of third persons).

Professor Weston describes the very real forms that overzealous (read: "unprofessional") conduct can take:

For the general practitioner and specially the solo and small firm practitioner, the impact of professional issues is extremely acute because there is no place to seek protection from the conduct of the other attorney. The solo and small firm lawyer must face it directly and immediately. The unprofessional lawyer who faxes notice of hearings and meetings at 8:00 p.m., or who conducts discovery to test the limits of reality, places a particular economic and professional burden on the solo and small firm lawyer because [her] resources are much more limited.

Weston, *supra* note 32, at 10.

Neither Weston nor I intend to vilify lawyers who return telephone calls at noon and 6 p.m. in the hopes of *not* finding people in their offices. That behavior may not be exemplary, but it's not unethical. On the other hand, everyone knows a lawyer who schedules meetings for a time that she knows that the other lawyer can't attend them, or who schedules interrogatories so that the answers are due during the vacation of the opposing lawyer. For instance, *my* war stories in this article (see *infra* notes 56 and 58) all came from a single case—and a single lawyer.

## Dealing With Unethical Lawyers

What of a lawyer who oversteps the bounds of zealotry? To the extent that a lawyer has engaged in significant professional misconduct,<sup>43</sup> other lawyers who know of the misconduct should report the offending lawyer.<sup>44</sup> Why have a positive duty to report? For one thing, the profession makes a big fuss about self-policing its members.<sup>45</sup> To make the claim that self-policing works, the honorable members need to root out the dishonorable ones. Moreover, potential clients need to be able to distinguish good lawyers from bad lawyers, and one way to do that is to check with the bar associations to see if a particular lawyer has been disciplined (and for what reason).

But judges can also enforce high standards through means other than the ethics rules. In a recent Ohio case, Judge Caldwell sanctioned a lawyer who had, among other things, missed his Chapter 13 client's Section 341 meeting, failed to re-notice the meeting, filed an unconfirmable plan, failed to appear at the rescheduled confirmation hearing, and—after the court ordered him to remit all of his fees to the client—even failed to remit the fees.<sup>46</sup> Judge Caldwell barred the attorney from practicing in his court until the attorney remitted his fees (which were now accruing interest).<sup>47</sup> The order sent a strong signal to lawyers that such rampant malfeasance would not be tolerated.<sup>48</sup>

---

<sup>43</sup> Model Rules Rule 8.4 defines professional misconduct as, among other things, violating (or attempting to violate) the Model Rules of Professional Conduct (or inducing someone else to do so), "commit[ing] a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation," and "engag[ing] in conduct that is prejudicial to the administration of justice." See also Model Code DR 1-102(A) (conveying the same general principles).

<sup>44</sup> See Model Rules Rule 8.3(a) ("A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects . . . shall inform the appropriate professional authority."); Model Code DR 1-103(A) ("[a] lawyer possessing unprivileged knowledge of a violation of a [Disciplinary Rule] shall report such knowledge to . . . authority empowered to investigate or act upon such violation.").

<sup>45</sup> See, e.g., Allen Blumenthal, "Attorney Self-Regulation, Consumer Protection, and the Future of the Legal Profession," 3 Kan. J. L. & Pub. Pol'y 6 (Winter 1994); cf. John A. DeVault III, "First, Let's Put the Lawyers Under the Legislature," 70 Fla. B.J. 8 (Jan. 1996) (arguing that lawyers are not self-regulated because the Supreme Court does the regulating). Of course, if lawyers police themselves, it's less likely that they'll go overboard in terms of punishing egregious conduct—if only from a "there but for the grace . . ." argument.

<sup>46</sup> *In re Sandra L. Talan*, No. 95-50950 (Bankr. SD Ohio filed Feb. 5, 1996) (order barring attorney from practice).

<sup>47</sup> *Id.*

<sup>48</sup> For recent examples of other situations in which an attorney was barred from practice in bankruptcy court due to misconduct, see, e.g., "Supreme Court Refuses to Reinstate Lawyer's License," *Detroit News*, Aug. 30, 1991 (cited in *The Hon. Ray Reynolds Graves*, "Ethical Issues in Bankruptcy," prepared for the Columbus Bar Association's 1996 Bankruptcy

## VI. Thou Shalt Not Indulge Thy Client's Sleazy Instincts.

Sometimes the lawyer is honest, but the client is not. The last thing that a bankruptcy judge wants to see is a lawyer arguing that her client's *unquestionably wrongful* behavior is acceptable, either in itself or as a permissible extension of the law.<sup>49</sup> From the judge's perspective, if the lawyer justifying her client's actions can't pass the "blush test,"<sup>50</sup> she shouldn't be making the argument in the first place. Justifying the unjustifiable cheapens the lawyer and the court. If a client wants to try something illegal or unethical, the law-

---

Bar Institute (May 2-3, 1996), at 22) (on file with author); see also *In re Disciplinary Proceedings Against Bennett*, 126 Wis. 2d 399, 376 NW2d 861 (1985) (suspending a lawyer for six months and requiring him to take fifteen hours of CLE after the lawyer had delayed filing a Chapter 7 petition which, when it was filed, was wrong; that Chapter 7 case was one of a long string of error-filled filings by that lawyer); *Kentucky Bar Ass'n v. Goodrich*, 851 SW2d 479 (Ky. 1993) (ordering a one-year suspension of attorney who filed late and error-filled petitions); *Kentucky Bar Ass'n v. Watson*, 862 SW2d 317 (Ky. 1993) (ordering a fifty-nine-day suspension of attorney who filed a deficient petition and tendered an NSF check for the filing fee upon the refiling of the amended petition).

My personal favorite is *In re Disciplinary Action Against Hawkins*, 502 NW2d 770 (Minn. 1993), in which a court publicly reprimanded an attorney who had completely disregarded the local rules and who had submitted documents with countless spelling and grammar errors. Thank goodness for judges who sanction such lawyers. After all, it's not as if the Yellow Pages indicate which of the many lawyers listed are competent and ethical—or can even read and write. Without some form of judicial sanctions, bad lawyers can get unwary clients *more* easily than good lawyers, who often don't advertise.

<sup>49</sup> See Model Rules Rule 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."); Model Code DR 7-102(A)(7) (a "lawyer cannot counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent"); see also Model Code DR 7-101(b)(2) (permitting a lawyer to refuse to assist in conduct that the lawyer believes is unlawful); Model Code EC 7-5 (lawyer "should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor.").

Lawyer-shopping is one unfortunate side-effect of counseling a client regarding impermissible behavior. A good lawyer hears a client's story and tells the client that the law requires a particular action that the client doesn't want to take. The client decides to go to a different lawyer. In conversations with the second lawyer, the client "forgets" to mention those facts that might trigger an unpleasant result. Whether the case is a consumer bankruptcy (e.g., a client with the ability to file a Chapter 7 with assets to distribute does some lawyer-shopping and some editing of facts, and comes out with a no-asset 7 filed by a second lawyer who doesn't know about the "missing" assets) or a corporate bankruptcy ("Toxic waste? *WHAT* toxic waste?"), lawyer-shopping is well-nigh impossible to avoid. What might help avoid the lawyer-shopping is some consistent "thou shalt nots" by lawyers. That won't help in terms of clients who learn to omit facts, but it *will* help in terms of clients telling the *same* facts to different lawyers and getting completely different advice.

<sup>50</sup> The "blush test" is simple: If, in making an argument, the lawyer can look the judge in the eye and not blush, then at least the argument doesn't seem outrageous to the lawyer. Of course, it could also be true that the lawyer herself isn't blushing because she has no shame. The "blush test" is not infallible. Still, it's not bad.

yer has a duty to try to change the client's mind and may have the right to withdraw from representation.<sup>51</sup> Although the power of a withdrawal threat hits the client "where he lives," by making explicit the tit-for-tat of "I won't represent you if you persist in trying something illegal" (which in turn cuts off the client's access to representation),<sup>52</sup> that's not so bad. We really shouldn't be encouraging clients to violate laws intentionally.<sup>53</sup>

## VII. Thou Shalt Not Automatically Turn to Litigation As the First, or Even Best, Alternative to Other Forms of Dispute Resolution.

In the "good old days," lawyers would routinely call their opposing counsel to schedule depositions, work out the ground rules for document production, and smooth over other touchy matters. Now lawyers involved in litigation skirmishes trot out Rule 11 at the first sign of trouble,<sup>54</sup> and their "meet and confer" sessions<sup>55</sup> are just window dressing.<sup>56</sup>

<sup>51</sup> See, e.g., Model Rules Rule 1.2(d)-(e) (prohibiting the lawyer from encouraging the client's criminal or fraudulent actions); Model Code DR 7-102(A)(7) (same); cf. Model Rules Rule 1.16 (covering the situations under which the lawyer is required or permitted to withdraw from representation); Model Code DR 2-110(C) (permitting a lawyer to withdraw from representation if the client insists that the lawyer engage in illegal or otherwise prohibited conduct). To the extent that the lawyer can construe the applicable ethics rules to permit withdrawal in situations where the client does not want to take her attorney's advice, the threat of withdrawal certainly can get the client's attention. See Stephen Ellmann, "Lawyers and Clients," 34 UCLA L. Rev. 717 (1987). Ellmann argues that lawyers manipulate their clients by more subtle means than withdrawal much more often, probably because the ethics rules don't make withdrawal that easy. *Id.* at 726-733. Neither the Model Rules nor the Model Code explicitly authorizes withdrawal in situations where the moral views of the client and the lawyer are simply in conflict, with no "right" or "wrong" view at stake. See Rover W. Gordon, "Corporate Law Practice as a Public Calling," 49 Md. L. Rev. 255, 279 (1990) (explaining that, under the ethics rules, lawyers "have no positive duty to urge compliance [with government regulations] or to go beyond 'purely technical advice' if that is all the client wants") (footnotes omitted).

<sup>52</sup> See Role, *supra* note 20, at 804-805.

<sup>53</sup> If every lawyer would refuse to give unethical advice, withdrawal then would become a more effective remedy. See *supra* note 51 and accompanying text.

<sup>54</sup> The problem has become so persistent that the American Bar Association Committee on Ethics and Professional Responsibility has had to answer the question of whether a lawyer may even threaten opposing counsel with a disciplinary complaint. See ABA Comm. on Ethics and Professional Responsibility Formal Op. 94-383 (discussing permissible and impermissible use of threatened disciplinary complaint against opposing counsel).

<sup>55</sup> See Fed. R. Civ. P. 37(a)(2)(A) (requiring that "[t]he motion (for a court order compelling disclosure or discovery must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.").

<sup>56</sup> My favorite war story on this topic involves a young lawyer who always sought Rule 11 sanctions at the drop of a hat. At one point, he sought Rule 11 sanctions against me because I had answered his interrogatories exactly as the questions had required. In the meet



There are easier and better ways to resolve disputes. For one thing, the fact that the bankruptcy bar is a fairly small and close-knit community<sup>57</sup> means that the most successful lawyers tend to be the ones who are reasonable and cooperative until there's a reason not to behave that way.<sup>58</sup> For another thing, judges hate deciding discovery disputes: those disputes clog their docket and, for the most part, waste their time.<sup>59</sup> No one wins in a discovery dispute: not the lawyer who brings the motion, not the lawyer who defends it, and not the client who has to pay his lawyer's fees. Unless the discovery dispute involves crucial material or an obstreperous lawyer, just settle the issue without involving the judge.

### VIII. Thou Shalt Honor Thy Calendar.

Lawyers have a tendency to take on (or be assigned) too many matters at one time to do complete justice to each of them. Schedule-juggling is a part of being a lawyer, and normal juggling is fine. A lawyer *should* handle emergencies before she turns to nonemergencies.

Sometimes, though, a lawyer will let overscheduling get out of hand and will miss deadlines, hearings, and meetings.<sup>60</sup> Although it is human to make mistakes, frequent scheduling mishaps violate the ethics rules.<sup>61</sup> To avoid annoying judges, just remember two simple rules: bring an up-to-date calendar with you to all hearings, and notify the court and opposing counsel of any previous appointments that take precedence over the scheduling in the case.<sup>62</sup>

---

and confer session, the lawyer argued that I should have interpreted the interrogatories as he had meant them to read, not as they actually did read. Being a bit of a snot myself, I asked the lawyer which rule in the Federal Rules of Civil Procedure required me to interpret and rewrite his interrogatories for him. After he leafed through my copy of the Rules, he slid my Rules across the table to me, growling "your Rules are defective."

<sup>57</sup> See Rhodes Conversation, *supra* note 34, and accompanying text; Lynn M. LoPucki, "The Demographics of Bankruptcy Practice," 63 Am. Bankr. LJ 289 (1989); Turning, *supra* note 24, at 926 n.37; Role, *supra* note 20, at 834-837.

<sup>58</sup> The same lawyer who lived merely for the joy of bringing Rule 11 motions, see *supra* note 56, routinely served discovery requests that were due during major holidays. After I figured out his timing, I started serving him our discovery requests to coincide with his vacation schedule. We reached detente soon afterwards.

<sup>59</sup> See Rhodes Conversation, *supra* note 34. For some examples of discovery abuse, see Arnold, *supra* note 32.

<sup>60</sup> See *In re Talan*, *supra* note 46.

<sup>61</sup> See Model Rules Rule 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."); Model Code DR 6-101(A)(3) (a lawyer may not "[n]eglect a matter entrusted to him"); Model Code DR 7-101(A)(1) (a lawyer cannot intentionally refrain from "seeking the lawful objectives of his client. . ."); Model Code DR 7-101(A)(3) (a lawyer "shall not intentionally . . . [p]rejudice or damage his client during the course of the relationship. . ."); see also Model Code EC 6-4 (a lawyer should "give appropriate attention to his legal work").

<sup>62</sup> Pam Maggied is both a sole practitioner and a Brownie Troop leader, and her troop meets every Wednesday afternoon during the school year. She tells every judge, trustee, and

## IX. Thou Shalt Keep Thy Client Informed.

Clients pay lawyers because lawyers are supposed to know the law. But they also pay lawyers because lawyers are supposed to be able to explain the law in lay terms. Too many lawyers risk disciplinary sanctions<sup>63</sup> because they're too busy (or lazy?) to return calls, leaving their clients irate. A lawyer has a duty to communicate with her client so that the client is kept reasonably informed about the status of his case.<sup>64</sup> It is even more imperative to fulfill that duty when the client is extremely distressed and needs extra hand-holding.<sup>65</sup>

---

opposing counsel, on an as-needed basis, that she's unavailable on Wednesday afternoons, and she's never had a scheduling problem based on her commitment to the Brownies. See *Maggied Correspondence*, *supra* note 4.

In terms of making sure that the court and opposing counsel all know about other matters that take precedence over hearings and meetings, it would help if lawyers began to value people's personal lives a bit more. There are very few real emergencies in cases that should take precedence over a child's recital or T-ball game, or over some time alone with a significant other. Of course, there *are* true emergencies, and lawyers generally must work fairly long hours just to stay current on their cases. But too many things these days that are classified as emergencies simply are not. If the "emergency" doesn't relate to death, serious injury, or imminent loss of assets, it's probably not one, and it can wait.

Many lawyers consider taking time to have a personal life to be a weakness. What everyone else would call "balance" gets disparaged as "not having enough fire in the belly." Such an attitude, especially prevalent in certain sizes of law firms and certain practice areas, reveals a very sad commentary about legal practice. Again, we need to work from the top down, see *supra* note 1 to change these attitudes.

<sup>63</sup> See, e.g., *In re Elowitz*, 866 P2d 1326 (Ariz. 1994) (disbarment appropriate in light of attorney's conduct in failing to communicate with multiple clients, coupled with attorney's failure to diligently and competently perform services, mishandling of client property, forgery and notarization without authorization, and failure to cooperate with state bar investigation).

<sup>64</sup> Model Rules Rule 1.4 requires the lawyer to "keep [the] client reasonably informed about the status of a matter . . . [and to] explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." See also Model Code EC 7-8 (the lawyer "should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations"); Model Code EC 9-2 (the lawyer "should fully and promptly inform his client of material developments in the matters being handled for the client"). For a primer on this issue in professional ethics, see "Failure to Communicate with Client as Basis for Disciplinary Action Against Attorney," 80 ALR 3d 1240.

Communication is part and parcel of some of the other Commandments in this essay. For example, lawyers who come to a settlement conference without any settlement authority are just wasting everyone else's time—including the judge's.

<sup>65</sup> See Model Rules Rule 1.14(a) ("When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-client relationship with the client."); Model Code EC 7-11 (the lawyer's responsibilities "may vary according to the intelligence, experience, mental condition or age of a client. . ."); Model Code EC 7-12 ("[a]ny mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. . .").

## The Lawyer As Counselor

Communication requires more than simply conveying the status of the case or translating the applicable law into "non-lawyerese." A good lawyer spends time with the client to explain the big picture: how the client's short-term tactical decisions will affect the client's long-term interests, or even the interests of other parties.<sup>66</sup> The Model Rules explicitly permit lawyers to give extra-legal advice, and the Model Code doesn't rule out extra-legal advice.<sup>67</sup> In an earlier article, I argued that bankruptcy lawyers have a special duty to consider the big picture beyond their client's short-term interests.<sup>68</sup> Bankruptcy judges can't do all of the big-picture analysis: they don't have the time, and they don't have access to all of the facts.<sup>69</sup> In fact, judges appreciate lawyers who don't try to reap short-term gains at the expense of long-term goals.<sup>70</sup>

## The Organization as Client, or "Who Calls the Shots Here?"

Communication about facts, law, and strategy is particularly tricky when the client is not a natural person but an organization. Although the ethics rules speak to the issue of organizations as clients,<sup>71</sup> the actual care and feeding of an organizational client is fairly tricky. The organization who hires the lawyer often uses several different people to communicate instructions or information, and the lawyer must remind herself (and these different people) that her duty is to the organization and not to any individual within the organization.<sup>72</sup>

---

<sup>66</sup> See Role, *supra* note 20, at 798-806.

<sup>67</sup> See Model Rules Rule 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations[,] such as moral, economic, social and political factors, that may be relevant to the client's situation."); Model Code EC 7-8 ("[a]dvice of a lawyer to his client need not be confined to purely legal considerations . . . [but the final judgment call regarding the weighing of non-legal factors is for the client]).

<sup>68</sup> See Role, *supra* note 20, at 827-844.

<sup>69</sup> Moreover, in our adversary system, it's not a judge's job to sort through all the facts and present them in the light most favorable to a particular side. That's why we *have* lawyers.

<sup>70</sup> This Commandment is honored when lawyers, acting in accordance with the other Commandments, shun frivolous litigation and work things out amicably, instead of relying on judicial intervention.

<sup>71</sup> See, e.g., Model Rules Rule 1.13(a) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."); Model Rules Rule 1.13(d) ("In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."); Model Code EC 5-18 (lawyer employed by an entity owes his allegiance to that entity).

<sup>72</sup> That's especially true in a corporate bankruptcy situation, when the corporation's finances are troubled and the co-obligated (human) equity holders and guarantors are feeling

## Thou Shalt Not Whine.<sup>73</sup>

One of the quickest ways to offend a bankruptcy judge is for a lawyer to blame others for her own failure to supervise their work. Even if a secretary types "parole" instead of "parol" in a brief, or a summer associate attaches the wrong version of a document to a settlement agreement, a good lawyer recognizes that, ultimately, the responsibility rests with her.<sup>74</sup> A lawyer who blames the staff for her own inadvertence is behaving reprehensibly: the lawyer is the one who (at least allegedly) earns the "big bucks," so she should take the responsibility for any errors.<sup>75</sup>

Blaming other lawyers for careless mistakes is similarly unprofessional, and the ethics rules don't permit blame-shifting.<sup>76</sup> And a lawyer who misses appointments or hearings because she "forgot" when something was scheduled (or who tries to file a document late because she started working on it on the day that it was due) has likewise violated the ethics rules.<sup>77</sup> People become lawyers for a variety of reasons, but many of them seek the power to affect others' lives and the freedom to control their own schedules.<sup>78</sup> In exchange, they have to be prepared to develop the moral fiber that accompanies that power and that freedom.

---

very nervous. For a good discussion of a lawyer's duty to identify conflicts of interest situations in the representation of business entities, see Kathryn Tate, "Lawyer Ethics and the Corporate Employee: Is the Employee Owed More Protection Than the Model Rules Provide?" 23 Ind. L. Rev. 1 (1990).

<sup>73</sup> The Ohio State College of Law has an informal "no whining" rule. It's not always easy to enforce, though.

<sup>74</sup> See, e.g., Model Rules Rule 5.3 (the supervising lawyer is ultimately responsible for the mistakes of a nonlawyer); Model Code DR 4-101(D) (a lawyer "shall exercise reasonable care to prevent his employees, associates, and others whose services are [used] by him from disclosing or using confidences or secrets of a client. . ."); Model Code DR 7-107(J) (a lawyer should "exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under Model Code DR 7-107").

<sup>75</sup> Or, as Pam Maggied puts it, that lawyer should "fall on her own sword rather than stick it in someone else." Maggied Correspondence, *supra* note 4.

<sup>76</sup> Model Rules Rule 5.1 requires partners in a law firm to make sure that all of the lawyers in the firm obey the ethics rules, and it requires supervising lawyers to make "reasonable efforts to ensure that the [supervised] lawyer conforms to the rules of professional conduct." Even though the supervised lawyer, who is bound by the same ethics rules that bind the supervising lawyer, can't escape liability for violating the ethics rules merely because she was being supervised, see Model Rules Rule 5.2(a), she has one small "out": if she was following the supervising lawyer's instructions regarding a grey area of ethics, she will not be held responsible for her conduct (but the supervising attorney *will* be held responsible). See Model Rules Rule 5.1(c)(1); Model Rules Rule 5.2(b).

<sup>77</sup> See *supra* note 61 and accompanying text.

<sup>78</sup> Of course, I'm not referring to junior associates at large law firms. They have little power and no freedom.

### Conclusion: Love Thy Neighbor . . .

If I had to condense this essay to one overriding thought, it would be this: Put yourself in a bankruptcy judge's place. Imagine how you would feel when faced with a barrage of ill-prepared lawyers who bicker about trifles, lie to you and to each other, ignore their clients' needs, and blame others for their own mistakes. Now imagine how much more fun your work would be if lawyers were efficient, if they took pride in their work, if they took responsibility and shared credit, and if they respected the legal profession and their clients. Which would you prefer to have appear before you?