(Almost) Everything We Know about Pleasing Bankruptcy Judges We Learned in Kindergarten

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Think back to when you were young. Your parents probably taught you certain rules to help you learn how to act in society. These rules were fairly simple (at least at first), and they helped you make friends and get along with others. Although you might have chafed against some of the rules, we presume that you followed most of them and learned that there were consequences when you broke the rules. Now, you are grown. If you’re reading this essay, you probably still play by the rules, and you probably dislike those who don’t. Sometimes, you might wonder what happened to those outliers, the ones who flouted the rules. What made them forget what their parents tried to teach them?

Trust us: The judges who watch lawyers misbehave also wonder the same thing.

Bankruptcy practice creates its own little society, with its own set of rules (including state ethics rules, the ethics rules found within the Bankruptcy Code, any ethics rule adopted by the district court or bankruptcy court in which a case is filed, and the local rules1 of behavior). Lawyers aren’t immune from violating these rules, and their violations irritate the heck out of the bankruptcy judges before whom these rule-breaking lawyers appear. Triggering the irritation of judges, when not done deliberately to make a point,2 can be a conflict-limiting move. In other words, if bad lawyers didn’t “learn it in kindergarten,” we sure hope that they’ll learn here.

Whose Team Are You On?

One man alone can be pretty dumb sometimes, but for bona fide stupidity, there ain’t nothin’ can beat teamwork.6

With all of the pressure to serve clients, lawyers may remember that they’re part of a team (the client’s team) but forget that they’re also part of a league7 (the league of the legal system). That league has its own rules that govern the play of all of the teams in the league.8 As NBRI said in Avoiding Judicial Wrath,9 “A lawyer has dual roles: She represents her client, and she acts as an officer of the court.”10 Sometimes, those two roles

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1 And not just any old point: a point about which the judge might be doing wrong, or a point about the law itself being fall-out wrong, limiting a judge for any less important reason is a Bad Thing. Cf. generally Martha Dayner.
2 For a goodprimer on how not to behave as a bankruptcy lawyer, see Debra J. Landis, Annot., Negligence, Inattention, or Professional Incompetence of Attorney in Handling Client’s Affairs in Bankruptcy Matters as Ground for Disciplinary Action—Motion Cases, 70 NBR 414 (2009) (hereinafter Landis).
4 See Adisk, supra n. 7, at 1474 (noting the простое (simple) act of writing to the bankruptcy attorney when there is a misunderstanding)
5 See Adisk, supra n. 7, at 1474 n. 1 & 4. We couldn’t resist.
6 See Avoiding Judicial Wrath, supra n. 4 at 616 n. 2-4 and accompanying text for a longer discussion of the subject about the purposes of the Bankruptcy Code.
8 At least, in NBRI’s view, RUB is a stiululating throw of their own making, and if you disagree with NBRI’s take on the amendments—please cut RUB some slack.
9 Translated from Latin, the phrase means “(Knowledge is power.”
10 Francis Bacon, Meditationes Sacrae: De Nascibilibus (1597), see also Providence 24.5 (King Jongs): “A wise man is strong; yea, a man of knowledge increaseth strength.” The less serious one of us (NBRI) is reminded of a misspeaking: As your body grows bigger, your mind grows slower.
11 "It’s great to know that (clue knowledge is power)
12 See www.theheartoflawyers.com/story/home.php. Line of sight (LOS) refers to the sound and is not an Andrew Lloyd Webber fan.

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judge has plenty to do without having to teach a lawyer about the facts of the lawyer's case.

Bankruptcy judges also don't have time to teach Code novices about how the Code works, and yet there are plenty of bankruptcy lawyer wanna-bes around. In McIntyre v. Comm'n for Lawyer Discipline, the court imposed sanctions against (among others) debtor's counsel, noting:

Other evidence supports the trial court's conclusion appellant knew or should have known representing Pappas in the bankruptcy court was beyond his competence. Appellant testified he had never represented a client in a bankruptcy case. His experience was limited to representing himself as a creditor in a bankruptcy proceeding on at least two occasions. [Bankruptcy attorney and friend of the appellant] Lundauer acknowledged appellant was not a regular bankruptcy practitioner, and further acknowledged an involuntary bankruptcy proceeding was not "ordinary" bankruptcy practice. Appellant represented to Judge Gibson he sought relief on behalf of the bankruptcy trustee when a bankruptcy trustee had not yet been appointed. He represented to Judge Gibson the relief requested was mandatory under the Bankruptcy Code. Judge McGuire found both of these representations to be "legally false." Setting aside the question of whether these representations were made intentionally, appellant was at least mistaken as to the applicable procedure and substantive law at the outset of the involuntary bankruptcy.

The court concluded the point by stating:

All of these problems were brought to appellant's attention. Both bankruptcy judges presiding over the involuntary proceeding raised questions about appellant's representation of Pappas in bankruptcy court. We hold the evidence was legally and factually sufficient to support the trial court's findings and conclusions that appellant knew or should have known he was not competent to accept and continue employment as Pappas's counsel in bankruptcy. The Phantom wore a mask to conceal his disfigured face, which he considered his greatest flaw. Once Christine saw the truth, she told the Phantom that it wasn't his face that she despised, but rather his character, distorted by the Phantom's (perceived) need to lie in shadow and act as he saw fit in order to survive. Although the Phantom told himself that he acted only in response to the cruelty of others, in fact, his character became as distorted as his outward appearance, and his actions were (and perhaps amplified) the others' cruelty toward him. Our advice is to be honest, be as open as you possibly can while plying your trade. Don't even put the mask on, and don't be tempted to deceive either your client or yourself.

Be Prepared

The world's a stage and most of us are desperately unprepared. Great lawyers, in any field of practice, remind us of ducks; gliding calmly above the water while paddling furiously below. Precious little of what these excellent lawyers do is spontaneous or lucky. 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 duties of competency and diligence require 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.

See Avering, Judicial Waif, supra 7 at 617. In NRW, id. MRD argued in that essay, "I never pretend to know anything in law," and we echo NRW's sentiments here. It is important to remember that we are not here to discuss our personal legal prowess, but rather to discuss the duties owed by lawyers to their clients. We do not have the space to discuss all aspects of our legal training, but we believe it is important to recognize that our legal training is extensive and that we have a duty to our clients to use that training to the fullest extent possible.

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This is the moment when the concept of that excellent representation becomes a high-functioning manifestation of obsessive-compulsive disorder.
Great lawyers work hard to maintain their abilities and their reputations. Bad lawyers hope to avoid the consequences of their lack of ability and their lack of diligence. Really, really bad lawyers lose their reputations and, sometimes, their law licenses.

That sticky little issue—not being paid enough to do competent and diligent work—catches a lot of otherwise good lawyers. We recognize the pressures that lawyers face in terms of covering their overhead and making enough money to clear some profit. No one can survive if all of her income is based on pro bono cases. (Mind you, "pro bono" does not mean “oops, the client didn’t pay.”) But remember: “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.”

**Don’t Lie (Part II)**

One of the most striking differences between a cat and a lie is that a cat has only nine lives.

Lawyers have three basic assets: their knowledge, their intelligence and their reputation. Once your reputation is gone, it is well-nigh impossible to win it back.

The fastest way to offend a judge or a colleague is to lie. Judges and colleagues have long memories. A lawyer whose word is meaningless will soon find herself outside the loop, both inside and outside 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.

To make your lives easier, we’re going to use the same sort of simple, declarative sentences that worked when our parents were training us as kids (see chart). Remember: When an attorney signs a pleading that is presented for an improper purpose, or when she advocates unwarranted claims, defenses or contentions, the court may (after notice) award appropriate sanctions against the attorneys, their law firms, and the parties. Even when an attorney doesn’t quite lie, the fact that she’s stretched the truth still can create an irreparably bad relationship between her and the court.

**Talk to Us**

What we have here is a failure to communicate.

One of the most common causes of a worsening relationship (of any kind) is the failure to communicate effectively. Communication failures—either with the other side, with the court, and even with your own client—are often triggers for sanctions (by the court) or grievances (from the client or from opposing counsel). If you need to move the date of the deposition, ask the other side. If you’ve settled something right before court begins, let the judge’s clerk know so that the judge can adjust the docket accordingly. And make sure that your client understands what you’re doing, and why you’re doing it. Communication requires more than simply conveying the status of the case or translating the applicable law into “nonlawyer-ese.”

**Play Nice[ly] with Everyone**

Fine[ly] need the support of fine manners in others.

Civility is still a problem, even after decades of complaints about the decline in civility in the legal profession. Often, civility will beget civility in return. But if you’re still confronted with a lawyer who has committed a serious breach of ethics, you should check your state ethics rules to determine whether you may (permissive) or must (mandatory) report the bad egg.

Why do lawyers have a positive duty to report? For one thing, the...
profession makes a big fuss about self-policing its members. 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.\(^{39}\)

**If Everyone Else Wants to Jump off the Roof, Should You Jump off the Roof, Too?**

Elilhu Root had it exactly right when he told a client: “The law lets you do it, but don’t. It’s a rotten thing to do.”\(^{40}\)

We’re sick and tired of lawyers hiding behind the excuse that their clients told them to do something that the law prohibits.\(^{41}\) It is one thing to help a client parse the rules fairly. But misusing loopholes in a way that contradicts the main reason for a rule is a very grey area.

Sure, if a law is poorly written, you can “help” your client “follow” the law all the way into a loophole; but by so doing, are you really acting in your client’s long-term best interests? (Ask those clients who invested in tax shelters later found to be illegal. Better yet—ask those lawyers who lost their jobs when their law firm went out of business after paying penalties for providing that tax shelter advice.\(^{45}\) Or just ask anyone ever associated with Enron.\(^{46}\)

An attorney holds a unique place in society. Despite the profession’s reputation, the attorney may not put all other considerations aside solely to pursue profit, as others are free to do in our capitalistic society. In addition to resisting his own untoward impulses, the attorney must also rebuf inappropriate suggestions by his client. 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. From the judge’s perspective, if the lawyer justifying her client’s actions can’t pass the “blush test,” 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 lawyer has a duty to try to change the client’s mind and may have the right to withdraw from representation. Although the power of a withdrawal threat hits the client “where he lives” by making explicit the it-for-tot of “I won’t represent you if you persist in trying something illegal” (which in turn cuts off the client’s access to representation), that is not so bad. We really should not be encouraging clients to violate laws intentionally.\(^{47}\)

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39. Model Rules Rule 5.4 defines professional misconduct as, among other things, violating or attempting to violate the Model Rules or misuse of information received to do so. “Colluding” is considered a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” Engagement in conduct involving dishonesty, fraud, deceit or misrepresentation, and “engaging in conduct that is prejudicial to the administration of justice.” Nevada Rules Rule 5.4 is worded, to practical purposes, similarly. See also Model Code 5-1-102(A) (same principle).

40. See Nevada Rules Rule 5.3(a) (the ethical purpose of Model Rules Rule 5.3(a) (“A lawyer who knows 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 report such knowledge to the appropriate professional authority.”). Model Code 5-1-102(A) (“A lawyer possessing unprivileged knowledge of a violation of a Disciplinary Rule shall report such knowledge to the appropriate disciplinary authority.”). This is similar to the ethical rule in the Oregon Code of Professional Conduct. See Code of Professional Conduct, Rule 5.3(a). See also, e.g. Alaska Bar Rule 2.2.1 (the ethical rule in the Alaska Bar Code of Professional Conduct). See also, e.g. Rule 5.3(a) (“A lawyer who knows 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 report such knowledge to the appropriate professional authority.”). See American Bar Association, Model Rules of Professional Conduct Rule 5.3(a) (“A lawyer possessing unprivileged knowledge of a violation of a Disciplinary Rule shall report such knowledge to the appropriate disciplinary authority.”). See also, e.g. Rule 5.3(a). See, e.g., Attorney General, Attorney Self-Regulation, Consumer Protection, and the Future of the Legal Profession, 3 Kan. J. L. & Pub. Policy & Pol'y (Winter 1994), at 29 (noting how the ABA’s own clients violate rules of ethical conduct and are not subject to discipline under the ABA’s rules).

41. See, e.g., Chief Justice Rehnquist, “Moments of Truth for Lawyers,” in Rethinking Legal Ethics, supra at 1027 (“moral code alone”).


47. Follow Through on Your Promises

**He was ever precise in promise-keeping.**

The practice of law is just too fast these days. Fixers begat Federal Express, Federal Express\(^{48}\) begat e-mails, e-mails begat Blackberries,\(^{49}\) Blackberries\(^{50}\) begat IM-ing, and all of these “time-savers” have put us on the express train to malpractice. Lawyers and their clients make stupid mistakes because they don’t have time to sit and think about what they’re doing. (Nancy Temple, of Arthur Andersen fame, sent out her fateful e-mail to David Duncan around 8:30 p.m. and found herself at the center of an obstruction of justice trial.)\(^{51}\) We have two words of advice. Slow down.

**Don’t Be a Cry-Baby**

*Qui s’excuse, s’accuse.*\(^{52}\)

47. Every lawyer would agree to give unadvised advice, withdraw then would become a more effective adversary.


53. Model Rules Rule 5.1 requires partners in a law firm to make sure that all of the lawyers in the firm obey the rules, and it requires supervising lawyers to make reasonable efforts to ensure that the “appropriate lawyer conforms to the rules of professional conduct.” Nevada Rules Rule 5.1 is identical. Even though the supervising lawyer, who is bound by the same ethical rules that bind the supervising lawyer, cannot escape liability for violating the ethics rules strictly because the individual lawyer was being supervised, see Model Rules Rule 5.3(a), she has one small “out”: if she was following the supervising lawyer’s instructions regarding a given 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(a); Nevada Rules Rule 5.1(a); Model Rules Rule 5.3(a); Nevada Rules Rule 5.3(a).

54. Avast Consulting, Legal Advice (supra at 1027) (footnotes omitted).


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If You Don’t Want to Play by the Rules, Don’t Play the Game

If you must play, decide upon three things at the start: the rules of the game, the stakes, and the quitting time.”\(^{50}\)
order the disgorgement of fees. Additional monetary sanctions are available when necessary to deter (but not to punish) sanctionable conduct. Moreover, sanctions for civil contempt are available where clear and convincing evidence demonstrates violation of a specific and definite order of the court. Furthermore, claim and issue preclusion, and even judgment by default, are also available, particularly for discovery abuses in which a party has disobeyed an order of the court. In addition, a court may impose non-monetary sanctions in order to prevent a repetition of sanctionable behavior. In McIntyre, the court’s sanctions included a public reprimand, the suspension from practicing law for 18 months, and the suspension from practicing bankruptcy law until completing 18 months of an “association” with an experienced bankruptcy attorney.

If we 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, who lie to you, to their clients, and to each other, who ignore their clients’ needs, and who 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 told the truth, if they took responsibility and shared credit, and if they respected the legal profession and their clients. If you were a bankruptcy judge, what would you prefer?

Litigator’s Perspective: Rooker-Feldman: Still a Litigator’s Mischief-Maker?

actions that are not otherwise doctrines such as preclusion, and litigants attempted to invoke the doctrine as a matter of course despite its rather specific roots. A simple Westlaw search reveals that the term “Rooker-Feldman” is now referenced in more than 4,500 federal cases. In contrast, 28 U.S.C. §1257 is referenced in only a little more than one-third of that number of federal cases.

In the bankruptcy world, before Exxon Mobil, the Rooker-Feldman doctrine had been commonly implicated and inconsistently applied in cases involving the automatic stay, dischargeability, property of the estate, avoidance actions and other more discrete issues in which a bankruptcy court might be forced to examine issues relating to prior state court proceedings. With respect to actions involving the automatic stay, courts were on opposite ends of the spectrum. Compare Grunt v. County of Los Angeles (In re Gruntz), 202 F.3d 1074, 1082-84 (9th Cir. 2000) (holding that Rooker-Feldman doctrine does not bar federal courts from examining whether state court judgment violated automatic stay); In re Benalacazar, 283 B.R. 514, 529 (Bankr. N.D. Ill. 2002) (same and further holding that interlocutory orders of state courts do not trigger Rooker-Feldman); and Singleton v. Fifth Third Bank (In re Singleton), 230 B.R. 533, 538-39 (6th Cir. B.A.P. 1999) (holding that state courts have concurrent jurisdiction over scope and effect of automatic stay and under Rooker-Feldman their rulings strip bankruptcy courts of jurisdiction to determine issue); Sixten v. Complete Aircraft Servs. (In re Sixten), 258 B.R. 554, 557 (Bankr. E.D.N.Y. 2001) (same). Dischargeability actions similarly generated polar results. Compare Raffel v. Raffel, 283 B.R. 746 (8th Cir. B.A.P. 2002) (Rooker-Feldman precludes review), with McGhan v. Ruiz (In re McGhan), 399 F.3d 1172, 1180 (9th Cir. 2002). The disagreements over the application of the Rooker-Feldman doctrine to other bankruptcy court orders were similarly widespread.

The Supreme Court Emphasized the Doctrine’s Narrow Application

Although the Supreme Court has not considered the application of the doctrine in a bankruptcy context, it has recently sought to rein in its rampant misuse. In Exxon Mobile, the Supreme Court declared:

The Rooker-Feldman doctrine, we hold today, is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments. Rooker-Feldman does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions.

544 U.S. at 284. Less than a year after Exxon Mobil, the Court revisited the Rooker-Feldman doctrine in Lance, 546 U.S. at 463 (“Accordingly, under what has come to be known as the Rooker-Feldman doctrine, lower federal courts are precluded from exercising appellate jurisdiction over final state-court judgments.”). In both recent cases, the