(Almost) Everything We Know about Pleasing Bankruptcy Judges We Learned in Kindergarten[1]

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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.

Nancy B. Rapoport

Bankruptcy practice creates its own little society,[2] 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 rules[3] 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,[4] can be a career-limiting move.[5] In other words, if bad lawyers didn't "learn it in kindergarten," we sure hope that they'll learn here.

Straight & Narrow

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 league[7] (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 NBR 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 conflict, such as when a client wants to lie under oath and the system wants the lawyer to prevent fraud on the court.[11] But the ethics rules provide the tie-breaker: Duty to the system trumps duty to the client. That priority must be the case, as putting the client first can erode the system's legitimacy past the breaking point.

If the Game Creates Ties, the Game Needs a Tiebreaker

I think that the team that wins game five will win the series. Unless we lose game five.[12]

Not only do bankruptcy lawyers have to protect the[13] legal system as a whole, they also have to understand enough about the Code to honor its principles. Unfortunately, the Code itself has two competing principles: to allow the debtor a fresh start and to provide a collective remedy for creditors.[14] Those two principles clash all the time, and Congress hasn't really provided any tiebreakers, although the recent amendments to the Code[15] seem to have tilted the scale towards creditor protection.[16]

Don't Lie (Part I)

Nam et ipsa scientia potestas est.[17]

Deception makes for great theater. In the famous musical *The Phantom of the Opera*,[18] the Phantom (who wears a mask

[1] With apologies to Robert Fulghum and his book, *All I Really Need to Know I Learned in Kindergarten: Uncommon Thoughts on Common Things* (1993). Special thanks are due to Candace Carlyon, whose outline and edits made this essay so much better. An earlier version of this essay appeared as Nancy B. Rapoport, *Avoiding Judicial Wrath: The Ten Commandments for Bankruptcy Practitioners*, 5 J. Bankr. L. & Prac. 615 (Sept./Oct. 1996). My thanks go to Roland Bernier, of course, for his hard work and good cheer; to my best editor, Jeff Van Niel; and to my dad, Morris Rapoport.

[2] Perhaps there are really two societies: the society involving consumer debtors, and the society involving business debtors.

[3] And occasionally secret (or even double-secret) rules. *Cf. Animal House* (MCA/Universal (1978)), imdb.com/title/tt0077975/quotes (double-secret probation).

[4] And not just any old point: a point about what the judge might be doing wrong, or a point about the law itself being flat-out wrong. Irritating a judge for any less important reason is A Bad Thing. *Cf.* generally Martha Stewart.

[5] 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].

[6] Edward Abbey, *The Monkey Wrench Gang* 313 (Lippincott Williams & Wilkins 1975).

[7] Or a guild. That's a subject for another day.

[8] *Cf. Aside, The Common Law Origins of the Infield Fly Rule*, 123 U. Pa. L. Rev. 1474 (1975) [hereinafter Aside]. NBR has always wanted to cite this piece somewhere.

[9] *Avoiding Judicial Wrath, supra* n. * at 624-25.

[10] *Id., citing* Nancy B. Rapoport, *Seeing the Forest and The Trees: The Proper Role of the Bankruptcy Attorney*, 70 IND. L.J. 783 (1995) (discussing the attorney's duties to the court and to his clients) [hereinafter Role]. NBR goes on to explain:

> 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...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 one of us (NBR) had with Professor John D. Ayer, Professor Ayer suggested a reasonableness standard that balances the two duties. Although we haven't played around with that idea enough to decide if we really like it better than NBR's "Pollyanna ethics," the reasonableness standard is significantly better than one that promotes zealous advocacy above all other considerations.

Avoiding Judicial Wrath, supra n. * at 624 n.36 (citation in footnote omitted).

[11] *See Role, supra* n. 9 at 787-806.

[12] Charles Barkely, "Charles Barkely Profile" at www.interbasket.net/players/usa/barkley.htm (quoting the former basketball player during the 1994 National Basketball Association playoffs).

[13] *See Aside, supra* n. 7 at 1474 nn. 1 & 4. We couldn't resist.

[14] *See Avoiding Judicial Wrath, supra* n. * at 616 nn. 2-4 and accompanying text for a longer discussion of the debate about the purposes of the Bankruptcy Code.

[15] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005).

[16] At least, in NBR's view. RJB is still sorting through his own view, and—if you disagree with NBR's take on the amendments—please cut RJB some slack.

[17] Translated from Latin, the phrase means "[k]nowledge is power." Francis Bacon, *Meditationes Sacræ. De Hæresibus* (1597); *see also Proverbs 24:5* (King James) ("A wise man is strong; yea, a man of knowledge increaseth strength."). The less serious one of us (NBR) is reminded of a related version:

> As your body grows bigger
> Your mind grows flowered
> It's great to learn
> ['Cause knowledge is power!
> www.schoolhouserock.tv/.

[18] *See* www.thephantomoftheopera.com/poto/home.php. One of us (NBR) wants to go on record that she is not an Andrew Lloyd Webber fan.

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to cover his disfigured face), seduces his naïve victim, the lovely Christine, by commanding her (in song) to "close your eyes[,] for eyes will only tell the truth, and the truth isn't what you want to see. In the dark it is easy to pretend that the truth is what it ought to be."[19] Christine believed that the Phantom, who had acted as a mentor to her in teaching her how to sing, was an angel.[20] Even when signs began to emerge indicating that the Phantom was, shall we say, no seraph, Christine preferred just to close her eyes and allow the delusion to continue. Until her hero rescued her, she remained willfully blind.

Willful blindness didn't work for Ken Lay or Jeff Skilling, both of Enron fame.[21] It won't work for you, either. Too many lawyers in court[22] fail to inform themselves about the most important issues of their case. Every bankruptcy 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.[23] In *McIntyre v. Comm'n for Lawyer Discipline*,[24] 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] Lindauer 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.[25]

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.[26]

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 mirrored (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 unrehearsed.[27]

Great lawyers, in any field of practice, remind us of ducks: gliding calmly above the water while paddling furiously below.[28] Precious little of what these excellent lawyers do is spontaneous or lucky.[29]

> 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.[30]

19 Andrew Lloyd Webber, "The Music of the Night," on *Highlights from the Phantom of the Opera* (PolyGram Records 1987). One of us (NBR) is reminded of the scene from *Forget Paris* (Columbia Pictures 1995) in which Billy Crystal's character tells Debra Winger's character that one of the songs in Phantom sounds an awful lot like the old song, "School Days, School Days, Dear Old Golden Rule Days." Sadly, she notes that this particular scene may have been the only funny one in the entire movie.

20 In one song, she pleads with him: "Angel of Music, hide no longer!" The phantom answers: "Flattering child, you shall know me; see why, in shadows, I hide...." Andrew Lloyd Webber, "Angel of Music," on *Highlights from the Phantom of the Opera* (PolyGram Records 1987).

21 NBR just couldn't let an article go by without mentioning Enron, could she? For an exhaustive (and probably exhausting as well) overview of Enron, see Nancy B. Rapoport and Bala G. Dharan, *Enron: Corporate Fiascos and Their Implications* (Foundation Press 2004); Mimi Swartz with Sherron Watkins, *Power Failure: The Inside Story of the Collapse of Enron* (2003); Robert Bryce and Molly Ivins, *Pipe Dreams: Greed, Ego, and the Death of Enron* (2002); Brian Cruver, *Anatomy of Greed: The Unshredded Truth from an Enron Insider* (2002); Loren Fox, *Enron: The Rise and Fall* (2002); Peter C. Fusaro and Ross M. Miller, *What Went Wrong at Enron: Everyone's Guide to the Largest Bankruptcy in U.S. History* (2002).

22 [These lazy lawyers] 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 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.

Avoiding Judicial Wrath, *supra* n. * at 617 (footnotes omitted). The duty of competence appears in every legal ethics code. *See, e.g.*, Nevada Rules of Professional Conduct Rule 1.1 (2006) [hereinafter Nevada Rules] (taken verbatim from Model Rules of Professional Conduct Rule 1.1); Model Rules of Professional Conduct Rule 1.1 (1994) [hereinafter Model Rules] (requiring "competent representation," which the rule 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 6-191(A)(3) (prohibiting the "[n]eglect of a legal matter"). So does the duty of diligence. *See, e.g.*, Model Rules Rule 1.3 (requiring diligence); Nevada Rules Rule 1.3 (same); Model Code DR 6-101(A)(3) (same). *Cf. In re Remington Dev. Group Inc.*, 168 B.R. 11, 17-18 (Bankr. D. R.I. 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]").

23 *See Avoiding Judicial Wrath*, *supra* n. * at 617-18.

24 169 S.W. 3d 803 (Tex. App.—Dallas 2005).

25 *Id.* at 809.

26 *Id.* at 810.

27 *See* Lonely Planet, *Irish Language and Culture* 160 (2007) (quoting Irish playwright Sean O'Casey).

28 *See Avoiding Judicial Wrath*, *supra* n. * at 618. As NBR said in that essay, "There is nothing undignified about calling a lawyer 'duck-like.' I much prefer ducks to wolves (as in 'you creditors are all a pack of wolves'), snakes, weasels, or certain parts of the human anatomy." *Id.* at 618, n. 12. Our defensiveness about using "ducks" in a pejorative way resonates because we both have connections to the University of Houston Law Center, which possesses a coat of arms containing three ducks. (Well, really, they're martlets; but martlets are—essentially—swamp ducks.) We like to think that we've got all of our ducks in a row.

29 Think of the concentration that such excellence requires as a high-functioning manifestation of obsessive-compulsive disorder.

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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."[31]

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.[32]

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.[33]

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.[35] 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.[36]

One of the most common causes of a worsening relationship (of any kind) is the failure to communicate effectively.[37] Communication failures—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 manners need the support of fine manners in others.[38]

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,[39] you should check your state ethics rules to determine whether you *may* (permissive) or *must* (mandatory) report the bad egg.[40]

Why [do lawyers] have a positive duty to report? For one thing, the

30 *Avoiding Judicial Wrath, supra* n. * at 618 (some footnotes omitted).

31 *Id.* at 619 and n. 17.

32 Mark Twain, *Pudd'nhead Wilson* 96 (Penguin Classics, 1986) (1894).

33 *Avoiding Judicial Wrath, supra* n. * at 619 (citations omitted).

34 By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

35 For a cautionary tale, *see* McIntyre, *supra* n. 23, in which an attorney, who had been representing a client in an unrelated matter, assumed representation after a creditor filed an involuntary petition and the attorney was unable to contact the client, who had "disappeared." The attorney signed papers in the debtor's name and without the debtor's permission. *Id.* at 805.

36 *Cool Hand Luke* (Warner Home Video (2002); theatrical distribution, 1967), imdb.com/title/tt0061512/quotes.

37 "What we have here is a failure to communicate." *Cool Hand Luke* (Warner Home Video (2002); theatrical distribution, 1967), imdb.com/title/tt0061512/quotes.

38 Ralph Waldo Emerson, "Conduct of Life. Behavior," in *Prose Works of Ralph Waldo Emerson: In Two Volumes, Volume II* 412 (James R. Osgood and Company 1875).

Parent-speak vs. Ethics-speak

Parent-speak	Ethics-speak
We love you and your sister exactly the same.	*Don't represent two clients simultaneously if you know there's likely to be a conflict of interest.*
I'll be the judge of that.	*Let the bankruptcy court decide if there's a conflict. Disclose, disclose, disclose.*
What really *happened?*	*Don't lie about the case law on point.*
I will punish you more for lying about breaking the lamp than for breaking the lamp.	*Don't lie about the facts of your case.*
If you swear that you're telling the truth, you'd better be telling the truth.	*Remember Bankruptcy Rule 9011(b).*[34]
I'm very disappointed in you.	*Call your malpractice carrier.*

profession makes a big fuss about self-policing its members.[41] 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.[42]

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

Elihu 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."[43]

We're sick and tired of lawyers hiding behind the excuse that their clients wanted them to do something that the law prohibits.[44] 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 rebuff 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 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), that is not so bad. We really shouldn't be encouraging clients to violate laws intentionally.[47]

Follow Through on Your Promises

He was ever precise in promise-keeping.[48]

The practice of law is just too fast these days. Faxes begat Federal Express,® Federal Express® begat e-mails, e-mails begat Blackberries®, Blackberries® 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.)[49] We have two words of advice: Slow down.

Don't Be a Cry-Baby

Qui s'excuse, s'accuse.[50]

One of us (NBR) believes that lawyers who blame others—especially junior lawyers and support staff—for their own mistakes (including the failure to supervise)[51] are sniveling weasels, worse than anything that Dilbert and his cartoon office-mates could imagine. Shame on them.

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. 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.

Blaming other lawyers for careless mistakes is similarly unprofessional, and the ethics rules don't permit blame-shifting. 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. 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. In exchange, they have to be prepared to develop the moral fiber that accompanies that power and that freedom.[52]

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.[53]

39 Model Rules Rule 8.4 defines professional misconduct as, among other things, violating (or attempting to violate) the Model Rules (or inducing someone else to do so), "commit[ting] 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." Nevada Rules Rule 8.4 is worded, for practical purposes, identically. *See also* Model Code DR 1-102(A) (conveying the same general principles).

40 *See* Nevada Rules Rule 8.3(a) (taken verbatim from Model Rules Rule 8.3(a)); Model Rules Rule 8.3(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 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."). We sympathize with those of you who are licensed in more than one jurisdiction and whose ethics rules might conflict. But that is a problem for another day.

41 *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.

42 *Avoiding Judicial Wrath*, *supra* n. * at 627 (footnotes omitted).

43 Sol M. Linowitz, "Moment of Truth for Lawyers," www.cosmos-club.org/web/journals/1995/linowitz.html.

44 *Id.* ("Elihu Root's words are worth recalling: 'About half the practice of a decent lawyer consists in telling would-be clients that they are damn fools and should stop.'").

45 *See, e.g.*, Ameet Sachdev, "Firm admits selling bogus tax shelters; Jenkens & Gilchrist closes Chicago office," Dallas HQ, Chi. Trib. (March 30, 2007), www.chicagotribune.com/business/chi-0703300072mar30,0,7013212.story?track=rss.

46 *See Avoiding Judicial Wrath*, supra n. * at 628-29 (footnotes omitted).

47 If every lawyer would refuse to give unethical advice, withdrawal then would become a more effective remedy.

48 William Shakespeare, "Measure for Measure." in *The Dramatic Works* 95 (Hartford Silas Andrus 1831).

49 *See* picker.uchicago.edu/Enron/TempleEmail(10-16-01).pdf; Mary Flood, "Decision by jurors hinged on memo," Hou. Chron., June 19, 2002. www.chron.com/disp/story.mpl/special/andersen/1458547.html.

50 Translated from French, "He who excuses himself accuses himself." Ian Davidson, *Voltaire in Exile* 269 (Grove Press 2004) (quoting French author Gabriel Meurier (1530–1601)).

51 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." Nevada Rules Rule 5.1 is identical. 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): Nevada Rules Rule 5.1(c)(1); Model Rules Rule 5.2(b); Nevada Rules Rule 5.2(b).

52 *Avoiding Judicial Wrath*, *supra* n. * at 633 (footnotes omitted).

53 T.S. Bogorad, *The Importance of Civility* 167 (AuthorHouse 2006) (quoting a Chinese proverb).

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If you engage in sanctionable conduct, the consequences may be more damaging to your career than you realize. The inherent power of courts to sanction behavior is *in addition to* the ability to issue sanctions pursuant to Rule 11.[54] Not only are the sanctions unpleasant in themselves, but other ramifications will follow those sanctions: Your professional reputation and your relationships with others within the field will suffer, and your malpractice premiums will increase.

Attorneys generally think of sanctions as monetary awards. At a minimum, a court can award attorneys' fees that one side "cost" the other side because of sanctionable behavior.[55] A court may also order the disgorgement of fees.[56] Additional monetary sanctions are available when necessary to deter (but not to punish) sanctionable conduct.[57] Moreover, sanctions for civil contempt are available where clear and convincing evidence demonstrates violation of a specific and definite order of the court.[58] 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.[59] 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,[60] and the suspension from practicing bankruptcy law until completing 18 months of an "association" with an experienced bankruptcy attorney.[61]

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? ■

54 Recently, the Supreme Court emphasized "the broad authority granted to bankruptcy judges to take any action that is necessary or appropriate 'to prevent an abuse of process' described in [U.S.C. 11] § 105(a)." *Marrama v. Citizens Bank*, 127 S. Ct. 1105, 1112 (U.S. 2007). At least one bankruptcy court has recently relied on *Marrama* to buttress its Rule 9011 sanctions against a law firm that prepared a consumer debtor's bankruptcy schedules and failed to disclose a personal injury claim. *See In re Opra*, 2007 WL 915205 (Bankr. E.D. Mich. March 28, 2007).

55 *See, e.g., In re Marsch*, 36 F.3d 825, 831 (9th Cir. 1994).

56 *See, e.g., In re N & T Assocs.*, 134 B.R. 17 (Bankr. D. Nev. 1991).

57 *See In re Dyer*, 322 F. 1178, 1192-95 (9th Cir. 2003).

58 *See id.* at 1190-91.

59 Fed. R. Bankr. P. 7037, incorporating Fed. R. Civ. P. Rule 37(b)(2).

60 *See McIntyre, supra* n. 23 at 814-15.

61 *Id.* at 815. Bankruptcy courts have statutory and inherent authority to bar attorneys from practicing before them. *See, e.g., In re Crayton*, 192 B.R. 970, 976 (9th Cir. BAP 1996).

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

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actions than other 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 Gruntz 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 Benalcazar*, 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); *Sisken v. Complete Aircraft Servs. (In re Sisken)*, 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. Rutz (In re McGhan)*, 399 F.3d 1172, 1180 (9th Cir. 2002). The disagreements over the application of the *Rooker-Feldman* doctrine to other bankruptcy concepts 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