(Almost) Everything We Learned About Pleasing Bankruptcy Judges, We Learned in Kindergarten

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(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 rules 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, can be a career-limiting move. In other words, if they’re part of a team (the client’s team) but forget that they’re also part of a league (the league of the legal system). That league has its own rules that govern the play of all of the teams in the league. As NBR said in Avoiding Judicial Wrath, “A lawyer has dual roles: She represents her client, and she acts as an officer of the court.”

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. 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.

Not only do bankruptcy lawyers have to protect the 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.

Don’t Lie (Part I)

Nam et ipsa scientia potestas est.”

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

1 See Role, supra, at 767–786.
3 See, supra, nota 7 at 1474 nn. 1 & 8. We couldn’t resist.
4 See Avoiding Judicial Wrath, supra n. 4 at 616 n. 2–4 and accompanying text for a longer discussion of the debate about the purposes of the Bankruptcy Code.
6 In passing, I have to say that I once sat on a jury in my own case, and if you disagree with NBR’s take on the amendments—please cast a vote some other day.
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17 See, supra, at 654–25.
18 See, supra, at 654–25.
to cover his disfigured face), seduces his native 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 scrup, 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 court22 fail to inform themselves about the most important issues of their case. Every bankruptcy

19 Andrew Lloyd Webber, "The Music of the Night," in Highlights from the Phantom of the Opera (PolyGram Records 1986). One of an 888 is
remained of the scenic from Fargen Paine (Columbia Pictures 1959) in which Billy Crystal's character acts Debra Winger's character that one of the
song's "Phantom" vocals was not like the song."School Days, School Days, Dear Old Golden Rule Days." Sec. 3, she notes that this particular scene may have been the only time one in the entire movie.

20 In one song, she says with tears: "Angel of Music, hide no longer." The phantom answers: "Flattering child you shall know me, see why, in

21 3M just can't let an article go by without mentioning Enron, can she? For an exhaustive (and probably exhausting as well) overview of
Enron, see Nancy S. Rapoport and Balb Ch. Dhawan, Enron: Corporate Fascism and Their Imitations (Foundation Press 2004); Mimi Swartz
with Sharon Wallace, Power Failure: The Inside Story of the Collapse of Enron (2003); Robert Breyer and Mel Kay, Plexi Synapsis: Green, Ego,
and the Death of Enron (2003); Bruce Craven, Anatomy of Greed: The Unauthorized Truth from an Enron Insider (2002); Lenn Fox, Enron: The
Rise and Fall (2002); Peter C. Fusaro and Rosa 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, "Yes, Your Honor I don't know the answer to that. The law is so complicated that it is
impossible to answer." The lawyers duty of competence requires better preparation than most judges are seeing in their courtrooms. Even
when preparation is excessive, it is far more cost-effective than ignorance—and less embarrassing.

Among Judicial Whiffs, supra n. 4 at 617, (notorious omit): The duty of competence appears in every legal ethics code. See, e.g., Nevada
Model Rules) (requiring "competent representation") which the rule
defined as being "able to handle the legal knowledge, skill, thoroughness and
preparation reasonably necessary for the representation."; see also, Model
Model Code) (requiring "competent representation," which the rule
defined as being "able to handle the legal knowledge, skill, thoroughness and
preparation reasonably necessary for the representation"); see also, Model
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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

23 See Averkis Judicial Whiff, supra n. 4 at 617-18
25 See id. at 60.

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
(pecked) 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
can possibly while plying your trade. Don't even put the mask on, and don't be tempted to deceive either your client or
yourself.

The world's a stage and most of us are desperately unprepared.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
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.

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**Play Nice with Everyone**

Fine[ly] with Everyone

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 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 stretched the truth still can create an irreparably bad relationship between her and the court.

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**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—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.”
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."

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

Elie H. 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." We're sick and tired of lawyers hiding behind the excuse that their clients wanted them to do something that the law prohibits. 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.) Or just ask anyone ever associated with Enron.

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 capitalist 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 his 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's-for-it's-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.

Follow Through on Your Promises

He was ever precise in promise-keeping.

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 obscenity of justice trial.) We have two words of advice. Slow down.

Don't Be a Sissy-Baby

Qui s'excuse, s'accuse.

If every lawyer were to give the same advice, we'd all become more effective attorneys.

William Shakespeare, "Measure for Measure," in The Dramatic Works (1623)."
order the disgorge 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?

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

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actions other 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 Raffel v. Raffel*, 283 B.R. 746 (9th Cir. B.A.P. 2002) (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); *Siskin v. Complete Aircraft Servs. (In re Siskin)*, 258 B.R. 544, 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 cases 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