Bankruptcy Pro Bono Representation of Consumers: The Seven Deadly Sins

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Bankruptcy

Pro Bono

Representation of Consumers

The Seven Deadly Sins
ride, envy, wrath, sloth, avarice, glutony, and lust. In Catholic theology, these seven deadly sins are considered such odious failings that they are fatal to a soul’s spiritual progress. Renaissance poet Dante Alighieri built his seven levels of Purgatory around those sins. At the gate of Purgatory, Dante met an angelic gatekeeper, who inscribed the letter “P” on his forehead seven times. Upon progressing through each of Purgatory’s levels, one “P” was removed.

The seven deadly sins for pro bono attorneys representing consumer debtors in bankruptcy may not have the same dire eternal consequences as for those misguided enough to veer from the spiritual straight and narrow. But each one of these “sins” has its own negative consequences, some of which may impede or terminate your client’s protection, while others might affect a lawyer’s practice.

In formulating this lawyerly list of seven deadly sins, the authors looked at the amendments to the Bankruptcy Code (BAPCPA), the revised Bankruptcy Rules, the Texas Disciplinary Rules of Professional Conduct, and associated case law. Although Dante likely had good reason for the order in which he presented the seven deadly sins, the authors have used artistic license to rearrange that order.

**ENVY—Eligibility to Practice in the Appropriate Court**

“This circuit,” said my teacher, “knots the scourge for envy; and the cords are therefore drawn by charity’s correcting hand.”

Dante described envy as “love of one’s own good perverted to a desire to deprive other men of theirs.” For attorneys, the deadly sin of envy is associated with an attorney’s eligibility to appear before the court, on the theory that only an envious attorney would try to appear in court without going through the appropriate admissions procedure.

An attorney’s eligibility to appear before a particular court seems so elementary that it almost does not warrant mentioning. After all, who would peril his own career so recklessly as to appear before the court without being duly authorized? Unfortunately, though rare, the practice isn’t extinct.

A judge confronting a lawyer who is ineligible to practice before the court typically wishes to use charity’s correcting hand quite firmly. Bankruptcy attorneys practicing in the Southern District of Texas operate under four main sets of rules: the Bankruptcy Code and Bankruptcy Rules, the local bankruptcy rules, the local rules of the district, and the Texas Disciplinary Rules of Professional Conduct. These rules make it clear that one must be eligible to practice before the court, either through admission to general practice under the appropriate rules or pro hac vice admission.

Why would an attorney jeopardize so much by continuing to represent a client after being ordered by a court to find someone else? After all, courts do not always give such warnings, and when they do, it seems prudent to follow their instructions. Then again, it also seems illogical to be envious of others. Dante saw the envious, who dwelled in the second ledge of Purgatory, penalized by having their eyes forced shut to prevent them from receiving pleasure from watching misfortune befall others. Lawyers similarly should approach a court with open eyes.

**SLOTH—Lack of Competence in the Relevant Subject Matter**

“Why partest from me, O my strength? So with myself I communed; for I felt my o’er-till’d sins slacken.”

Originally described as “sadness or apathy,” Dante characterized sloth as a failure to love God with all due zeal, labeling it “gloominess or indifference.” An attorney’s “sloth” is associated with his or her lack of competence in bankruptcy.

Whether a lawyer engages in sloth because of some overreaching ambition, simple carelessness, or lack of resources, attorneys always should be diligent in weighing their abilities to manage a case—before they take on that representation. This principle is especially true in such specialty niches as bankruptcy. Unless there are emergency circumstances, an attorney may not undertake a representation for which he is unqualified, unless he simultaneously associates with a lawyer who is competent in that area of law. Plain and simple, an attorney should not represent a client in matters that are “beyond the lawyer’s competence.”

In Dante’s Purgatory, those who were guilty of sloth were purged of the sin by continually running, demonstrating their zeal for penance. On the other hand, those attorneys who overcome apathy—who dare to respect their role in the legal system by obtaining and maintaining their skills—can avoid this deadly sin.

**PRIDE—Are Attorneys “Debt Relief Agencies” under BAPCPA?**

“My old blood and forefathers’ gallant deeds made me so haughty, that I clean forgot the common mother; and to such excess wax’d in my scorn of all men, that I fell…”

The Divine Comedy placed the deadly sin of pride on the very first level of Purgatory. For the purposes of eternity and a soul’s destiny, pride is defined as “the love of self perverted to hatred and contempt to one’s neighbors.” For attorneys, pride is equated with the statutory linking of attorneys to that of a “debt relief agency” under BAPCPA. (Admittedly, a stretch, but please bear with the authors.) This little piece of Purgatory may seem less dramatic than Dante’s, but its importance should not be minimized.

Courts are split on the question of whether attorneys are debt relief agencies under BAPCPA. BAPCPA defines a “debt relief agency” as anyone who provides any bankruptcy assistance to an assisted person in return for the payment of money...
or other valuable consideration. Debt relief agencies have been assigned numerous new duties under revised §§ 526-28 of the Code.

The term “bankruptcy assistance” includes any services “sold or otherwise provided” that are expressly or impliedly for the purpose of providing advice or counsel to an assisted person. An “assisted person” is a person whose debts are primarily consumer debts in nature and that do not exceed $150,000. Debts are “consumer in nature” when they are incurred primarily for personal, family, or household purposes.

Explicitly excluded from the definition are: (1) those who act in the capacity of officer, director, employee, or agent of one providing bankruptcy assistance; (2) non-profit organizations exempt from paying taxes under § 501(c)(3) of the Internal Revenue Code; (3) a creditor who is assisting the debtor to restructure his debt with that particular creditor; (4) banks and credit unions; and (5) one who is acting in his capacity as an author, publisher, distributor, or vendor of works subject to copyright protection under Title 17.

Whether an attorney is considered to be a debt relief agency (or not) is important because of the numerous responsibilities the statute assigns to debt relief agencies. Courts concluding that attorneys and/or their firms are debt relief agencies have explained that, because debt relief agencies provide “bankruptcy assistance,” which may include legal representation, attorneys offering such legal representation are providing the service ascribed to the debt relief agencies, and thus fall within the definition of debt relief agencies.

Those same courts note that although Congress considered excluding attorneys from the definition of debt relief agencies, it did not.

Courts that do exclude attorneys from the definition of debt relief agencies reason that, although the definition of debt relief agency encompasses many tasks typically performed by an attorney, the definition of debt relief agency does not explicitly mention “attorney” or “lawyer.” The term “attorney” is, in fact, defined elsewhere. One court has opined that, because the term “attorney” clearly does not mean the same thing as “debt relief agency,” the ordinary meaning of those terms should govern their statutory construction, absent special statutory definitions. The same court declared the incorporation of “legal representation” into the services provided under the term “bankruptcy assistance” to be an instance of Congress’s intention to protect consumers from the unauthorized practice of law by bankruptcy petition preparers.

Another basis for excluding attorneys from the definition of debt relief agency is the doctrine of constitutional avoidance. Any construction of a statute that creates grave constitutional questions is less desirable than a construction without such questions. Still another argument takes a “split the baby” approach: even if attorneys generally might fit within the definition of debt relief agencies, at least one attorney has argued that an attorney working pro bono does not receive valuable consideration for his services, and therefore, the pro bono attorney should be excluded from the definition of debt relief agency, even though an attorney working for money is included in the definition.

Because the statute seeks to govern the behavior of debt relief agencies, the construction that equates attorneys to debt relief agencies would tie those rules to attorneys. The authors believe that such a construction is flat-out wrong, because states, not the federal government, traditionally govern attorney behavior; moreover, even where there might be a need for some federal regulation of attorney behavior, the rules governing certain statements that debt relief agencies may or may not make interfere with an attorney’s ability to represent the client competently and zealously.

Attorneys who practice in a jurisdiction that considers them to be debt relief agencies will have to comply with a
multitude of new restrictions. For either a chapter 7 or 13 case, debt relief agencies must provide to the client a brief description of chapters 7, 11, 12, and 13, “and the general purpose, benefits, and costs of proceeding under each of those chapters,” along with a brief description of the types of services available from credit counseling agencies. Within three business days of a debt relief agency’s “first offer of assistance,” the debt relief agency must provide to the debtor a “clear and conspicuous written notice” that: (1) the debtor must disclose information with respect to his case that is “complete, accurate and truthful;” (2) all assets and liabilities must be completely and accurately disclosed, along with their respective replacement costs stated “where requested after reasonable inquiry [has been undertaken] to establish such value;” (3) information the debtor provides may be audited; and (4) failure to provide information may be penalized by dismissal or other sanction, including criminal penalties. At least one analysis has concluded that an attorney may rely upon his client’s representations as his “reasonable inquiry.” But beware: don’t risk discipline under the assumption that an attorney is always safe in accepting her client’s representations. If the attorney sees red flags in what a client is saying, the attorney will likely have a duty to investigate those red flags further.

Debt relief agencies must also provide, within those same three days, a notice containing the words, or words substantially similar to, those articulated in § 527(b).

As a debt relief agency, a lawyer also must execute a contract with the debtor that is dated before the date of the bankruptcy petition. The contract should explain the services that the attorney will provide to the debtor, the fees and the terms of payment, and the obligation of all debtors not eligible for exceptions to complete a pre-discharge financial management course.

Because all debtors must file the certificate verifying that the debtor has completed credit counseling, all attorneys practicing bankruptcy must deal with the introduction of the counseling organization into a now already convoluted mix. The presence of another party can have unforeseen consequences.

BAPCPA imposes new, enumerated responsibilities upon attorneys. Those lost souls whom Dante met in Purgatory purged their sins of pride by having to bear the weight of heavy stones on their back, so that they were unable to stand up straight. BAPCPA places similar stones on attorneys’ backs, and prudence dictates that lawyers learn the new requirements, at least until and unless Congress or the courts revisit the issue conclusively.

LUST-Disclosures for all Attorneys

‘[W]hen thus the instructor warn’d; ’strict rein must in this place direct the eyes. A little swerving and the way is lost.’

"They Said My Client Was Not a Target"

This quote from a civil practice attorney came after he advised his client to “interview” with ICE and Homeland Security agents regarding the business practices of his client’s company. Shortly thereafter, the Government seized $2,506,719.74 from the company bank account and began a criminal investigation of the client and other company officers.

Sam Adamo has 35 years experience defending major criminal cases throughout the United States. Voted Outstanding Criminal Attorney by Harris County Judges in a Houston Chronicle poll, Sam Adamo provides confidential and professional advice to many civil law firms.

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Dante characterized the deadly sin of lust as an excessive love of persons. In the bankruptcy context, BAPCPA's excessive love of enumerating the various obligations that attorneys have always had is one legal analogy for "lust" (which the authors concede falls flat, so feel free to email them with other suggestions). Attorneys have disclosure requirements even beyond those obligations for debt relief agencies. Attorneys must insure that they meet the general notice requirements listed in § 342(c)-(g). An attorney must file a certificate stating that he has performed a reasonable investigation of the circumstances giving rise to the bankruptcy petition, that the petition is well-grounded in fact and warranted in law, and that the attorney has no knowledge of any incorrect information contained within the documents that he has signed and filed with the court. (Actually, attorneys always had these obligations under their state ethics rules, but now the obligations are linked directly to the Bankruptcy Code via BAPCPA.)

**GLUTTONY-Multiple Filings**

"Honey and locusts were the food whereon the Baptist in the wilderness fed..."

Under BAPCPA, the court is prohibited from granting a discharge under chapter 13 if the debtor has received a discharge under chapters 7, 11, or 12 during the previous four years; or under chapter 13 during the two years before the date of the current order. Courts also cannot grant discharges to chapter 7 debtors who have received a discharge "commenced within 8 years before the date of the filing of the [current] petition." The new four-year bar between a chapter 7 discharge and a subsequent chapter 13 discharge curtails the practice of filing a "chapter 20," which consisted of first filing a chapter 7 petition to discharge as much debt as possible, promptly followed by a chapter 13 petition to allow the debtor to pay the remaining debt over time.

Those in Dante's Purgatory who were guilty of gluttony were forced to stay between two fruit-laden trees, unable to partake of either one. Debtors under BAPCPA will not get too many bites of the "discharge" apple, either.

**GREED-Overreaching**

"As avarice quenched our love of good..."

Pro bono attorneys are not usually associated with the deadly sin of greed. (As noted earlier, even the pro bono credit given by the state bar was not considered by one court to rise to the level of "valuable consideration"). The authors analogize the sin of greed as overreaching under the means-testing process under BAPCPA, and suggest reading some of the many articles written on this topic.

**WRATH-Sanctions**

"Blessed they, the peace-makers: they know not evil wrath..."

Dante described the deadly sin of wrath as the perversion of justice for revenge or
spite. For these purposes, the authors would like to caution practitioners against incurring the wrath of the court, which usually is manifested in the form of sanctions against the offender. For an attorney to protect himself against sanctions, he must avoid making those mistakes outlined above. Above all, an attorney needs to know the Code, rules, procedures, and customs of bankruptcy law.

A court finding that an attorney representing a debtor violated Rule 9011 of the Federal Rules of Bankruptcy Procedure during a chapter 7 case may, sua sponte or "on the motion of a party in interest," assess civil penalties against the attorney for the benefit of both the debtor and a trustee. In addition, the court may require the attorney "to reimburse the trustee for all reasonable costs in prosecuting a motion filed under [chapter 7]." Lawyers must be familiar with the means test for debtors (described in § 707(b) of the Bankruptcy Code) to ensure that their clients do not trigger the § 707(b) presumption of abuse.

Summary: Dante and BAPCPA

Those violating this article's version of the sin of envy will not, as those in the Purgatory of Dante, have their eyes sewn shut to prevent them from enjoying the misfortune of others, but they risk the suspension of their licenses to practice law, the sullying of their professional reputations, the payment of an uncomfortably large fine, and any further sanction a court may see fit to impose. Those who disregard these warnings of the sin of sloth will not, as Dante observed, be forced to run in perpetuity, but they risk running afoul of the court's displeasure. Those who cannot avoid the deadly sin of pride will not walk around carrying heavy boulders on their backs, but they will feel "bowed under" if they decide on their own (without case law or Congressional support) that they do not have to comply with the rules governing debt relief agencies.

Dante described the penitent in Purgatory purging his lust by walking through fire. No court will ask a lawyer to walk through a single flame or over a single hot coal, but violating the notice requirements discussed above may land a lawyer in hot water with the court. If a lawyer engages in multiple filings contrary to the new rules, he won't suffer the pangs of hunger with food just out of reach, but might notice a bitter taste in his (or the judge's) mouth. Upon failing to measure a client's wealth (or at least his projected disposable income) accurately, a lawyer will not be forced to kneel on hard, uncomfortable ground, reciting examples of greed, but might find himself in front of an angry tribunal, which can be just as uncomfortable.

We end by observing that no court will make a lawyer walk through thick clouds of smoke to force the realization that she has been blind to reason, as those, guilty of the sin of wrath had to do in Dante's Purgatory. We hope that we have been able to clear the air and help lawyers avoid all seven deadly sins.
Nancy B. Rapoport is a professor of law and the former dean of the University of Houston Law Center. As of July 2007, she will become the Gordon & Silver, Ltd. Professor of Law at the William S. Boyd School of Law, University of Nevada, Las Vegas. She thanks Roland Bernier for doing the heavy lifting on this article, as well as Jeff Van Niel for his helpful comments.

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Endnotes
1. Encyclopedia Britannica Online, deadly sin, at http://www.britannica.com/kb/article-00399620/deadly-sin (last visited on Jan. 21, 2007); cf. Schmidt (New Line Home Video 1996); Bizarre (Twentieth Century Fox 1997); Bratell (Twentieth Century Fox 2000) (female). 2. Dave Aligheimer, THE DIVINE COMEDY 149-289 (Henry Francis Cary trans., Doubleday & Co. 1946) (c. 1310-14) [hereinafter Cary]. 3. Id. at 166. 4. Id. at 199, 210, 219, 227, 238, 250, and 259. 5. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005). 6. See Fed. R. Bankr. P. 1007 (2005) (“List, Schedules and Statements: Time Limits”); Rule 1009 (2000) (“Amendments of Voluntary Petitions, Lists, Schedules and Statements”); Rule 2002 (2005) (“Notice to Creditors, Equity Security Holders, United States, and United States Trustee”); Rule 2003 (2005) (“Filing of Claim of Interest in Trustee”); Rule 3005 (2005) (“Filing of Claim, Acceptance, or Rejection By Guarantor, Surety, Indemnitor, or Other Codebtor”); Rule 3005 (2005) (“Filing and Transmittal of Papers”); Rule 7004 (2006) (“Process; Service of Summons, Complaint”); Rule 9001 (2005) (“General Definitions”); Rule 9006 (2005) (“Time”); Rule 9036 (2005) (“Notice by electronic transmission”). 7. Cary, supra note 2, at 201. 8. Dave Aligheimer, THE DIVINE COMEDY 67 (Dorothea L. Sayers, trans., Penguin Books 1973) (c. 1310-14) [hereinafter Sayers]. 9. At least one of us believes that any attorney was required to attend, may it please the court, to ask for permission to appear before the court. 10. In re Zuniga, 332 B.R. 760 (Banc.: S.D. Tex. 2002). This endnote reflects a perfect example of the fate of attorneys who fail to comply with the rules for admission to practice before a court. In this case, debtor Martha Zuniga contacted Select Financial Services (“Select”), a “credit repair” service based in California, to help alleviate financial pressures. 332 B.R. 767-68. After determining that Zuniga, a Spanish-speaking junior whose English was poor, did not qualify for any of its programs, Select persuaded her that filing for bankruptcy was the appropriate course of action. Id. at 766. Employees of Select changed Zuniga’s last name to help her file a bankruptcy petition, and then filed a Cahnlinea law firm for the benefit of a California law firm from which they were not licensed to practice in state courts in Texas or in the Southern District of Texas. Id. at 768-69. BLC hired Don Craig, a Houston based attorney, to represent the debtor’s interests locally. Id. at 767. Craig filed Zuniga’s chapter 7 petition and associated documents with the Bankruptcy Court in the Southern District of Texas, despite his own ineligibility to practice before that particular court. Id. at 767, 770. An attorney for BLC prepared all of the documents filed by Craig, including a document required under rules implemented by the Central District of California, but not under the rules of the Texas court in this matter. Id. at 770. The court stated that before the Bankruptcy Court of the Southern District of Texas, an attorney must have either filed a written application with and received approval by the clerk of court, or have obtained permission from a judge before whom a “case or adversary proceeding is pending.” Id. at 774. The first type of permission allows the attorney to practice before the court at any time. Id. The latter practice, called pro hac vice, allows the attorney to appear before the court only for that particular matter. Id. Because neither BLC nor Craig had obtained either type of authorization to practice before the court, each was subject to disciplinary action under the District Court’s local rules, and each had “actually committed the unauthorized practice of law.” Id. at 777 (citing TEX. DISCIPLINARY R. PROF’L CONDUCT 5.01, reprinted in TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. A, art. 10, § 9 (Vernon 2005)). The partner at BLC who directed a junior attorney to prepare the petition and associated documents assumed the responsibilities and of a partner or supervisory attorney as expressed under Rule 5.01. Id. Craig, by signing the petition declared himself to be the debtor’s attorney, and became the “attorney-in-charge” of the case under the District’s Local Rule 11. Id. at 791. Both BLC and Craig were sanctioned by the court, for these and other violations. Id. Craig, in response, suggested no approach to replevin or pay a $5,000 fine to the clerk of court. Id. at 789. 11. See discussion, supra note 10. 12. Cary, supra note 2, at 201. 13. Id. 14. Sayers, supra note 8, at 67. 15. Cary, supra note 2, at 217, 16. TEX. DISCIPLINARY R. PROF’L CONDUCT 1.01. One of us has referred to people unfamiliar with bankruptcy law as “bankruptcy wanna-bes.” See C.R. Bowles & Nancy B. Rapoport, Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Conduct, 6 AM. BANKR. INST. L. REV. 45, 72 (1999), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=936373.

In re Zuniga, 332 B.R. 760 (Banc.: S.D. Tex. 2002), the debtor’s attorney stood accused of practicing bankruptcy law without having the requisite knowledge of the field. The lawyer had been handling a related matter for the debtor when a creditor filed an involuntary petition. Id. at 805. The debtor had disappeared before the filing, and the attorney was unable to contact him. Among other things, the attorney signed papers in the debtor’s name without the debtor’s authorization, id., signed amended pleadings attesting to his own competence, id. at 808, represented the client despite having no authorization to do so, id. at 813, and did so even though he knew that he lacked knowledge of the law and procedures of bankruptcy law. Id.
The court understood the attorney's belief that exigent circumstances existed in the immediate aftermath of an involuntary filing. Even so, the conformance of legal representation beyond the limited period in which the appointed attorney's services exist is permitted.

The fact that the attorney failed to work diligently, as evidenced by the court's findings, is not relevant to whether the attorney's efforts were of the quality required.

The court found that the attorney's conduct was not the fault of the defendant or his family. However, the court also noted that the defendant's family was not represented by a lawyer during the period of the attorney's neglect.

The court stated that the attorney's neglect in failing to represent the defendant's interests was not due to negligence or incompetence.

The court concluded that the attorney's conduct was not excused by exigent circumstances or other circumstances that would excuse the attorney's neglect.

The court ordered the attorney to pay the defendant's family for the services they were entitled to receive and to make a donation to a charitable organization.

The court also ordered the attorney to attend a course on professional responsibility.

The court noted that the attorney's conduct was not in the best interests of the defendant or his family.

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