Moral Bankruptcy: Modeling Appropriate Attorney Behavior in Bankruptcy Cases

by Nancy B. Rapoport

John Guthery has kindly offered me this bully pulpit to say a few words to Nebraska lawyers, and I'm delighted to take him up on this opportunity. I've noticed a few subtle changes in my outlook since I became a dean, and the one that surprised me the most really shouldn't have surprised me at all. Assuming the role of dean has caused me to start writing in a new genre, one that blends my two worlds - as a bankruptcy ethics scholar and as someone who is part of the larger mission of educating and mentoring law students and law alumni.

My work in the bankruptcy ethics field up until now has criticized the use of "off the rack," state-based ethics rules to determine the appropriate behavior of lawyers practicing bankruptcy law.[1] I still plan to explore bankruptcy ethics from theoretical and empirical perspectives. (In fact, I'm already planning some empirical research to study the ways in which commercial-side bankruptcy ethics issues differ in kind or in degree from consumer-side bankruptcy ethics issues.) The beauty of being an academic is that you have the free time to contemplate, plan, and carry out a research agenda of your own design.

There's a beauty to being a teacher, too. As a teacher (and, yes, as a dean), I have a duty to start our law students on the right track - to use teachable moments to inculcate appropriate values in these budding lawyers. Teaching values in law school, though, isn't enough. If law students get conflicting messages in the "real world," they're apt to follow the real world's examples.[2]

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Although I'm familiar with several practice areas, the one in which I practiced myself for several years was bankruptcy law, so my examples tend to come from that area. What I'd like to talk about in this essay is the ways in which novice bankruptcy lawyers can learn good lawyering or bad lawyering. We've all heard horror stories about bad bankruptcy lawyers: lawyers who give clients wildly inappropriate advice about topics ranging from the choice of chapters to exemption planning;[3] lawyers who choose to represent more than one client in a bankruptcy case even though the clients' interests *clearly* conflict;[4] and lawyers who suggest to their clients a variety of smarmy practices that are in clear violation of the Bankruptcy Code.[5]

These lawyers learned bad habits from somewhere, and I'll bet that it wasn't in law school. If we want to encourage appropriate lawyer behavior, then, we need to present a united front.

What that means is that we in the ivory tower need the help of you "real world" types. If lawyers and judges reward and reinforce ethical behavior, then our freshly minted lawyers will want to be ethical. I know that you're busy, and I know that you can't catch every violation. But you need to set the tone.

I have four priorities that I'd like to see every admitted lawyer and every judge emphasize. These priorities aren't specific to bankruptcy practice; they apply to how we set the tone for all newly admitted lawyers. After I discuss these priorities, I'll turn to specifics that I'd like to see in bankruptcy practice. First, though, the four priorities:

Priority one: it's important for fledgling lawyers to understand about civility and professionalism. They need to model good behavior, and they need to model the behavior of established lawyers and judges. (Those people are the ones whose good behavior needs to be above reproach. No fledgling lawyer is going to look *first* at the behavior of a second-year associate, even though the fledgling will have more frequent contact with the second-year associate.)

In case you're wondering just how much effect the "real world" has on law students, let alone newly minted lawyers, consider the

research that Larry Hellman has done on ethical issues that students have faced while working with attorneys.[6] Dean Hellman studied students at Oklahoma City University who were interning with local firms. He asked them to report any professional responsibility dilemmas that they encountered and to suggest how those issues should have been resolved. [7] Here's one example:

. . . One of the attorneys I work for found himself too busy to write a motion for summary judgment and supporting brief, so he gave it to me. The problem is that the deadline for filing was about to expire. I had to do my research and write the brief in one full work day. After writing it, the employer did not even read it and just signed his name. The factual situation was fairly complicated so I don't even know if I applied the law correctly or even used the right cases. I wonder if it is proper for an attorney to rely whole heartedly on my work without exercising any type of supervision?[8]

Remember, this is a law student working with a real lawyer. We in the ivory tower talk about the lawyer's duty to represent the client competently. But the lawyer's behavior in this quote was most definitely inappropriate. Who do you think the law student (and the fledgling lawyer) is most likely to believe - the person who hasn't practiced law in several years, or the one who's actively engaged in the practice of law? We *have* to make sure that the ethics rules that we teach are honored, not in the breach, but in the practice.

Priority two: it's important for fledgling lawyers to know what it is that they don't know yet - and for them to be able to determine when it is that they do *know something*. I've heard from several judges that the most frustrating part of their job is dealing with unprepared or unknowledgeable lawyers. This problem is particularly acute in highly technical fields, such as bankruptcy law, but it's a problem across the board.

Part of the problem is inherent in the "newness" of our fledgling lawyers. Nothing teaches like experience, and no matter what sort of example we set, new lawyers need to see a variety of situations before they can become comfortable about representing clients.

But there are still ways in which experienced lawyers and judges can help our fledglings. We have to emphasize the value of preparation, even though preparation is costly. Judges can reward good preparation and sanction lack of preparation. Experienced lawyers can explain to fledglings that they're *supposed* to take more time on new tasks,[9] and they can write off the fledglings' excess preparation time so that the clients aren't overcharged.

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There's another thing that experienced lawyers can do to help fledglings make the leap to competency. They can teach the fledglings how good lawyers make cognitive leaps. What most beginning lawyers tend to do is to rehash research that they've discovered, rather than trying to fill in gaps in already established law. When I was a young lawyer, my department head sat me down and told me that the difference between a new lawyer and a good lawyer was that good lawyers are willing to think about the implications of the law and to take those implications to their natural conclusions. We want to encourage some bravery in our new lawyers. And we want to teach them that they have to take (reasonable) risks - and make some (recoverable) mistakes - in order to learn and to grow as professionals.

I know that fledgling lawyers are loss-leaders for an established practice. It takes a few years before new lawyers really earn their salaries. Sometimes that discrepancy between cost and salary leads lawyers to short-circuit the training of new lawyers. Gone are the days when new lawyers spent their first year or so observing more experienced lawyers (and billing their time for doing that). Clients can't afford to pay for that type of training, and it's expensive for legal practices to absorb. There's a fine line between unleashing new lawyers who don't have sufficient training and mollycoddling them by keeping them away from clients for the first few years. But it's an important line, and lawyers need to be mindful of the benefits of investing in the training of new lawyers.

Priority three: it's important that fledgling lawyers learn to question "accepted wisdom" and work for change within the system. One of the nicest things about teaching law students, especially first-year law students, is that they tend to see the legal system with fresh eyes. They question the way that things "have always been done." Now, often there's a reason for why things have to be done a certain way: that way is efficient and leads to the best result. But there are plenty of reasons to encourage newly minted lawyers to keep an eye out for areas for possible change in the legal system. We want them to feel that they are truly a part of the system;[10] we want them to think actively about the way in which they practice so that they can choose good habits after proper reflection; and, of course, we want them to get rid of bad habits that we ourselves have developed.

In my own writing, I've questioned why federal bankruptcy law should use state ethics codes to govern attorney behavior. [11] We've "always done it that way," but I don't believe that state ethics codes give attorneys sufficient guidance about how to practice "moral" bankruptcy law. I've also questioned the conventional wisdom about the balance between the duty of zealousness and the duty of lawyers as officers of the court.[12] Questioning accepted wisdom is one of the most satisfying parts of my job as an academic, but there's no reason for academics to corner the market on that type of inquiry.[13]

Priority four: it's important to encourage fledgling lawyers to see how the "non-law-

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yer" part of their lives affects their self-esteem as lawyers. We've all read stories of how new lawyers become disillusioned with the practice of law. Many of these new lawyers are so disillusioned that they leave the practice entirely.[14] My completely unscientific guess is that many of these disillusioned lawyers lost part of themselves when they began to practice. [15] They spent so much time learning how to be lawyers that they forgot to nurture the other aspects of their lives. We experienced lawyers need to demonstrate - by example - that well-rounded people make the best lawyers.[16]

The big picture, applied to bankruptcy law: what should bankruptcy lawyers be doing? It's not easy being a bankruptcy attorney. Not only is bankruptcy law itself changing, but the rules governing how bankruptcy lawyers should behave aren't always clear. Although bankruptcy law is like other types of law, it has its own idiosyncracies, and the ethics rules don't really provide appropriate guidance to deal with those idiosyncracies. Without clear, bankruptcy- specific rules, bankruptcy practitioners can find themselves stumbling into several types of pitfalls.

Pitfall #1: recommending pre-bankruptcy planning that doesn't take the realities of post-petition life into account (or, the "pig-hog" distinction revisited). Newly minted lawyers may remember the "zealousness" requirement of the ethics rules and grab for every possible exemption to which their clients are entitled, notwithstanding the other considerations that more experienced practitioners would use. Without proper mentoring, these fledglings might not consider factors such as the relationship between pre-bankruptcy planning and the availability of the discharge;[17] the categories of exemptions that tend to raise inquiry (or eyebrows); or even the local culture of bankruptcy practitioners,[18] where some exemptions are more (or less) favored by peers.

Newly minted corporate lawyers may also face unexpected problems as their clients spiral, inexorably, into bankruptcy.[19] Pre-petition advice that zealously tries to resuscitate a dying company for the benefit of the shareholders can become bad advice once the company becomes a debtor in possession trying to safeguard the estate for the benefit of creditors. The guessing game of who the client is[20] when it's not clear whether the client is insolvent is a difficult game even for *experienced* practitioners. Imagine how much more difficult that game is for a fledgling lawyer. We need to be teaching these fledglings that they have to strategize for a variety of outcomes, rather than just reacting to clients' immediate needs.

Pitfall #2: trying to represent virtually everybody in a single bankruptcy case. Here's another situation where new lawyers are looking to more experienced ones for guidance (and where the guidance often falls short). I'm not someone who says that lawyers should never take on simultaneous representation of multiple clients in a bankruptcy case - far from it.[21] But, there has been a lot of press about high-profile firms taking on questionable multiple representations,[22] and new lawyers are understandably confused about what is and isn't acceptable behavior. We need to adopt clearer rules on conflicts of interest in bankruptcy cases[23] so that mistakes of this ilk aren't perpetuated across generations of lawyers.

Pitfall #3: hiding the ball from the court or from other parties in interest. Pitfall #2 is often related to pitfall #3. The conflicts problems usually occur because someone's

been less than truthful to the court. Whether or not the Bankruptcy Code allows the court to permit representation when the "disinterestedness" standard isn't strictly met,[24] no court wants to find out about potential disqualifying conflicts in the middle of some hotly contested skirmish. If nothing else, "moral" bankruptcy practice requires complete disclosure to the bankruptcy courts.

Pitfall #4: pretending to be what you're not. This final pitfall has a couple of variations. One variation involves the practitioners who think that they understand *all* of the Bankruptcy Code because they've had experience with a few of the Code's sections. In bankruptcy practice, especially, a little knowledge can be a very dangerous thing. I've heard many stories of judges who have had to educate lawyers in the middle of a hearing. That's not really too surprising. Most clients don't use lawyers regularly and don't have good ways of determining whether a lawyer "knows her stuff." But until the local culture illuminates some minimum competency standards, these clients will be placing their lives in the hands of lawyers who may not know the first thing about bankruptcy law.

A second variation involves lawyers who only "do" one type of bankruptcy filing: they "do" chapter 7s or chapter 13s, but not both.[25] I'm sympathetic to the problems of those consumer bankruptcy practitioners who must rely on high volume in order to make ends meet.[26] But every client deserves the proper advice on chapter choice, and lawyers shouldn't hold themselves out as bankruptcy lawyers if, in fact, they're only giving advice related to one chapter of the Bankruptcy Code.

All of these pitfalls - mistaking zealousness for recklessness, attempting to represent clients whose interests clearly conflict, misleading the court and the other parties, and pretending to be what you're not - involve bad habits of experienced lawyers. We need to bring a halt to these bad habits before another generation of new lawyers mimics them.

To bring things back to the beginning, I'm excited about tying our work as academics who train fledgling lawyers with your work as real world teachers. All of law schools' teaching about professionalism can only go so far if that teaching isn't reinforced in "real life." Cooperation and feedback among judges, lawyers, and academics will go a long way toward raising our fledgling lawyers right. We need your help.

Endnotes available upon request, call the NSBA TNL office at 402-475-7091, ext. 38.