

BANKRUPTCY COURT ETIQUETTE: RULES OF CIVILITY, DECENT BEHAVIOR AND ETHICS

Robin Russell, Andrews Kurth LLP
Bankruptcy Judge Marvin Isgur, Southern District of Texas
Hector Duran, U.S. Trustee's Office

**Southern District of Texas
Bankruptcy Bench Bar Conference**

June 18, 2014

Basis for Sanctions

- Bankruptcy Rule 9011(c)
- 28 U.S.C. § 1927
- Bankruptcy Rule 7037
- Bankruptcy Code § 105

Bankruptcy Rule 9011(c)

- Allows “Appropriate” Sanctions
- “Least Severe” Standard
- Joint and Several Liability
 - Evidentiary Support Required of Client and Attorney
 - Legal Support Required of Attorney
 - Effect of Subsequent Events
- Reasonable Inquiry of Facts
- Attorney at Higher Risk Than Client/Local Counsel Issues
- Objective Standard
 - Reasonable Basis
 - Reasonable Person

What is “Inquiry Reasonable Under Circumstances”?

- What information did the attorney have about the client’s business?
- Did the attorney verify the information?
- How knowledgeable was the attorney about the client’s business operations?
- Were other professionals, such as accountants or financial advisors, consulted?

What is “Inquiry Reasonable Under Circumstances”?

(continued)

- What independent investigation, if any, did the attorney undertake prior to the filing?
- What did the clients tell them?
- Were they justified in believing what the clients told them?
- Was there an exigent reason for filing and limited time within which to complete due diligence?
- Does exigency provide a satisfactory defense?
- Could you let someone use your ECF filing number?

28 U.S.C. § 1927

- Unreasonably and Vexatiously Multiplies Proceedings
- Attorneys Only/Parties Excluded
- Strict Construction
- Applied Sparingly
- Bad Faith Requires Fact Intensive Inquiry

Rule 7037

- Unjustifiably Resisting Discovery
- May Apply to Contumacious Conduct in Courtroom
- Limited Use in bankruptcy

Bankruptcy Code Section 105

- Inherent Power
- Finding of Bad Faith Required
- Requirement of Order
- Sanctioning a Client or Attorney
- Most Susceptible to Abuse of Discretion

Bad Faith Under 105

- “Temple of Justice Defiled”
- Finding Must be Specific
- Evidentiary Standard
 - Issue Related (example: exclusion of evidence) = preponderance of evidence
 - Penal (i.e. attorney’s fees, fines, etc.) = clear and convincing evidence

Examples of Willful Bad Faith

- Submission of false and misleading schedules.
- Failure to attend court hearings and motion arguments.
- Failure to prosecute petition in consumer bankruptcy cases.

Sanctions on Motion v. Court Initiated

- On Motion---Notice and Opportunity to Cure
- Court Initiated---Orders to Show Cause (burden of proof issues?)

Safe Harbor Provision of Rule 9011(c)

- Allows the challenged party **21 days** to modify or amend the petition or document.
- No Safe Harbor for bankruptcy petitions.

Why are Bankruptcy Lawyers Sanctioned?

- a) The attorney who knows the rules but ignores them
- b) The attorney who doesn't know the rules --- the novice
- c) The attorney who makes the judge mad
- d) All of the above



“It is better to be loved than to be feared but if you cannot be loved it is better to be feared”

Machiavelli

Top Reasons for Sanctions

- Violation of Rule 9011 including
 - Serial/Frivolous Filings
 - Failure to Disclose under Rule 2014
- Failure of Debtor's Counsel to comply with BACPA
- Violation of Automatic Stay
- Violation of Discharge Injunction
- Violation of Court Order/Local Rules
- Overly Aggressive Tactics/Bad Behavior

Debt Relief Agency Provisions Impose Requirements on Debtors' Counsel

- Not to fail to provide a service that counsel obliged himself to provide. 11 U.S.C. §526(a)(1).
- Not to counsel a client to make an untrue or misleading statement. 11 U.S.C. §526(a)(2).
- Not to make misrepresentations to a client. 11 U.S.C. §526(a)(3).
- To provide the information required by §342(b)(1) and §527(b) of the Bankruptcy Code and to retain copies of certain notices. 11 U.S.C. §§527(a)(1), 527(b), 527(d).
- To notify a prospective or actual client of the duty to provide honest and complete disclosures and the nature of the required information and to provide the client with information on how to provide the required information. 11 U.S.C. §§527(a)(2), 527(c).
- To have a clear fee contract with the client and to timely provide a copy of the contract to the client. 11 U.S.C. §528(a)(1)-(2).
- To follow certain advertising requirements. 11 U.S.C. §§528(a)(3)-(4), 528(b).

Section 526 Sanctions

- An award of a refund of fees, actual damages, attorney's fees and costs if the attorney intentionally or negligently failed to comply with § §§526, 527 or §526(c)(2)(A).
- An award of a refund of fees, actual damages, attorney's fees and costs if the attorney intentionally or negligently failed to file a document required pursuant to § 521 or intentionally or negligently disregarded the material requirements of the Bankruptcy Code or Rules. 11 U.S.C. §526(c)(2)(B)-(C).
- An injunction to enjoin violations of §526, along with an award of attorney's fees and costs. 11 U.S.C. §§526(c)(3), (c)(5)(A).
- The imposition of an appropriate civil penalty. 11 U.S.C. §526(c)(5)(B).

Disclosure of Connections under Rule 2014(a)

- Professionals seeking employment by a debtor in possession must file an application with the court.
- Application must contain information “**to the best of the applicant’s knowledge**” about **all** possible connections with the debtor, creditors, or any other interested party.
- Disclose **all** connections with debtor in application to represent debtor.
- Failure to disclose connections may lead to sanctions and disgorgement of fees.
- Even a negligent or inadvertent failure to disclose may lead to denial of requested fees.

Sanctions Beyond Attorneys Fees under Section 105

- Punitive Damages
- Injunctive Relief
- Equitable Subordination
- Loss of Voting Rights
- Educational Sanctions
- Referral to U.S. Attorney and/or State Bar (Disciplinary/Criminal)

Appellate Issues

- Legal Issues (*de novo*)/Factual Findings (abuse of discretion)
- Severe Sanctions Draw Scrutiny
- Legal and Factual Basis Must Be Specific

Malpractice: Insurance Reporting Obligations

8. (a) The term “CLAIM” shall include any written notice received by an ASSURED from or on behalf of any person that it is the intention of such person to hold the ASSURED responsible for the results of an ACT. Without limiting the foregoing, the term “CLAIM” shall include written **notice of the commencement of a lawsuit, arbitration, or other proceeding** against an ASSURED; an express written unconditional demand for money or some other redress made against an ASSURED; an express written unconditional threat to take legal action against an ASSURED; and/or a written request made to an ASSURED to toll or waive a statute of limitations relating to a potential CLAIM.
- (b) The term “CLAIM” shall include any claim against an ASSURED for compensatory damages, penalties in the nature of compensatory damages, and/or punitive damages. The term “CLAIM” shall also include a claim for injunctive or administrative **sanctions** brought by or before a federal or state regulatory agency (including State Supreme Court or Bar Association disciplinary or grievance procedures). Indemnity for a CLAIM before a federal or state regulatory agency shall be provided only for COSTS, CHARGES, AND EXPENSES incurred by the ASSURED in its defense, and only for COSTS, CHARGES, AND EXPENSES incurred after the date that the COMPANY is notified by the FIRM of such CLAIM or the **circumstances** which may give rise to such a CLAIM. The COMPANY shall have no liability for COSTS, CHARGES, AND EXPENSES incurred prior to the date of such notice. (emphasis added)

Sanctions and The Prior Work Conflict

Rule 1.06 Conflict of Interest: General Rule

- a) A lawyer shall not represent opposing parties to the same litigation.
- b) In other situations and except to the extent permitted by paragraph c), **a lawyer shall not represent a person if the representation of that person:**
 - 1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyers firm; or
 - 2) reasonably appears to be or become adversely **limited** by the lawyers or law firm's responsibilities to another client or to a third person **or by the lawyers or law firm's own interests.**
- c) A lawyer may represent a client in the circumstances described in b) if:
 - 1) the lawyer reasonably believes the representation of each client will not be materially affected; and
 - 2) each affected or potentially affected client **consents** to such representation **after full disclosure** of the existence, nature, implications, and possibly adverse consequences of the common representation and the advantages involved, if any. (emphasis added)

Miscellaneous

- Can you be sanctioned for filing a losing motion for sanctions? Yes.
- Are sanctions awarded against a party or attorney dischargeable in a future bankruptcy? Probably not.

Threatening Your Opponent With Sanctions

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer shall not present, participate in presenting, ***or threaten to present.***

(1) criminal ***or disciplinary charges solely to gain advantage in a civil matter; or***

(2) civil, criminal or disciplinary charges against a complainant, a witness, or a potential witness in a bar disciplinary proceeding solely to prevent participation by the complainant, witness or potential witness therein.



“If you haven’t got anything nice to say about anybody, come sit next to me.”

Alice Roosevelt Longworth
(Teddy’s daughter)

Slander, Defamation and the Litigation Privilege

Defamation Per Se

“A statement constitutes defamation per se if it ‘injures a person in his office, profession, or occupation’ or it accuses someone of a crime”
Leyendecker & Assocs. v. Wechter, 683 SW2 369, 374 (Tex. 1984).

- An improper attempt to influence a tribunal is a crime Tex. Pen. Code §36.04
- Extortion is a Crime, Be careful of your “settlement” tactics.

Fact v. Opinion

If a speaker says, “In my opinion John Jones is a liar,” he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and **the statement, “In my opinion Jones is a liar,” can cause as much damage to reputation as the statement, “Jones is a liar.”** **As Judge Friendly aptly stated: “[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words ‘I think.’”** See *Cianci [v. New Times Publishing Co.]*, 639 F.2d 54, 64 (2d Cir., 1980)]. It is worthy of note that at common law, even the privilege of fair comment did not extend to “a false statement of fact, whether it was expressly stated or implied from an expression of opinion.” RESTATEMENT (SECOND) OF TORTS, § 566, Comment a (1977).¹

¹ *Bentley v. Bunton*, 94 S.W.3d 561, (Tex. 2002) (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990))

Litigation Privilege

- “[T]he privilege is an integral part of a public policy which permits all suitors, however bold and wicked, however virtuous and timid, to secure access to the courts of justice to present whatever claims, true or false, real or fictitious, they seek to adjudicate. To assure that such claims are justly resolved, it is essential that pertinent issues be aired in a manner that is unfettered by the threat of libel or slander suits being filed.”
- “The protected realm has traditionally been regarded as composed only of those communications which are issued **in the regular course of judicial proceedings** and which are **pertinent and material to the redress or relief sought.**”
- “[I]n any action based upon professional misconduct which might be brought against plaintiff in a proceeding before the Disciplinary Board, it would not be pertinent, material, and in the regular course of procedure to forward copies of a letter such as the present one to [the trial judge and plaintiff].”

Except as provided by the Constitution, by statute, by these rules, or by other rules prescribed pursuant to statutory authority, **no person has a privilege to:**

- 1) refuse to be a witness;
- 2) refuse to disclose any matter;
- 3) refuse to produce any object or writing; or
- 4) **prevent another from being a witness or disclosing any matter or producing any object or writing.**

Tex. Rule of Evidence 501