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## Lawyers in the Hot Seat: The State of Ethics & Professionalism

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## Lawyers in the Hot Seat: The State of Ethics & Professionalism\*

*Honorable Jeffery P. Hopkins, Ronald R. Peterson, Catherine E. Vance, and Professor Mark D. Yochum*

MS. VANCE: Thank you to everybody for coming.

It's no secret that the public doesn't think a whole lot of our profession, but we brought some numbers to share with you about what they actually think. There was a survey in 2007, a Harris Poll that asked people whether they thought the law was a prestigious profession.<sup>1</sup> Twenty-two percent said the law had very great prestige, twenty percent said considerable, forty-one percent gave us some, and seventeen percent said hardly any prestige at all. So we're not doing so well there.

The good news for those numbers is we went up from a low of fifteen percent in 2002. So we are on the rise. In 1977, however, thirty-six percent of people thought that the law had very great prestige.

MR. PETERSON: So we're still ahead of politicians and TV anchormen.

MS. VANCE: Actually I'm not sure on that.

More importantly, there was a survey in 2006 that asked, "Can lawyers be trusted to tell the truth?"<sup>2</sup> And the respondents said—twenty-seven percent of them said they would trust lawyers while sixty-eight percent said that they would not trust lawyers to tell the truth.<sup>3</sup> And of the twenty-two professions asked about in that survey, only actors did worse than lawyers.<sup>4</sup>

Even though we're talking about lawyers, the whole system comes into play. And so that survey also asked whether people thought

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\* This is an edited version of the transcript from the third panel at the DePaul Business and Commercial Law Journal Symposium, *Lawyers, Law Firms & the Legal Profession: An Ethical View of the Business of Law*, held on May 1, 2008.

1. THE HARRIS POLL #77, FIREFIGHTERS, SCIENTISTS AND TEACHERS TOP LIST AS "MOST PRESTIGIOUS OCCUPATIONS," ACCORDING TO LATEST HARRIS POLL (2007), [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=793](http://www.harrisinteractive.com/harris_poll/index.asp?PID=793).

2. THE HARRIS POLL #61, DOCTORS AND TEACHERS MOST TRUSTED AMONG 22 OCCUPATIONS AND PROFESSIONS: FEWER ADULTS TRUST THE PRESIDENT TO TELL THE TRUTH (2006), [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=688](http://www.harrisinteractive.com/harris_poll/index.asp?PID=688).

3. *Id.*

4. *Id.*

judges could be trusted to tell the truth.<sup>5</sup> And, good news, Judge Hopkins, seventy percent said that they trusted judges to tell them the truth.<sup>6</sup> That was down from seventy-nine percent in 1998.<sup>7</sup> But, again, in 2002—everybody seemed to take a dip in 2002—it was sixty-five percent.<sup>8</sup>

In a different survey on judges and perceptions of fairness, and this isn't as relevant to those of us in bankruptcy but it's still an interesting perception of what the public is thinking, people were asked to compare judges to juries in terms of who they thought would issue a fair verdict.<sup>9</sup> Twenty-three percent said they trusted the judges to be fair while fifty percent put their faith in the juries.<sup>10</sup> If you're found guilty, however, the public didn't want the juries issuing a sentence because forty-eight percent said that they trusted the judges to be more fair, and only thirty-one percent went with the jury.<sup>11</sup>

So, so far we're not doing too well. The judges are trustworthy when it comes to what they say, but none of us are doing very well at all.

This is one of my favorite results: honesty and ethical standards. People were asked in a 2007 Gallup Poll to rate the honesty and ethical standards of lawyers.<sup>12</sup> Any guesses on what percent said "very high?" Two.<sup>13</sup> Thirteen percent said "high."<sup>14</sup> The biggest vote was "average" at forty-nine percent.<sup>15</sup> Twenty-five percent said "low,"<sup>16</sup> and ten percent said "very low."<sup>17</sup> So over a third of people had lawyers' honesty and ethical standards at "low" or "very low,"<sup>18</sup> and only fifteen percent were "high" or better.<sup>19</sup>

Again our judges fared better than lawyers who appear before them. Only eight percent said "very high," but thirty-eight percent

5. *Id.*

6. *Id.*

7. THE HARRIS POLL #61.

8. *Id.*

9. THE HARRIS POLL #9, JUST UNDER THREE IN FIVE AMERICANS BELIEVE JURIES CAN BE FAIR AND IMPARTIAL ALL OR MOST OF THE TIME (2008), [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=861](http://www.harrisinteractive.com/harris_poll/index.asp?PID=861).

10. *Id.*

11. *Id.*

12. GALLUP POLL, HONESTY / ETHICS IN PROFESSIONS (2007), <http://www.gallup.com/poll/1654/Honesty-Ethics-Professions.aspx>.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. GALLUP POLL.

18. *Id.*

19. *Id.*

said that judges had a “high” standard of honesty and ethics.<sup>20</sup> Forty-one percent put it at “average,”<sup>21</sup> and twelve percent were mixed with “low” and “very low.”<sup>22</sup> So, again, Judge Hopkins is better than the rest of us.

Does the public trust the justice system? This is, I think, probably one of the most important questions that we can ask ourselves as lawyers. The question was, “How much confidence do you have in the people running the justice system?”<sup>23</sup> Twenty-one percent said they had a great deal of confidence and, unfortunately, fifty-two percent had only some and twenty-six percent had hardly any.<sup>24</sup> So that’s nearly eighty percent that have a faltering confidence in the entire justice system. And this was in 2007.

So that’s the end of the data, and I think that we’ve pretty much borne out what Professor Livingston opened the day with. The public doesn’t think a lot of us.

One of the things that we want to explore today is, you know, the extent to which we bring this on ourselves by the way we act. And, Ron, I think you have some examples of things that might prove the public right?

MR. PETERSON: Well, we are suffering in many respects from a total lack of civility. All of you have dealt with the Stalingrad defense, the strike suit, and people just having a plain bad hair day. Let me share with you perhaps one of the worst examples I found in a case that dealt with over one hundred million dollars in damages and that is the Paramount Pictures security litigation.<sup>25</sup>

Over a hundred million bucks at stake and this case gets up to the Delaware Supreme Court and Chief Justice Veasey is writing about a twenty-six page opinion affirming the chancellor and then sits down and takes a five page supplement to compliment the lawyers on their deposition-taking skills. Let me share with you that transcript, Mr. Johnston must be a young lawyer from the way I read this transcript:

Mr. Johnston: Okay. Do you have any idea why Mr. Oresman was calling that material to your attention?

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20. *Id.*

21. *Id.*

22. GALLUP POLL.

23. THE HARRIS POLL #19, CONFIDENCE IN LEADERS OF MAJOR INSTITUTIONS: SMALL BUSINESS TOPS THE LIST THIS YEAR (2007), [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=735](http://www.harrisinteractive.com/harris_poll/index.asp?PID=735).

24. *Id.*

25. *Paramount Commc’ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1993).

Mr. Jamail: Don't answer that. How would he know what's going on in Mr. Oresman's mind? Don't answer it. Go on to your next question.

Mr. Johnston: No Joe—

Mr. Jamail: He's not going to answer that. Certify it. I'm going to shut it down if you don't go to your next question.

Mr. Johnston: No. Joe, Joe—

Mr. Jamail: Don't "Joe" me, asshole. You can ask some questions, but get off that. I'm tired of you. You would gag a maggot off a meat wagon. Now, we've helped you every way we can.<sup>26</sup>

So my first question is to the professor. If you were young Mr. Johnston, what would you do at this point of the discussion?

PROFESSOR YOCHUM: You know, I had one deposition in my life and—

JUDGE HOPKINS: It wasn't as contentious, hopefully.

PROFESSOR YOCHUM: What was worse, I was the witness. So I would have run out of the room. But I probably would have done little.

MR. PETERSON: Well, we get a case that is really recent, 2007, from Judge Easterbrook, *Redwood v. Dobson*,<sup>27</sup> and here you have a lawyer party married to her counsel and they do not particularly care for the opposing attorney and his client, but in the course of the deposition—and this has nothing to do with the subject—they keep asking the defendant if he is a homosexual and has he had a homosexual affair and then they go on and ask about his secretary and have you had an affair with your secretary? And this goes on and on and on. Now, what do you suppose Judge Easterbrook would have done?

Judge, what would you have done in such a deposition?

JUDGE HOPKINS: Now that I've read the case, I'd probably pause and seek leave of court to have that deposition stopped, those questions interrupted, and to seek a protective order and sanctions pursuant to Rule 26(c)<sup>28</sup> against the other side for conduct really unbecoming of a lawyer.

MR. PETERSON: It's amazing this lawyer took it, he just let this couple run all over him; the deposition was heated.

Judge Easterbrook ultimately entered a very severe censure against the lawyer and his wife for conduct unbecoming of an attorney, then turned around to the poor lawyer who was defending this deposition and gave him an admonishment for not getting up and walking out of

26. *Id.* at 53-4.

27. *Redwood v. Dobson*, 476 F.3d 462 (7th Cir. 2007).

28. FED. R. CIV. P. 26(c) (2007).

the room after making a motion on the record pursuant to Rule 37<sup>29</sup> to terminate the deposition.

So the moral of the story, I suspect, is that we lawyers are sometimes egged on by our clients. Some clients want to see gun slingers. Clients are uncomfortable if we get along with our opposing counsel and what we've seen is a pattern among some lawyers of taking this profession to a new low in terms of its civility and with that the public's respect for the bar.

JUDGE HOPKINS: But, Ron, let me turn it around. Let me ask you a question. I mean that's the case that we find, but what do you do though? I mean clients will pound sand and go somewhere else where they'll get a lawyer less civil who's going to do what it is that they bid them to do.

MR. PETERSON: Well, as much as I love collecting fees from my clients, part of my job is not only to be an advocate, but to be a counselor. And I will sit down with a client and I will tell him that such conduct is counterproductive and if we get to that impasse where he wants somebody who's going to engage in unethical conduct, he can go hire the guy down the street for all I care.

MS. VANCE: But what do we do about the guy down the street, if we consider ourselves members of a profession, in light of the data and what the public thinks about us and how little confidence they have in the system?

MR. PETERSON: I think that's where the judges come in and keep record when these types of things take place. If the courts don't step in when lawyers are way out of line, in these two cases I've given you they were way out of line, there's going to be no order in the barnyard and it's going to spread.

I mean, we gave you another case, this really happened last year, some lawyer stood up in front of a federal judge with whom he's engaged in an argument and says to her, "You're a few french fries short of a Happy Meal."<sup>30</sup>

MS. VANCE: I think he said "with due respect."

MR. PETERSON: Judge, what would you do if somebody said that?

JUDGE HOPKINS: Judge Laurel Isicoff of Southern Florida in Miami handled that probably the best way you can. She went on with the proceeding, asked the attorney to go ahead with his argument,

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29. FED. R. CIV. P. 37 (2007).

30. Order to Show Cause, *Goldberg v. Mount Sinai Med. Ctr. of Greater Miami, Inc.*, No. 07-1210-BKC-LMI (Bankr. S.D. Fla. May 21, 2007).

although apparently they didn't agree on the point that he was trying to make. She then put out an order to show cause why that attorney should not be suspended from the practice or held in contempt.

Then she had a full-blown hearing on the record where that lawyer appeared with his managing partner in tow representing him, quite contrite. The attorney had also done some things that really showed that he was attempting to mitigate the circumstances. He also apologized to the judge and made it appear that he was really, really sorry for what he'd done.

MS. VANCE: I'd like to ask any of you to what extent do you think that attorney's punishment came more from the publicity? Because that was such a shocking statement, of course it made, I don't know if it made any headlines in the general news media but certainly within the bankruptcy community, there were quite a number of stories and he became a notorious attorney rather quickly—to what extent that served as his punishment which ended up completely outside the system.

MR. PETERSON: But that was the tip of the iceberg. The client fired them. He was removed as the chairman of that firm's bankruptcy practice and basically in many respects, his career has been ruined.

JUDGE HOPKINS: Right. I thought the severity of the punishment that the attorney received in retribution from his own colleagues and clients was far greater than what the judge did. The only thing Judge Isicoff did was require the attorney to attend five hours of professionalism training which he'd already done prior to the hearing to sort of mitigate the damage he'd caused.

PROFESSOR YOCHUM: Can I make a comment? I mean this is small, but in your individual states, particularly I know Pennsylvania's done it and other states think about it, they do issue from time to time what they call codes of civility.<sup>31</sup> These are in the nature of, by definition, aspirational rules. And I was going to talk about the language. I teach at a Catholic school and swearing in court is bad, swearing in deposition.

One wonders whether this sort of aspirational rule gets through, as Cathy was suggesting, to the public. When they hear the Happy Meal story, maybe it's not that he was sanctioned and that the legal profession is improving, it's rather, well, there's another instance of a low-life lawyer.

MS. VANCE: And sometimes I don't think that they hear about the follow-up because there was a 2002 survey within the American Bar

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31. 204 PA. CODE § 99.3 (2000).

Association<sup>32</sup> and one of the impressions that was taken from the survey is that people recognize that this could be a situation of bad apples, but they don't think that the profession as a whole deals with its bad apples appropriately.

And I think—because I didn't see follow-up stories on what happened to that attorney—perhaps sometimes it's like any other news story, the shocking thing that happens first gets the attention, but then the public is left to think that this guy just said this to a judge and that was the end of it. Much like the lobbyist who said that bankruptcy judges aren't real judges. Yes?

A PARTICIPANT: I would submit that actually the publicity about the french fry remark in the court is not surprising anybody in the public and that's why you're getting those quotes on why people think lawyers are liars and creeps, why people don't trust them. Both from the people who think that it doesn't surprise them that a lawyer's going to do it, or it doesn't surprise them that maybe the judge deserved it, and maybe the judge was a couple of french fries short of a Happy Meal. The most damage is not to the attorney, but to our profession, because that's the news story. Everybody thinks lawyers should behave that way and that simply underscores it.

MS. VANCE: Well, honestly, we've had some discussions about this and I don't want to wonder too far off our point, but if you chase back through history, you have to go back pretty far to find a point at which there wasn't disdain for attorneys. And I think it was Adam saying to Eve, the reason this is a paradise is because there are no lawyers.

People have hated us for a very long time. Professor Yochum, I think, has studied some of that and can go into, what, BC?

PROFESSOR YOCHUM: Not quite BC, but a little CC, we lawyers have been hated for a long time. There's no doubt about that. I'm not sure I want to do that.

You want to move on to advocacy? Is that my cue?

MS. VANCE: Yes, it is your cue because I think that it's an important component that people can see us as uncivil and disrespectful, but they also think that we waste a lot of time making frivolous arguments.

PROFESSOR YOCHUM: Keeping along with the McDonald's theme, one of the obvious clichés of bad lawyer behavior are frivolous lawsuits, and that's the McDonald's coffee cup case, whether it's true or not.

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32. ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, SURVEY ON LAWYER DISCIPLINE SYSTEMS (2002), [http://www.abanet.org/cpr/discipline/sold/toc\\_2002.html](http://www.abanet.org/cpr/discipline/sold/toc_2002.html).



And my task here is to talk a little bit about frivolous litigation. I am a failed tax lawyer as well as not a very good litigator either. One of the things I like about these conferences is that you live in a particular world, bankruptcy, debt collection, etcetera, but I get to move across.

And the problem of frivolous advocacy in tax has been around for a long time. You could file a tax return and it's hidden, that is, there's an audit lottery. And similarly you see, particularly in Chapter 7 practices, there are a lot of cases that are going through. It's been a long time, about twenty years that tax practitioners are restricted in their advocacy. We're not allowed to advocate before the IRS any position that doesn't have a better than one in three chance of winning. And recently they have adjusted that last year to more probable than not. So advocacy restrictions are around. They've been coming around.

One wonders what stopped frivolous litigation a thousand years ago during the age of trial by combat. Well, that stopped it automatically. If you lost in trial by combat, you lost your hand or your head and so there was less likelihood of bringing that sort of litigation.

And the other thing I want to say is we're an oath-based system. I know this is off the beat, but when Cathy was going through the list—are lawyers liars? Every one of us signed an oath, took an oath, swore probably to God, the United States, the Constitution. I wonder whether that reaches home any longer for people.

Frivolous litigation. The major rule, and it's similar in all the states and the Federal Courts, is ABA (I'll tell you the Model Rule) 3.1: A lawyer shall not bring or defend a proceeding or assert or controvert an issue unless there is a basis in law and fact for doing so that is not frivolous.<sup>33</sup>

One of the problems with legal education is we have taught you that nothing is frivolous, right? You probably had some torts law professor whose method was jerking you around to persuade you. He'd say the sky is blue, it's really blue, and then a half hour later it's green, it's gray. Right? We are trained to find that which is not frivolous.

I would divide frivolity into two parts, that is fact-based frivolity and legally-based frivolity. While one is bringing an action that is not legally justified, the other is bringing an action that the law is well understood but the facts are uncertain.

It has only been recently, at least in my view, that there has been aggressive identification of the lawyer with the client's activity. The person that got nicked before for bringing in unmeritorious litigation

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33. ABA MODEL RULES OF PROF'L CONDUCT R. 3.1.

was really the client. They would lose. Now we still do not see any bar association sanctions for frivolous behavior. Not a one. I look around the country all the time. But what you see is this idea filtering through statutes and rules. Statutes that are involved in fee shifting and of course Rule 11<sup>34</sup> and its bankruptcy cousin, Rule 9011.<sup>35</sup>

The traditional rule with respect to litigation actually, and this is a thousand years old too, that the lawyer was in charge of the law and the client was in charge of the facts. The client comes to your office and tells you a story. What are you supposed to do? Are you supposed to cross-examine your client or are you to believe him?

In any case, Rule 9011,<sup>36</sup> as you know, can create the imposition of personal liability on the attorney and throughout BAPCPA<sup>37</sup> now we see things that are in the nature of things in the frivolous area. This affirmative obligation on the part of practitioners, particularly with respect to schedule preparation or advocacy to make some sort of inquiry, the line drawn is frequently reasonable inquiry into the facts of a particular case, and we see, I think increasingly, personal liability on the attorneys, which is consistent obviously with Rule 9011.<sup>38</sup>

I should also note, and I think it's probably in our material somewhere, that there is increasing tort liability. This is completely outside of the rule system. Obviously you can have liability in the courts, but we see increasing actions against lawyers who are bringing actions for some plaintiffs out there that are non-meritorious.

What is a frivolous position? Well, it's obviously unknown. But we have included in the materials a number of cases that you might say are frivolous in nature and indeed the gravamen of the sanctions in those cases is frivolity.<sup>39</sup>

And I don't know whether it's appropriate for me to mention, but we have at the beginning the summary of cases on mortgage creditors and services. Is this all right to talk about these a little bit?

MS. VANCE: Sure.

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34. FED. R. CIV. P. 11.

35. FED. R. BANKR. P. 9011.

36. *Id.*

37. Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, 119 Stat. 23 (2005).

38. FED. R. BANKR. P. 9011.

39. *In re Allen*, 2007 Bankr. LEXIS 2063 (Bankr. S.D. Tex. June 18, 2007); *In re Porcheddu*, 338 B.R. 729 (Bankr. S.D. Tex. 2006); *In re Rivera*, 342 B.R. 435 (Bankr. D.N.J. 2006) *aff'd* *Schwartz v. United States Trustee's Office* (In re Rivera), 2007 U.S. Dist. LEXIS 47345 (D.N.J. June 29, 2007); *In re Gorshtein*, 285 B.R. 118 (Bankr. S.D.N.Y. 2002); *In re Fagan*, 376 B.R. 81 (Bankr. S.D.N.Y. 2007); *In re Osborne*, 375 B.R. 216 (Bankr. M.D. La. 2007).

PROFESSOR YOCHUM: I won't go through each in detail, but it's again this routine work. It is routinely using pre-signed certifications of default without having any understanding whether in fact the debtor in a particular Chapter 13 case or whatever had engaged in a default on the mortgage itself.

JUDGE HOPKINS: Professor Yochum, that's what really sort of struck me as I read through our case material for today. All of these cases involve creditors' misbehavior or malfeasance if you will, whereas sections 526 through 528 of the Bankruptcy Code<sup>40</sup> are directed more at the conduct of the "debtor's" attorney.

I don't want to revisit the Commission's Report, nor the minority view expressed therein that eventually became the law, but it struck me that all the miscreant lawyer conduct we're discussing here occurred on the creditor's side and was not done by debtor's attorneys.

MS. VANCE: Well, actually the commission did discuss false claims by creditors. And that was set aside as not meriting attention. And one reason that we included the lender/servicer cases is because it seems to be becoming bigger and bigger, and we're starting to see the damage that's done.

But I wonder—maybe, Ron, you can address this. When I read these cases, I see misconduct, I see sloppy lawyering, but I also get a sense that these new lawyers are trying to fit the practice of law within the confines of the larger marketplace. They're trying to meet some demands that their non-lawyer clients are putting on them, and these cases are reflecting a failure.

Do you see that tension, and if so, what do you think should be done?

MR. PETERSON: Well, what we see—take Chicago for example. I think eighty or ninety percent of the consumer mortgage foreclosure work is done probably by four or five mills. The clients are sophisticated and they're constantly—it's like a Dutch auction, how little money can you do my foreclosure for? Well, the lawyers are ingenious people, so they figure out what corners can we cut and still make a profit at that place for a foreclosure. And it's these shortcuts where somebody's sitting down with a tablet of affidavits and filling them out in advance and then leaving the law firm, but they keep the tablet anyways—

MS. VANCE: Which is *In Re Rivera*.<sup>41</sup>

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40. 11 U.S.C.A. §§ 526-528 (2005).

41. *Rivera*, 342 B.R. 435.

MR. PETERSON: That's the *Rivera* case.<sup>42</sup> And the fact that nobody really knows what the default was, whether there was a default—they're just running these things through because of the economy scale in order to be profitable considering what their clients are paying them for the work.

JUDGE HOPKINS: How about the underlying documents related to the foreclosure?

MR. PETERSON: Well, that's a double problem because not only do you have the efficiency problem that I discussed, but—unlike twenty years ago when I borrowed money for my first house, I was assured that the bank made the loan, and I owed the bank the money—today, ninety-five percent or more of all mortgages are sold on a secondary or tertiary market. And God knows what's happened to the documents because it is passed off from investor to investor, from trust to trust.

And one of the little tortures that I have is that any secured lender's lawyer who files a motion to vacate the stay, prior to my 341 meeting, I serve them with a subpoena to produce all the documents. And that has ended that practice.

PROFESSOR YOCHUM: One component of the mortgage cases is, of course, sometimes the lender is right, but they can't prove it. But to me that's a little bit different from an ethical violation, although it certainly could be an ethical violation where you assert something that you cannot prove. That is a violation of the rules.

But it's this mass of material, and I wonder—maybe I'll ask the judge—when you have, you must have I don't know what the number is of these cases coming through, what is your capacity as a judge to monitor this behavior or are you relying on debtor's counsel or indeed the debtors themselves to bring these issues to light?

JUDGE HOPKINS: You really do sort of rely on debtor's counsel.

The sheer volume of these cases is incredible. Ohio is one of those states that the new economy of the twenty-first century never really reached. We're an industrial-based economy and a lot of those factories are closing and moving out, at least in my area, and even strong companies are closing those old, obsolete factories and moving offshore.

So what we're having is this demographic shift of people working—not in factory jobs where they were able to make a very decent living and be part of the middle class—they're now shifting to working at a Staples or some other low level white-collar position where they sim-

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42. *Rivera*, 342 B.R. 435.

ply cannot meet their obligations anymore with the income. So we're seeing a huge volume of Chapter 13 filings where people are trying to save their homes, Chapter 7 filings where they're trying to reaffirm on the debt and get rid of the other debt, and it just isn't happening. So we are seeing a huge volume of cases.

The more acute problem, I think, is with the foreclosure. In the materials you'll see some cases from the Southern District, the district court, where now under diversity jurisdiction a lot more lawyers are bringing cases in the federal courts to foreclose against their debtors because the state courts are so clogged. But the federal courts, under their subject matter jurisdiction, are really questioning whether the plaintiffs have the proper documentation to be able to bring to foreclosure.<sup>43</sup> It piques my interest to see really what the state courts were doing beforehand. I know they were getting overrun, so whether or not the courts were really checking to see if the underlying documents supported foreclosure or not, really is a question.

PROFESSOR YOCHUM: One of the things you see in the mortgage servicing cases is individual courts setting up essentially local rules by a decision about procedure. A couple of these cases you see the lawyers nicked pretty bad, with an injunction that the lawyer do maybe more than what you would consider doing under the reasonable inquiry test, which is really what the test is throughout the bankruptcy code and 9011.<sup>44</sup>

I don't know if you want to talk about reasonable inquiry for a second. Reasonable inquiry is what it is. When this came out in BAPCPA, you'd ask a bankruptcy attorney what is the reasonable inquiry of my client and the answer would be none. You never had any investigation; they'd come in, fill out the schedules and so forth.

There are a number of thoughts out there about what that word means and whether there is a cognate in other forms of law, and I know Ms. Vance has some opinions on this. Frankly, I would pick the worst metaphor, and that's securities law, because I think that that's what they're after. The same sort of due diligence investigation that a securities lawyer might have to file—or do with respect to a securities filing—which is more inquiry certainly than the ordinary bankruptcy petitioner has done or is probably used to doing.

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43. *In re* Foreclosure Cases, 521 F. Supp. 2d 650 (S.D. Ohio 2007); *In re* Foreclosure Cases, 2007 U.S. Dist. LEXIS 95673 (S.D. Ohio Dec. 27, 2007); *In re* Foreclosure Cases, 2007 U.S. Dist. LEXIS 90812 (S.D. Ohio Nov. 27, 2007); *Midwest Bank v. Davenport*, 2007 U.S. Dist. LEXIS 87741 (S.D. Ohio Nov. 29, 2007); *Deutsche Bank Nat'l Trust Co. v. Key*, 2007 U.S. Dist. LEXIS 94975 (N.D. Ohio Dec. 12, 2007).

44. FED. R. BANKR. P. 9011.

A PARTICIPANT: There was a very recent case out of the middle District of Florida, Everwood or Evergreen,<sup>45</sup> in which the sanctions were \$371,000 and a five year bar on appearing in that court for bringing a recusal motion and filing three writs of mandamus based on essentially a rumor. And there was no inquiry. And in that opinion the judge goes into great detail about what reasonable inquiry is, and the attorneys clearly did no inquiry.

PROFESSOR YOCHUM: That's always the easier one.

A PARTICIPANT: But there was—I think it was a very good discussion because it involved two different firms with a lot of people deferring to other people trying to find cover. The judge gave no one cover and put the onus on every attorney in the process, including the firms, and said that the firms were responsible as well as the individual attorneys.

PROFESSOR YOCHUM: That's absolutely correct. And you should all know that one of the rules of professional conduct in all jurisdictions is that the partners or the managing authority in a firm are required to have in place mechanisms to ensure all individuals comply with the rules of professional conduct and there is an additional rule, which is essentially a *respondeat superior* rule for the firm based upon such conduct. May I ask a question? Who was the judge?

JUDGE HOPKINS: A good one.

A PARTICIPANT: I can't remember—

PROFESSOR YOCHUM: Bankruptcy judge?

MR. PETERSON: Briskman or Jennerman?

A PARTICIPANT: Briskman.

MS. VANCE: My red flag goes up when I hear that somebody made a recusal motion because—and this is just a bias, I don't have anything to back it up—I have a tendency to think that the one who's seeking recusal is usually up to no good because there are so many bad ones.

But I want to get back to these mortgage servicing cases, if we could, because this question of inquiry is very important and I think, Judge, you were correct to point out that the new sections 526, 527, and 528 of the Bankruptcy Code<sup>46</sup> go to a class of lawyers or several classes of lawyers in bankruptcy, only one of which Congress actively sought to regulate.

And at the same time, we had these cases slowly coming in on the mortgage servicing side and then of course Katie Porter released her study last fall and she found, I forget the exact number, but over fifty

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45. *In re Evergreen Sec., Ltd.*, 2008 WL 2477635 (M.D. Fla. 2008).

46. 11 U.S.C.A. §§ 526-528 (2005).

percent of the documents that these servicers and lenders were filing in Chapter 13 cases were wrong, they were charging fees that they weren't allowed to charge, they were coming in and seeking relief from stay based on defaults that never occurred.<sup>47</sup>

There was a recent case where, without advising the debtor, the bank decided that it would no longer accept payments made at a branch, and so when the debtor goes in, it takes the check, it gets rejected, they go into default because the bank simply changed its policy on how the debtor could make the payments. Pretty outrageous stuff going on.

But the real question is where do the lawyers fit into it?

I think *Rivera*<sup>48</sup> is a very clear case of a court saying, I really don't care what the pressures of the market are. And the *Rivera* court actually even said specifically that if you have to risk losing a client, then too bad, so sad. The opinion stated, "Lawyers must maintain their independence and resist, at the risk of losing a client or their employment, pressures which would undercut their professionalism."<sup>49</sup> And *Rivera* is about two years old.

A much more recent case that I ran across yesterday, so unfortunately I wasn't able to put it into your materials, is out of the District of Massachusetts and it's *In re Nosek*,<sup>50</sup> n-o-s-e-k. And this is probably the most blistering one I've ever seen, and I wanted to share a couple of quotes with you. What happened in this case is an adversary proceeding had continued for some time and then much later on it was, "Oh, we've got the wrong plaintiff." It was the wrong person, it was the same situation, but nobody knew who really held the mortgage and had standing to sue.

The judge at one point said:

Similarly, Ameriquest's argument that the noteholder's identity was disclosed during a deposition of one of its employees misses the mark and, as noted above, so does the argument that the assignment of the note and mortgage ultimately became a matter of public record. Ameriquest argues that assignments of notes and mortgages frequently occur with documentation of the transfers recorded, and even executed, at a later time. Moreover, Ameriquest represents that it is not uncommon for the original noteholder or mortgagee to take back the note and/or mortgage when a borrower defaults. Us-

47. Katherine M. Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, U OF IOWA LEGAL STUDIES RESEARCH PAPER NO. 07-29, available at <http://ssrn.com/abstract=1027961>.

48. *In re Rivera*, 342 B.R. 435 (Bankr. D.N.J. 2006).

49. *Id.* at 468.

50. *In re Nosek*, 386 B.R. 374 (Bankr. D. Mass. 2008).

ing these excuses, the parties' attitude appears to be that confusion as to a party's role is understandable against the current commercial climate. If the transfer of such negotiable instruments occurs at such a fast pace and without timely recorded evidence of the transfers, why should the Court and Debtor's counsel be expected to know the role of the parties? The burden is clearly on the sophisticated, albeit careless, lenders and servicers.<sup>51</sup>

I wonder—any of you are welcome to chime in—is Judge Rosenthal setting a standard here, at least for practitioners in the District of Massachusetts?

And, just so you know, in another place in the opinion he says very explicitly that the burden is on the creditor to demonstrate that they actually are the person who's going to assert the claim.<sup>52</sup> Do you think that this is where this trend might go, these blistering decisions that actually tell the rest of the community this is what I expect from here on in? Judge?

JUDGE HOPKINS: I don't know how you could shift it to the debtor. In terms of the secondary marketing, what Ron talked about earlier, interestingly enough I got a call from a high school classmate of mine who is now trading in the markets in New York. He asked me, "What are your courts doing with these foreclosure cases?" He said, "This makes our securities valueless. If we can't foreclose on the actual asset, who knows what the value of this paper is." I mean this is real money here.

But you know, on the other end, we also have to think of the human cost. I mean we're dealing with debtors who are seeking relief that the Congress has sought fit to provide. And the constitution, as you know, has a bankruptcy clause in it and it's been there for a long time, and they should be able to take advantage of bankruptcy and try as they might to save their home. And, someone's ox is going to get gored. I think the commercial lenders are in a much better position to be able to find assignees through the chain of title and come up with those documents.

MS. VANCE: What do you think about the threat to the court system? Because implicit in this decision, the *Nosek*<sup>53</sup> decision and some others, are the standards that exist within the court, and the standards of professionalism should and perhaps must give way to the person in New York who's saying, "What are you doing? This is worth a lot of money."

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51. *Id.* at 382-3.

52. *Id.* at 383.

53. *Id.*



Do you think that the system is threatened?

JUDGE HOPKINS: These are ancient principles. Professor Yochum has gone through Rule 11.<sup>54</sup> And if you're going to file it, you've got to be able to have a reasonable basis in fact and law to support your argument. Indeed, if you look at these mortgage foreclosure cases,<sup>55</sup> the courts are really trying to protect the prestige of the federal courts.

When you talk about standing, you've got to have injury, you've got to have the correct relationship to be able to pursue these claims and have proper adjudication of the claim. I don't see how courts can get there otherwise; courts can't go on supposition and innuendo.

MR. PETERSON: I think ultimately too, you're going to see the trustee's bar picking up on this, and we're challenging more mortgages than we used to.

I just had an opinion out of Judge Schmetterer<sup>56</sup> about a month ago where we tossed a mortgage, one that was recorded in New York on Highland Park, Illinois property, and the other mortgage was tossed because they didn't identify the indebtedness.

But I think the trustees who eat what they kill have a tremendous incentive here to police this system.

MS. VANCE: How would they do so?

MR. PETERSON: By objecting to the secured creditor and putting him to a screw. I mean I'd make a lot of money if I could vitiate a mortgage and sell the home free and clear.

MS. VANCE: What happens if there is no money for you to be made? I mean—I guess my question is how effective do you think the trustees will be within this system?

MR. PETERSON: Well, if I have a \$500,000 house in Highland Park and I can knock out the mortgage, I get a commission for that and I get to pay my lawyer. And the discovery on this is pretty simple. I have a standard can 2004 document subpoena, and I want to see the documents, including both copies of the right of decision under the Truth in Lending Act.<sup>57</sup> You'd be amazed the number of secured lenders who can't cough up the documents.

54. FED. R. CIV. P. 11.

55. *In re* Foreclosure Cases, 521 F. Supp. 2d 650; *In re* Foreclosure Cases, 2007 U.S. Dist. LEXIS 95673; *In re* Foreclosure Cases, 2007 U.S. Dist. LEXIS 90812; *Midwest Bank*, 2007 U.S. Dist. LEXIS 87741; *Deutsche Bank Nat'l Trust Co.*, 2007 U.S. Dist. LEXIS 94975.

56. *In re* Berg, 387 B.R. 524 (Bankr. N.D. Ill. 2008).

57. Truth in Lending Act, contained in Title I of the Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (codified as amended at 15 U.S.C. §§ 1601-1667f (2000)).

MS. VANCE: What do you think would be the ultimate outcome? Because I think the market forces here are very strong personally.

MR. PETERSON: Well, I think if enough trustees start knocking these out, the secured lending bar is going to have to rethink what they're doing.

PROFESSOR YOCHUM: Actually, I'm struck as outside the world of it, but computer programming is a lot of the problem, isn't it?

JUDGE HOPKINS: Yes.

MR. PETERSON: I've seen a shift over on the mortgages to an electronic mortgage recording service. No matter who owns the note, we now can find the mortgage. And you have a public trustee who holds title to the mortgages in places like Colorado. So there is a response in the marketplace to this problem.

PROFESSOR YOCHUM: That specific problem will be taken care of technologically over time, but I think it's going to be a while.

You know, lawyers sometimes complain that compliance with ethics results in loss of cash. That's the point. I told Cathy, this is a cheap joke, but I'm available for doing a topic called sex with clients, and I like to call sex with clients—

JUDGE HOPKINS: Available?

PROFESSOR YOCHUM: I am available. There will be a sign-up sheet outside. But it's amazing to me about how many lawyers have sex with clients when the ethical solution is simply, in the language of the code, withdraw. That is, don't be their lawyer anymore.

JUDGE HOPKINS: Ron, I thought you were going to go into trustee suits. We had an interesting case out of the Seventh Circuit on that.

MR. PETERSON: Yeah. Before I start, I will make this ethical disclosure. I am the counsel for Andrew Maxwell. On March 21st of this year, the Court of Appeals for the Seventh Circuit considered the case of *Maxwell v. KPMG*.<sup>58</sup> This was an appeal from a decision by District Judge Joan Gottschall that granted summary judgment in favor of the accounting house.

The issue that the trustee argued to the Seventh Circuit was as follows: The accountants purportedly missed something that—there are a lot of different names for it—home running, which is that the income was overstated prior to a merger. It was overstated by about fifteen million dollars. The trustee's argument was that but for this fifteen million dollar overstatement, we never would have bought this turkey, and therefore we would have suffered no damages. And there-

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58. *Maxwell v. KPMG LLP*, 520 F.3d 713 (7th Cir. 2008).

fore we're entitled to the entire loss of our market cap because we wouldn't have lost it had we not done the merger.

The trustee had some argument to make. This case was controlled by Illinois law, and Illinois law basically says foreseeability in a tort case is a jury question. When the Court of Appeals got this—now think of the panel we have here—Judge Posner, Judge Easterbrook, and Judge Wood, looked at it and said, wait a minute, this debtor suffered its losses because the internet market imploded. This was a four billion dollar stock swap. Don't tell me a sixteen million dollar overstatement in income was going to affect anything.

Now, it was a very scholarly opinion as to what a plaintiff trustee or any plaintiff must show in a tort case in terms of foreseeability and proximate cause. And had the opinion ended on page six, we wouldn't be discussing it here today.

MS. VANCE: But then—

MR. PETERSON: But then—and this matter is not before the court—but Judge Easterbrook then launches into a study, a damage study that was done by a very prominent damage study firm, Michel-Shaked, out of Massachusetts, a lot of Harvard professor types. And what they said in terms of the damage study—the damage study's nuts.

To make matters worse, the lawyer was not a bankruptcy lawyer who argued the appeal for the trustee. He was asked by Diana Wood, "Who do you represent?" to which he responded, "the creditors, of course."

Well, the creditors in this case, according to the trustee, were about ninety-three million dollars, and they're suing KPMG for six hundred million dollars. And so the judge concluded this looks like, smells like, and is seen in the company of strike suits, and they brought this number so big that poor KPMG would—bet the company litigation.

Well, if the opinion had ended at page nine, we would not be having this discussion.

MS. VANCE: But then—

MR. PETERSON: He then goes on to say, when you look at the tenuousness of the trustee's liability case, and then you look at this damage study, he uses the "F" word. He calls it frivolous.

And then he turns his eye toward the bankruptcy judges and says, you bankruptcy judges aren't watching the trustees very well in terms of their litigation judgment. And then he goes on to state: In a private litigator he has to worry about the vendors, he has to worry about the shareholders, he has to worry about the government, he has to worry

about customers, and there are great inhibitions in a private litigator to bringing lawsuits such as the one at bar.

Bankruptcy trustees walk into the cases, they walk into this room, there is this pile of cash, and all they have to think about is how do I spend the cash. They make extortionist demands upon innocent parties, and if they don't pay, the trustee sues him.

Therefore, he concludes, we will invite the appellee to bring a motion under Federal Rule Appellate Procedure 38<sup>59</sup> and under Federal Rule Bankruptcy 9011<sup>60</sup> in the district court and if these sanctions are allowed, and here's the parenthetical without citation to authority, of course the trustee will be personally liable, not the estate, close paren. And then the final sentence in the opinion is: Of course we're not prejudging the outcome of the sanctions motion.

Now, several interesting questions come up from this. Number one, I think it's one of the responsibilities of the NABT<sup>61</sup> and other bar associations to educate the court of appeals as to the number of inhibitions we work under, including the good judge here who approves my fees, the U.S. Trustee who never leaves me alone, creditors in large cases who always encourage me to spend my money as opposed to theirs, and the fact that we trustees often eat what we kill and there is no pile of cash when I walk into a case, and I'm betting the firm's resources that I can win. And I am very, very conservative on how I bet my firm's resources.

The other question though, and I'll pose this to the judge, because I had this situation, Judge, down the river from you at New Albany. Judge Lorch last week or two weeks ago announced that he would pre-screen a suit before it was brought by the debtor to undo a pre-leverage buyout pre-petition. And I had never heard of a bankruptcy judge doing that before.

I guess my question to you, in light of Judge Posner's epistle, do you feel as a judge that you have a duty to screen and question the trustee's litigation judgment before the fact as opposed to after the fact when you sign off on the deeds?

MS. VANCE: Or any party.

JUDGE HOPKINS: I really did not feel I had that obligation. Was this epistle by Judge Lorch prior to the *KPMG* decision?

MR. PETERSON: No, it was about a month after.

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59. FED. R. APP. P. 38.

60. FED. R. BANKR. P. 9011.

61. National Association of Bankruptcy Trustees

JUDGE HOPKINS: Well, he obviously read the research that Professor Yochum shared with us with regard to the ability of a trustee to protect him or herself. The trustee needs to get the blessing of the bankruptcy court before filing suit. Under that rubric, you get the protection of the judicial immunity we enjoy, but only if the suit is brought pursuant to an order from the court.

My thinking is that what the bankruptcy court is trying to do really is protect the trustee, but that really isn't our role. And I was really interested to see the patchwork of law on this subject.

PROFESSOR YOCHUM: And we know in this panel we don't want to talk too much about trustee liability, personal liability.

MR. PETERSON: I don't want to talk about it at all.

PROFESSOR YOCHUM: I'm a neutral. I'm a professor. But it is an amazing old body of law that has not been re-explored. And the last good law review article, as a matter of fact, I found on the subject was from the Commercial Law League's older journal, sort of the antecedent to this one; trustees traditionally had immunity as judicial officers.

As an academic, I'd want to research whether the new United States trustee system affects that immunity. Personal liability was always available against trustees for stealing or doing something outrageously stupid. It is consistent, however, with any expenditure of assets by the estate because that's what litigation is, you're going to spend some money to perhaps be able to get bankruptcy court approval of that expenditure in advance.

I think that it's going to take a while to litigate this out. In this particular case,<sup>62</sup> the trustee was a party plaintiff and thus, theoretically under Rule 11,<sup>63</sup> is subject to Rule 11 or 9011<sup>64</sup> style sanctions. There's a huge body of law talking about trustees being nominal parties, but in fact, the real party is the estate itself.

Traditionally, only gross negligence—and that's the expression, gross negligence—would be grounds for personal liability. I'm not sure—and I talked with Cathy about this, these are two different words—whether frivolous is the same as gross negligence. They may be very close.

I will say one other thing from a general perspective out of this case. Judge Posner, Mr. Law and Economics, heavily into numbers, when you ask him in his opinion what does frivolous mean, he gives no

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62. *Maxwell*, 520 F.3d 713.

63. FED. R. CIV. P. 11.

64. FED. R. BANKR. P. 9011.

numbers. He says a frivolous appeal has some chance of success, lightning may strike. But if the probability is very low, the suit is frivolous. Thus, you know, it's still fairly gray.

I'll make one final point about this point from my perspective on frivolousness and my sort of demarcation. I take this to be a fact-based frivolous case, and maybe it's fact based because Judge Posner doesn't know the law, but he's saying that one of the standard elements of negligence was unprovable, that is, that you had no evidence with respect to cause and that makes this case frivolous.<sup>65</sup>

JUDGE HOPKINS: I'll tell you one thing that I will do if I find a case coming before me that perhaps may not meet the frivolous standard, but perhaps is weak on facts or law, is to deal with the concern in the Rule 16<sup>66</sup> conference that I often have with these adversary proceedings.

If you look at that rule, it's pretty aggressive in terms of the reach that the district court or the bankruptcy court in this instance has. The court can strike frivolous claims, it can strike defenses in the course of the conference that you're having. And I've often done that with cases where I found the claim itself may not warrant further adjudication.

MR. PETERSON: I'll make just three comments. One, what's at stake here for Mr. Maxwell in his personal capacity is five and a half million dollars in sanctions.<sup>67</sup> You can imagine the expression on his wife's face when he came home for dinner that Friday night.

Number two, the standard for trustee personal liability is a three-way split in the circuits. The Seventh Circuit has historically been willful and wanton conduct, the Fifth Circuit I believe is gross negligence, and there are a few circuits out in the east that are simple negligence. This was a question, by the way, of both fact and law because the question was which rule of law in the state of Illinois applies because Illinois governed, and whether foreseeability was to be left to the tender loving care of the jury or it was a question of fault.

But again, it's an ethical question here that we all as plaintiffs bring lawsuits. And what is the difference between a perfectly good, aggressive, let's get money for the creditors and approve the state lawsuit as opposed to a strike suit where we are acting like nothing more than shameless extortionists? That line is sometimes very gray. But again, here the trustee in *Maxwell* had his independent counsel, it wasn't his law firm, and he had hired one of the best damage experts in the coun-

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65. *Maxwell*, 520 F.3d 713.

66. FED. R. CIV. P. 16.

67. *Maxwell*, 520 F.3d 713.

try, and even with all that he finds himself staring at a five and a half million dollar sanctions order.<sup>68</sup>

MS. VANCE: I think where that line is drawn is actually in the eye of the beholder as well because you could ask ten different people where the line should be drawn and you would get ten different responses, which brings me to one last topic that I want to raise after—I want to give Judge Hopkins some time to talk about a particular item.

Professor Yochum, you mentioned a little bit ago about regulatory and legislative efforts moving into the regulation of attorneys. And I don't want to spend too much time on it, but I would like thoughts from any of you actually about what seems to be an increasing tendency of—I've seen it at the federal level, I don't know the extent to which it's happening at the state level, but I'm sure it is, especially when you're talking about tort claims and asbestos and things like that—but it seems as if Congress thinks that part of what it ought to do is regulate lawyers.

Certainly everybody in the bankruptcy world knows what happened with BAPCPA. We know, like I said earlier, it was one group of attorneys—attorneys who represent consumer debtors in Chapter 7 cases and in some instances Chapter 13 cases. These were the bad actors, and these were the ones who had to be regulated.

And my question is threefold for anybody who wants to chime in. Is this appropriate; is it necessary; and in order to accomplish the goal, do the backers of these efforts by definition make the public's perception of us and our profession worse because they have to say how bad we are in order to convince everybody that the legislation ought to be passed?

Now, I tried to—the Congressional Record is really hard to search, but some very very bad things were said about debtors' attorneys in order to get these provisions of BAPCPA done.

MR. PETERSON: Well, you have a situation in the prior republican Congress, you had Senator Grassley, a non-lawyer, as chairman of the Judiciary Committee, and that was before Senator Specter. And he really believes that there were too many frivolous lawsuits in the United States, starting with the McDonald's coffee cup case.<sup>69</sup>

MS. VANCE: Let me ask you a question before you go on. This has puzzled me forever. How does a case that gets to a jury verdict get called frivolous? That's always baffled me. The frivolous ones I thought were the ones you're supposed to weed out through

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68. *Id.*

69. Liebeck v. McDonald's Restaurants, P.T.S., Inc., 1994 WL 360309 (N.M. Dist. 2004).

12(b)(6)<sup>70</sup> and things like that. How do you get all the way to the jury on a claim that's frivolous? I'm not asking that of you, it's just a question that's always been in my mind, because a jury issued a verdict in that case.

MR. PETERSON: Well, a lot of judges, and I'll let the judge speak for himself, I think there's an inclination by a lot of judges to let cases go to the jury rather than take the case away from the jury on the theory if the jury brings in a verdict for the defendant, then they didn't have to do any work. And then if the jury brings in the wrong verdict, then they have the painful process of an N.O.V. How do you feel, Judge?

JUDGE HOPKINS: Oh, I don't know, I find facts under Rule 7052.<sup>71</sup> I haven't had the experience of conducting a jury trial as a bankruptcy judge.

MR. PETERSON: I think you see two trends in Congress. There's a feeling that the lawyers are bringing too many frivolous suits, and Senator Grassley's response was almost to make Rule 11<sup>72</sup> mandatory. Somebody had to bring it. And you had to have this piece of ancillary litigation tagged on.

There is also a movement in Congress, I think a move from the American rule to the English rule. In the English rule, if I brought a lawsuit, I have to post a bond so that in the event I lose, I have to pay the defendant his legal fees. And I think if you look at some of the writings of Judge Easterbrook, he sort of feels romanced of that whole concept of let the loser pay.

The second and unfortunate concept we see moving on is Congress doesn't like common law judges. Congress wants to codify everything and strip from the judges every conceivable piece of discretion they might have on this earth so that they can achieve this legislative purpose. And BAPCPA certainly is a horrible example.

JUDGE HOPKINS: I think that's right. And I think, Cathy, you wrote a piece where you said other lawyers, other than bankruptcy lawyers, beware.<sup>73</sup>

MS. VANCE: It's in the materials.

JUDGE HOPKINS: Yes. That's coming.

PROFESSOR YOCHUM: Well, fee shifting was the original approach to frivolous litigation. I mean, that seemed to be most accessi-

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70. FED. R. CIV. P. 12(b)(6).

71. FED. R. BANKR. P. 7052.

72. FED. R. CIV. P. 11.

73. Catherine E. Vance, *Professionalism and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, Sept. 30, 2005.



ble. And, again, Rule 11<sup>74</sup> is the example, but in every area of law now, there are fee-shifting statutes.

I'm going to ask the judge a question. You know, we talk about legislative response or judicial response through the rule process. Do you think that the judges are pulling the trigger more than they used to? Is that okay to ask?

MS. VANCE: Of course it's okay.

PROFESSOR YOCHUM: I don't want to, you know, get shot.

JUDGE HOPKINS: Our materials are chocked full of instances where judges are really sort of pulling the trigger, but it seems to me that the sanctions imposed in each of these cases was justified where lawyer misconduct is occurring.

I had another instance come up where this whole discharge by plain language took place. It occurred for the first time in the student loan area where, as we all know, plaintiffs have to bring an action under Section 523(a)(8)<sup>75</sup> in order to discharge a student loan.

After the *Andersen*<sup>76</sup> and *Pardee*<sup>77</sup> decisions from the Tenth and Ninth Circuits, a number of debtor's attorneys thought it was a clever trick, or at least maybe they felt an ethical obligation under this concept of zealous representation, to insert in their plans a discharge provision for student loans. And, if the creditor, the state agency that was in charge of collecting the student loan, didn't catch the discharge language when served with a copy of the plan, it became *res judicata* under the *Pardee*<sup>78</sup> decision.

So I took action, having discovered that provision or clause in a plan. In the show cause hearing, I told the attorney that that sort of practice stepped over the line. In instances like that, clearly in my opinion, courts are justified in correcting the attorneys. I don't know that my colleagues are pulling the trigger any sooner than they should.

PROFESSOR YOCHUM: I didn't mean more than they should, but more.

JUDGE HOPKINS: But you see the punishment meted out, when you see what Judge Isicoff did in "the few french fries short" case<sup>79</sup> it was a rational, well-reasoned, and measured response. I think it was proportional to the harm done. She had a show cause hearing. The

74. FED. R. CIV. P. 11.

75. 11 U.S.C.A. § 523(a)(8) (2005).

76. *Andersen v. UNIPAC-NEBHELP*, 179 F.3d 1253 (10th Cir. 1999).

77. *Great Lakes Higher Educ. Corp. v. Pardee*, 193 F.3d 1083 (9th Cir. 1999).

78. *Id.*

79. Order to Show Cause, *Goldberg v. Mount Sinai Med. Ctr. of Greater Miami, Inc.*, No. 07-1210-BKC-LMI (Bankr. S.D. Fla. May 21, 2007).

attorney realized the error of his ways, and the only punishment she imposed essentially was requiring the attorney to take a course in professionalism in Florida.

I've had similar things occur, and what I did in one instance, it was a business Chapter 13 case, was order the lawyer to speak at a CLE program on how to handle a business Chapter 13 case. He's not fulfilled his obligation yet. He doesn't appear before me anymore, I left him alone, but it was a troublesome matter.

PROFESSOR YOCHUM: Bob has a question.

MR. BERNSTEIN: Earlier you asked about whether a trustee would be—whether trustees were policing the creditors where there was nothing in it for the trustee and I'm not sure that there is ever—I guess there might be a case where there wouldn't be anything for the trustee, but I wanted to mention in Pittsburgh the Chapter 13 trustee has filed 293 motions for sanctions against Countrywide with respect to Countrywide allegedly losing payments that she transmitted.<sup>80</sup>

Her fear is that there will be charges somewhere in the account or adverse action against the debtor down the road and that the burden shouldn't be on these debtors to find that, it should be somehow clarified by the courts. And Countrywide is the target of lots of things going on, but technically one of her points was it's her duty to police this on behalf of the Chapter 13 debtors.

But incidentally, in her prayer for relief, one of the prayers in each of the 293 motions is, I believe, a two thousand dollar sanction for a motion paid to her for her efforts. So maybe there is never a time when there is really nothing in it for everyone.

MS. VANCE: Well, I think that we could probably do a program on the trustee's role in all this, the mortgage lender/servicer sort of thing, which is to say I'm going to try to make a segue away from that. I want to say it's easy to slip into what the lenders and the servicers are doing.

What we want you to come away with is the extent to which the attorneys' ethical and professionalism standards are implicated when they file motions for relief from stay based on information that is just completely wrong and that nobody sought to verify or when they take action on behalf of an entity that actually has no interest in the property.

So I think that all of those things are very important, but our point here is to focus on where the attorneys fit and the expressions like that

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80. *In re Countrywide Home Loans, Inc.*, 384 B.R. 373 (Bankr. W.D. Pa. 2008).

of the *Rivera*<sup>81</sup> court that you don't get to waver from your ethical duties. You don't get to put aside professionalism because it's more profitable to do so. And that it's definitely a tension for these attorneys, but like I said, it's so easy to slip into what the servicers and the lenders are doing because you've got some pretty outrageous facts in all of these, but I fear that we only have a couple of minutes left and we only have about three, Judge. Is that enough time for you to talk about your mentoring?

JUDGE HOPKINS: Sure. I'll take whatever time is allotted to me. Judges are a subset of lawyers, so I can probably cut it short.

MS. VANCE: And you're also more trusted than us, remember.

JUDGE HOPKINS: Cathy asked me to speak because she had to sit through a luncheon talk I gave last year at our Midwest Regional Bankruptcy Seminar in Cincinnati. Last year I was president of the NCBJ<sup>82</sup> and, you know, as any good trial lawyer, you want to have a story to tell or at least have a theme when you're presenting your case to your colleagues.

We have a number of new judges, as you know the bankruptcy bench has turned over quite a bit in the last few years. We now have a real mix—some older judges who've been on for thirty years or more, and some who are very young. So, I wanted to really strike a theme with my colleagues on an issue that I thought that we needed to deal with, frankly.

And so I told them the little story about myself and my family. I was born in South Georgia, we moved to Ohio in the '60s ostensibly because of the conditions that existed in the south in the '60s, epitomized by a case called *Screws v. United States*.<sup>83</sup> It was a 1945 decision from the Supreme Court, and the story about this case was told in our family for many, many years because of the person who was involved. What happened in this case was the sheriff of Baker County, Georgia named Screws had essentially killed an African-American man who he had held a grudge against for some time.

The State never filed any charges criminally against Screws, but the Federal Government did, believe it or not, in 1945. An attorney named John Doar who had been part of the Kennedy Justice Department, but was a Republican holdover from the previous administration before, was the real inspiration behind that case.

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81. *In re Rivera*, 342 B.R. 435 (Bankr. D.N.J. 2006).

82. National Conference of Bankruptcy Judges

83. *Screws v. U.S.*, 325 U.S. 91 (1945).

The story had been passed down through my family in sort of hushed tones because of the obvious pain involved. The man killed in the case, Robert Hall, had been my great uncle. He was brutally beaten in broad daylight on the steps of the courthouse and died overnight in jail.

That story really stuck with me as a youngster and later inspired me to become a lawyer. I really wanted to be a public lawyer and one who defended the rights of citizens under the Constitution.

A funny thing happened on the way to the forum. Obviously, I'm practicing or judging in the bankruptcy area—a commercial law field. But nonetheless, those doors are open, and I stand on the shoulders of those who went before me who opened those doors.

I also went to a small college in Maine called Bowdoin College, which has a very rich history and tradition in terms of public service. The motto of the College is “to serve the public good.” And I've always been one who has found it most comfortable being a public lawyer, having served in the Justice Department before taking the bench.

In relating the story of the *Screws* case, I was trying to convey to my colleagues, and to those attending the luncheon, a couple of things. Cathy has a slide that didn't make it. One of the things that we can do as lawyers to improve ourselves and the way the public views us is to educate the public about how to handle common legal problems. Another instance was do a better job of policing and regulating ourselves. And the third was do more public service and pro bono work.

The point that I was trying to make with my colleagues and my friends was that we are all public servants. Through research, I found a very good quote from Professor Edward Re who gave a speech at Saint John's University Law School some time ago which captures this ideal. Professor Re said the word profession is derived from the Latin *professio*, *professionem*, which means to make a public declaration. The term evolved to describe the calling or an occupation that required new entrants to take an oath professing their dedication to the ideals associated with this learned calling.

Our English colleagues, from whom we borrow not merely our common law but also many of our legal customs and traditions, speak of the calling of the law. The word “calling” conveys the thought that students of the law are not merely admitted to the bar for the practice of the law, but are called to the bar.

And so from that theme, I went on to say that I think as lawyers in order to improve our image and really fulfill the public calling that we have to do some sort of public service. And, I advocate pro bono service.

UCLA Law Professor Ken Klee and some other scholars at our NCBJ program in 2006 held a debate as to whether major law firms, commercial law firms, should be in the business of pro bono work anymore when it comes to representing consumer debtors. And I can tell you that the need is great and that there are many persons who need bankruptcy protection. I'm very proud to say that some of my colleagues, particularly ones in South Florida, and also in Georgia and Houston where the pro bono programs were really dying on the vine, have ruled that lawyers are not debt-relief agencies and that these provisions, as harsh as they are, don't apply to lawyers, even if the attorney doesn't get the pro bono case through a non-profit agency pursuant to the safe harbor clause of BAPCPA.

So I would encourage everyone to be more active in the pro bono area.

The other thing I told my colleagues and I told those that were in attendance in Cincinnati was I think we can do some things to mentor younger lawyers—especially ones of color.

I'm one of the first to have attended college in my family, and it was very important for me to have a strong mentor. My mentor was Judge Alan Norris of the Sixth Circuit where I clerked. I think that we can reach out to minority lawyers who are perhaps laboring as the first who've gone through law school or college to help in that regard. And it's easier than ever now because of e-mail.

I know Judge Ann Williams, who is a gem and really a very good friend, has a program here in Chicago where she does a lot of this kind of thing. If you touch base with her, I'm sure she'll put you in touch with minority students who could use a mentor through the Just The Beginning Foundation.

MS. VANCE: We wanted very much to end on a high note and to encourage everybody to remember that you have to be a part of the profession, not just an advocate for one client, but an advocate for a system that is fair and is just.

Thank you all for coming.