



AMERICAN
BANKRUPTCY
INSTITUTE

Rocky Mountain Bankruptcy Conference

Bankruptcy Game Show

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Jeopardy-Style CLE Questions (Ninth Circuit-Focused Ethics and Practice Themes)

1. Game Instructions (Facilitator Slide)

1. Contestants must respond in the form of a question (e. g. , "What is...?").
2. Select a category and point value; facilitator reads the clue.
3. Correct response earns points; incorrect response deducts points (optional).
4. If a clue references "the attached cases," participants should identify the principle illustrated by those materials (not necessarily a jurisdiction-specific holding).
5. Optional: Use "Daily Double" for one clue per round; allow wagering.

2. Jeopardy Board (Round)

1. Ex Parte and Court Contact

1. **\$100:** This type of communication with a judge about a pending matter, without notice to opposing counsel, is generally prohibited.
2. **\$200:** A lawyer's improper direct outreach to chambers can create this risk to the proceeding's perceived fairness and impartiality.
3. **\$300:** Even when a judge receives an improper communication, the judge may need to do this to protect the parties' rights and the integrity of the process.
4. **\$400:** This professional-conduct rule topic broadly prohibits ex parte communications with a judge during the course of a proceeding (as illustrated by the attached discipline materials).
5. **\$500:** This is a key best practice when any non-routine contact with chambers is necessary (think: transparency and equal access).

2. Candor, Citations, and the Record

1. **\$100:** Filing a brief with quotations that do not exist is a problem of this core duty to the tribunal.
2. **\$200:** When you cite authority, you must confirm not only that it exists, but also that it supports this.

3. **\$300:** A response brief containing incorrect citations and misstatements of authority can trigger this type of motion practice from the opposing party.
4. **\$400:** This is the minimum quality-control step before filing any document that includes case citations generated by a tool or another person.
5. **\$500:** This is the litigation harm that occurs when the court must spend time untangling defective citations instead of deciding the merits.

3. Generative AI in Litigation

1. **\$100:** Generative AI output should be treated as this, not as a final, filing-ready product.
2. **\$200:** Submitting AI-generated citations without verification can violate this obligation to advance only meritorious legal contentions.
3. **\$300:** One ethical risk of using generative AI tools is exposing this category of protected information.
4. **\$400:** A lawyer must understand the technology used in practice to satisfy this baseline professional obligation.
5. **\$500:** A court may impose non-monetary sanctions to deter repetition and educate the bar after this AI-related filing failure.

4. Sanctions, Discipline, and Remedies

1. **\$100:** This remedy requires counsel to return fees because the services provided conferred no benefit (as illustrated by the attached bankruptcy discipline materials).
2. **\$200:** A court may require completion of this as a condition to lift a practice suspension.
3. **\$300:** This is a common non-monetary sanction short of suspension that formally expresses the court's disapproval.
4. **\$400:** This sanction shifts the opposing party's reasonable expenses and attorneys' fees caused by misconduct.
5. **\$500:** This severe sanction removes or limits an attorney's ability to practice before the court for a period of time.

5. Bankruptcy Practice Pitfalls (Practice Management)

1. **\$100:** When a bankruptcy filing provides "absolutely no benefit" to the debtor, the court may order this financial consequence for counsel.
2. **\$200:** The attorney who signs the petition is often treated as bearing this type of responsibility for the filing's accuracy and handling.

3. **\$300:** A court may condition reinstatement on completing a set number of hours of this type of education, including ethics content.
4. **\$400:** Assessing a trustee's fees and costs against counsel is an example of this broader category of court-ordered financial consequence.
5. **\$500:** A pattern of mishandling cases can lead to this practice-limiting outcome within a specific subject-matter area.

3. Final Jeopardy

1. **Category:** Professional Responsibility in the Age of AI
2. **Clue:** A lawyer uses a generative AI tool to draft a motion, but files it without verifying the cited cases exist; the court later discovers the citations are fabricated. The single most important safeguard that would have prevented the problem is this.
3. **Wager:** Teams may wager up to their total score.

4. Facilitator Answer Key (Expected "Question" + Teaching Point)

1. Ex Parte and Court Contact

1. **\$100:** *What is an ex parte communication? * Teaching point: Avoid unilateral communications about merits or pending issues.
2. **\$200:** *What is the appearance (or risk) of bias/partiality? * Teaching point: Even perceived unfairness can damage credibility and process integrity.
3. **\$300:** *What is disclosure to the parties (and consideration of recusal if necessary)? * Teaching point: Remedial steps may be required after improper contact.
4. **\$400:** *What is the prohibition on ex parte communications with a judge during a proceeding? * Teaching point: Discipline materials emphasize broad prohibition and professionalism.
5. **\$500:** *What is providing notice to opposing counsel (and using formal filings when possible)? * Teaching point: Transparency is the default; filings create a record.

2. Candor, Citations, and the Record

1. **\$100:** *What is candor toward the tribunal? * Teaching point: Accuracy in quotations and citations is foundational.
2. **\$200:** *What is the proposition for which the authority is cited? * Teaching point: Existence is not enough; relevance and support matter.

3. **\$300:** *What is a motion to strike/exclude or a sanctions request based on defective briefing?
* Teaching point: Opponents will highlight citation defects to undermine credibility.
4. **\$400:** *What is Shepardizing/KeyCiting (or otherwise verifying) every citation and quotation against the source? * Teaching point: Verification is non-delegable.
5. **\$500:** *What is prejudice to judicial efficiency (wasted judicial resources)? * Teaching point: Courts treat this as serious because it burdens the docket.

3. Generative AI in Litigation

1. **\$100:** *What is a first draft (or starting point)? * Teaching point: AI output requires lawyer review and revision.
2. **\$200:** *What is the duty to bring only meritorious claims/contentions (and to ensure legal contentions are warranted)? * Teaching point: Filing fabricated authority is the opposite of merit screening.
3. **\$300:** *What is confidential client information? * Teaching point: Tool selection and settings must protect confidentiality.
4. **\$400:** *What is competence (including technological competence)? * Teaching point: Lawyers must understand tools sufficiently to use them responsibly.
5. **\$500:** *What is filing hallucinated/nonexistent authority (fabricated citations)? * Teaching point: Courts may use non-monetary sanctions to deter and educate.

4. Sanctions, Discipline, and Remedies

1. **\$100:** *What is disgorgement (return of fees)? * Teaching point: If services provide no benefit, fee return may be ordered.
2. **\$200:** *What is continuing legal education (CLE) as a reinstatement condition? * Teaching point: Courts may require targeted education (including ethics).
3. **\$300:** *What is a reprimand (or censure/admonition)? * Teaching point: Non-monetary discipline can still be significant.
4. **\$400:** *What is a fee-shifting award of reasonable expenses and attorneys' fees? * Teaching point: Sanctions can compensate for costs caused by misconduct.
5. **\$500:** *What is suspension from practice before the court? * Teaching point: Practice restrictions are among the most serious sanctions.

5. Bankruptcy Practice Pitfalls (Practice Management)

1. **\$100:** *What is fee disgorgement? * Teaching point: Courts scrutinize value delivered to the debtor.

2. **\$200:** *What is responsibility for the filing (signature responsibility/primary counsel accountability)? * Teaching point: Signing counsel is accountable for proper handling.
3. **\$300:** *What is bankruptcy-focused CLE (including ethics hours)? * Teaching point: Reinstatement may require subject-matter and ethics training.
4. **\$400:** *What is assessment of trustee fees and costs (cost-shifting)? * Teaching point: Courts can allocate administrative costs to counsel when warranted.
5. **\$500:** *What is suspension from bankruptcy practice in the district? * Teaching point: Courts may tailor discipline to the practice area implicated.

Final Jeopardy

1. **Expected response:** *What is independently verifying every AI-generated citation and quotation against the actual source before filing? * Teaching point: Verification is the single most effective control to prevent fabricated-authority filings.

ANSWER KEY

Jeopardy-Style CLE Questions — Ninth Circuit Jurisdiction (Revised Answer Key)

1. Ex Parte and Court Contact

1. **\$100 Answer:** *What is an ex parte communication?*
2. **\$200 Answer:** *What is creating an appearance of impropriety or undermining confidence in the court's impartiality?* [Taylor-El v. Macomber, 2025 U.S. Dist. LEXIS 220389](#), [Richards v. Jain, 168 F. Supp. 2d 1195](#).
3. **\$300 Answer:** *What is promptly disclosing the communication on the record and giving the other side an opportunity to respond (and considering recusal if warranted)?*
4. **\$400 Answer:** *What is the duty to avoid improper ex parte communications with the court during a proceeding?*
5. **\$500 Answer:** *What is using a noticed filing or a joint/served communication (or otherwise ensuring equal notice and access to the court)?*

2. Candor, Citations, and the Record

1. **\$100 Answer:** *What is the duty of candor to the tribunal?*
2. **\$200 Answer:** *What is the proposition for which the authority is cited (and that the authority actually supports it)?*
3. **\$300 Answer:** *What is a motion for sanctions or other relief based on misrepresentations or defective briefing?*
4. **\$400 Answer:** *What is independently verifying every quotation and citation against the underlying source before filing?*
5. **\$500 Answer:** *What is wasting judicial resources and impairing the court's ability to decide the merits efficiently?*

3. Generative AI in Litigation

1. **\$100 Answer:** *What is a draft or starting point that requires attorney review and editing?*
2. **\$200 Answer:** *What is the duty to ensure legal contentions are warranted and nonfrivolous before presenting them to the court?*
3. **\$300 Answer:** *What is the risk of disclosing confidential or privileged client information through an AI tool?*
4. **\$400 Answer:** *What is the duty of competence, including understanding the tools used in practice sufficiently to supervise their use?*
5. **\$500 Answer:** *What is filing a document containing fabricated or unverifiable authorities (and facing corrective or deterrent sanctions as a result)?*

4. Sanctions, Discipline, and Remedies (Including Deposition Misconduct)

1. **\$100 Answer:** *What is disgorgement (return of fees) when the representation provides no meaningful benefit to the client?*
2. **\$200 Answer:** *What is requiring targeted CLE (often including ethics) as a condition of reinstatement or continued practice?*
3. **\$300 Answer:** *What is a reprimand/admonition (a formal non-monetary discipline short of suspension)?*
4. **\$400 Answer:** *What is cost-shifting/fee-shifting—ordering payment of reasonable expenses caused by the misconduct?*

5. **\$500 Answer:** *What is suspension or other practice restriction before the federal court?*

Ninth Circuit–Relevant Sanctions Framing (from the attached deposition-misconduct scenario)

- **Key answer emphasis:** *What is tailoring sanctions to the misconduct while avoiding unfair prejudice to a party when the party’s complicity is unclear?*
- **Permissible remedial approach reflected in the materials:** *What is allowing the jury to see the recorded deposition exchanges so it can assess credibility, rather than barring testimony outright?*

5. Bankruptcy Practice Pitfalls (Federal Court Authority)

1. **\$100 Answer:** *What is fee disgorgement when the filing or services confer no meaningful benefit on the debtor?*
2. **\$200 Answer:** *What is counsel’s responsibility for the accuracy and propriety of filings signed and submitted to the bankruptcy court?*
3. **\$300 Answer:** *What is bankruptcy- and ethics-focused CLE as a corrective condition imposed by the court?*
4. **\$400 Answer:** *What is assessing trustee or administrative costs against counsel as a monetary sanction/remedial measure?* [Riese v. County of Del Norte, 2014 U.S. Dist. LEXIS 29959](#), [Erum v. County of Kauai, 2008 U.S. Dist. LEXIS 52272](#).
5. **\$500 Answer:** *What is restricting or suspending an attorney’s ability to practice in bankruptcy matters before the court?* [In re 3dfx Interactive, Inc., 2007 Bankr. LEXIS 1941](#), [United States Trustee v. Garvey, Schubert & Barer \(In re Century Cleaning Servs.\), 215 B.R. 18](#).

Final Jeopardy — Professional Responsibility in the Age of AI

- **Answer:** *What is independently verifying every AI-generated citation and quotation against the actual source before filing anything with the court?*

One Clarifying Question (to finalize Ninth Circuit specificity)

Which Ninth Circuit forum should these answers track—district court civil practice generally, bankruptcy court practice, or Ninth Circuit appellate practice?

Content supporting AI-generated response:

◆ [Taylor-El v. Macomber, 2025 U.S. Dist. LEXIS 220389](#) | 9th Circuit - US District Court Cases | Cases | U.S. Federal | Sep 3, 2025

Q [Richards v. Jain, 168 F. Supp. 2d 1195](#) | 9th Circuit - US District Court Cases | Cases | U.S. Federal | Oct 17, 2001

A [Riese v. County of Del Norte, 2014 U.S. Dist. LEXIS 29959](#) | 9th Circuit - US District Court Cases | Cases | U.S. Federal | Mar 6, 2014

◆ [Erum v. County of Kauai, 2008 U.S. Dist. LEXIS 52272](#) | 9th Circuit - US District Court Cases | Cases | U.S. Federal | Jun 30, 2008

A [In re 3dfx Interactive, Inc., 2007 Bankr. LEXIS 1941](#) | 9th Circuit - US Court of Appeals, District & Bankruptcy Cases, Combined | Cases | U.S. Federal | Jun 1, 2007

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[17] Knobbe proposed that any compelled disclosure be designated "Attorneys' Eyes Only" to protect client identity. *Id.* at 6-7. "Ample precedent exists for limiting disclosure of highly sensitive, confidential or proprietary information to attorneys and experts, particularly where there is some risk that a party might use the information or disseminate it to others who might employ it to gain a competitive advantage over the producing party." *Alexander v. F.B.I.*, 186 F.R.D. 54, 58 (D.D.C. 1998) (quoting *Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp.*, No. 97-3012, 1998 WL 186728, at *2 (E.D. La. Apr. 17, 1998))."

However, the Petitioners have not inspired confidence in this route of protection. At the August 6 Status Conference, Petitioners' counsel represented to the Court that they would need to share the identity of the requestors with Petitioners to determine whether they bore relation to Connolly or C&C. See Status Conf. Tr. (Aug. 6, 2021 at 3:37-3:45 PM). Petitioners' counsel stated that even if no relationship to C&C or Connolly were evident, Petitioners would likely issue follow-on subpoenas to explore the identities of the requestors. See *id.* And Petitioners' counsel reported that they would inform Petitioners of any follow-on subpoenas. See *id.*

Even if Petitioners "would take all appropriate steps to put anything [they] learn[] out of [] mind, it is a simple fact that it is difficult to unlearn something once it is learned. If [Petitioners are] not already in a position to compete with the [requestors], [they] likely will be in the future, and thus there is a risk that [Petitioners] might inadvertently use information that [they] gained through this lawsuit." *D'Onofrio v. SFX Sports Grp., Inc.*, 256 F.R.D. 277, 280 (D.D.C. 2009) (internal citation omitted). Any protective order fashioned by the undersigned could not both compel disclosure of

the information requested and adequately preserve its confidentiality.⁴

V. CONCLUSION

Enforcing Petitioners' subpoenas would impose an undue burden on Knobbe and KV, one that cannot be mitigated by a protective order. And Petitioners have multiple alternatives to obtain the information they seek. Thus, Petitioners' Motion to Compel Compliance is DENIED and KV's Motion to Quash is GRANTED.⁵



BARKSDALE SCHOOL PORTRAITS, LLC, d/b/a Hockmeyer with Barksdale, and BSP New England, LLC d/b/a Hockmeyer with Barksdale, Plaintiffs,

v.

Elizabeth Hockmeyer **WILLIAMS**, and E-Illuminations, Defendants.

Elizabeth Hockmeyer Williams, and E-Illuminations (a d/b/a of JCW Consulting, LLC), Counterclaim and Cross-Claim Plaintiffs,

v.

Barksdale School Portraits LLC, d/b/a Hockmeyer with Barksdale, BSP New England, LLC, d/b/a Hockmeyer with Barksdale, Wayne Barksdale individually, and Susan Sheridan, individually, Counterclaim Defendants.

Civil Action No. 20-cv-11393-IT

United States District Court,
D. Massachusetts.

Signed 08/31/2021

Background: In civil action, plaintiffs moved for sanctions against defendant

4. KV claims that responsive documents fall into a category of attorney-client privilege reserved for information that would reveal the motive of a confidential client. See KV MTO at 22-23. Because the Court finds that Petitioners' motion imposes an undue burden, this issue need not be decided.

5. Pursuant to LCvR 72.2, any party may file written objections to this ruling within 14 days after being served. The objections shall specifi-

cally designate the order or part thereof to which objection is made, and the basis for the objection. The filing of oppositions and replies shall be governed by LCvR 7(b) and (d). Pursuant to LCvR 72.2(c), a district judge may modify or set aside any portion of a magistrate judge's order found to be clearly erroneous or contrary to law. See also *Brown*, 771 F.2d at 954 ("The scope of review is the 'clearly erroneous' standard.").

based on defense counsel's coaching of defendant during remote video deposition.

Holdings: The District Court, Indira Talwani, J., held that:

- (1) sanctions were warranted;
- (2) court would not dismiss defendant's claims and defenses;
- (3) court would not prohibit defendant from testifying as to questions to which defense counsel fed her answers during deposition, or instruct jury to make adverse inference regarding such questions; but
- (4) court would permit plaintiffs to play and highlight to jury the recorded exchanges of defense counsel's witness-leading comments; and
- (5) counsel would be disqualified.

Motion granted in part and denied in part.

1. Federal Civil Procedure §1451

District court holds considerable discretion in the selection and imposition of sanctions for impeding, delaying, or frustrating the fair examination of a deponent. Fed. R. Civ. P. 30(d)(2).

2. Federal Civil Procedure §1451

District court would issue sanctions against defendants in civil action, based on conduct of defendant and defense counsel during remote video deposition, in which defendant and defense counsel were seated in same room and wearing face masks, citing "COVID rules," and defense counsel surreptitiously provided answers to defendant which defendant repeated more than 50 times; by exploiting remote nature of deposition to improperly assist defendant, defense counsel frustrated plaintiffs' rights to fair examination of defendant, counsel's actions were not momentary or single lapse of judgment but were repeated numerous times over course of day, and counsel's conduct had effect of sowing seeds of doubt in minds of litigators and judges as to effectiveness of remote deposition proceedings. Fed. R. Civ. P. 30(d)(2).

3. Federal Civil Procedure §1451

Dismissal of defendant's claims and defenses was not warranted as sanction for misconduct during remote video deposition, in which defense counsel surreptitiously provided answers to defendant which defendant repeated more than 50 times; wrongdoing was largely counsel's, and although defendant was complicit, record suggested that defendant was following her counsel's lead, and wrongdoing did not unfairly prejudice plaintiffs. Fed. R. Civ. P. 30(d)(2).

4. Costs, Fees, and Sanctions §1323

Dismissal ordinarily should be employed as a sanction only when a plaintiff's misconduct is extreme.

5. Federal Civil Procedure §1451

As sanction for misconduct during remote video deposition, in which defense counsel surreptitiously provided answers to defendant which defendant repeated more than 50 times, prohibiting defendant from providing testimony at trial on questions where counsel fed defendant answers and instructing jury to make adverse inference against defendant as to those questions was not warranted; defendant's level of complicity in misconduct was unclear, and requested sanctions would effectively punish defendant for defense counsel's wrongdoing while not necessarily furthering truth-seeking functions of court. Fed. R. Civ. P. 30(d)(2).

6. Federal Civil Procedure §1451

As sanction for misconduct during remote video deposition, in which defense counsel surreptitiously provided answers to defendant which defendant repeated more than 50 times, district court would permit plaintiffs to play and highlight to jury the recorded exchanges of defense counsel's witness-leading comments; such relief would allow jury to assess defendant's credibility rather than substituting counsel's assessment of her testimony. Fed. R. Civ. P. 30(d)(2).

7. Attorneys and Legal Services §777

Defense counsel would be disqualified from continuing to represent defendants in civil action based on misconduct during remote video deposition, in which defense counsel surreptitiously provided answers to de-

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defendant which defendant repeated more than 50 times; permitting counsel's continued representation in the proceeding would suggest tolerance for counsel's conduct.

8. Attorneys and Legal Services ⇐1197

Disqualification of an attorney is proper where the claimed misconduct in some manner taints the underlying trial or the legal system.

9. Attorneys and Legal Services ⇐1200, 1202

Disqualification of an attorney is not to be taken lightly since it could well hang over an attorney's name and career for years to come, and may deny a litigant of the right to counsel of his choice.

10. Attorneys and Legal Services ⇐1199, 1202

Attorney may be disqualified only when there is reasonable possibility that some specifically identifiable impropriety actually occurred and, in light of interests underlying standards of ethics, social need for ethical practice outweighs party's right to counsel of his choice.

Jeffrey A. Dretler, Rubin and Rudman, LLP, Boston, MA, Michael D. Homans, Pro Hac Vice, Homans Peck, LLC, Wayne, PA, for Plaintiffs/Counterclaim Defendants Barksdale School Portraits, LLC, BSP New England, LLC.

Michael D. Homans, Homans Peck, LLC, Wayne, PA, for Plaintiffs/Counterclaim Defendants Wayne Barksdale, Susan Sheridan Barksdale.

Jeffrey M. Rosin, O'Hagan Meyer PLLC, Boston, MA, William T. Harrington, Harrington & Rice, P.C., Hingham, MA, for Defendants/Counterclaim and Cross-Claim Plaintiffs.

ORDER

TALWANI, D.J.

Before the court is Plaintiffs' Motion for Sanctions [#46]. Plaintiffs Barksdale School

1. E-Illuminations is a tradename for JCW Consulting, LLC, whose sole member/manager is Jeffrey Williams, Ms. Williams' husband. See Notice of Residence [#19].

Portraits, LLC, and BSP New England, LLC (collectively "Barksdale School Portraits") allege that Attorney Jeffrey Rosin, counsel for Defendants Elizabeth Hockmeyer Williams and E-Illuminations, engaged in misconduct during Barksdale School Portrait's deposition of Ms. Williams. Namely, Barksdale School Portraits alleges that Mr. Rosin took advantage of the remote nature of the deposition proceedings to surreptitiously provide Ms. Williams with the answers to dozens of questions asked of her during the deposition. Barksdale School Portraits seeks, as a sanction for this conduct, dismissal of Ms. Williams' claims and defenses or, in the alternative, lesser sanctions such as directing the jury to form an adverse inference based on Mr. Rosin's conduct and displaying the video to the jury to impeach Ms. Williams' credibility. Additionally, Barksdale School Portraits requests that the court refer Mr. Rosin to the state bar disciplinary authority. As set forth more fully below, Plaintiffs' Motion is GRANTED IN PART and DENIED IN PART and the request for disciplinary action is referred to the Presiding Judge pursuant to Local Rule 83.6.5.

I. Background

This action is one of two related actions involving Barksdale School Portraits and its former employee, Ms. Williams. In this action, Barksdale School Portraits brings several claims under federal and state law accusing Ms. Williams of wrongful conduct during her employment and in the establishment of a new and competing company, E-Illuminations.¹ See Pls.' Second Am. Compl. [#49]. Ms. Williams brings counterclaims against Barksdale School Portraits and crossclaims against its owners, Wayne Barksdale and his wife, Susan Sheridan, for wrongful employment practices. Defs.' Second Am. Answer, Affirmative Defenses and Countercls. [#37]. In the related action, No. 20-cv-11640-IT, which has been consolidated for the purposes of discovery, see Elec. Order [#26], Ms. Williams' husband, Jeff Williams, has sued Barksdale School Portraits, Wayne Barksdale, and Susan Sheri-

frey Williams, Ms. Williams' husband. See Notice of Residence [#19].

dan for violating state and federal employment laws, breach of contract, and unjust enrichment; and has also sued Wayne Barksdale for loss of consortium. See Am. Compl. [#16]. In that action, Barksdale School Portraits has joined Ms. Williams as a third-party Defendant. See Answer and Joinder [#20]. Attorney Jeffrey Rosin represents Ms. Williams, E-Illuminations, and her husband in both actions.

On March 22, 2021, Plaintiffs' counsel noticed Ms. Williams' videoconference deposition via Zoom, specifying that "[t]he deposition testimony will be recorded by stenographic means and videoconference recording."² See Notice Dep. [#46-2]. As scheduled, on April 28, 2021, Plaintiffs' counsel took the deposition of Ms. Williams by videoconference over the Zoom platform. During the deposition, Attorney Rosin and Ms. Williams sat in the same conference room. Pls.' Mem. 2 [#47]. Over Plaintiffs' counsel's objection, both Mr. Rosin and Ms. Williams wore face masks throughout the entire deposition, citing "COVID rules." Defs.' Opp'n 9 [#52]; Pls.' Mem. 2 [#47]. In the fifth hour, Plaintiffs' counsel overheard Attorney Rosin provide Ms. Williams with an answer to a question and witnessed Ms. Williams repeating the same answer as her own. Pls.' Mem. 2 [#47]. Counsel for Plaintiffs confronted Mr. Rosin at that time and raised concerns about an ethical violation, but Mr. Rosin rebuffed the allegation and the deposition continued. *Id.* Following the deposition, Plaintiffs' counsel reviewed the video recording of the deposition and identified over 50 other instances where Plaintiffs'

counsel heard Mr. Rosen surreptitiously provide Ms. Williams an answer to a question followed by Ms. Williams repeating the answer. *Id.* at 3.

Plaintiffs' Motion for Sanctions [#46] followed. Plaintiffs request that the court dismiss Ms. Williams' claims and defenses as a sanction under Fed. R. Civ. P. 30(d)(2). Pls.' Mem. 12-15 [#47]. In the alternative, Plaintiffs request two forms of lesser relief. First, Plaintiffs request that Ms. Williams be prohibited from providing testimony at trial on the same issues on which she was coached during the deposition and that the jury be instructed to make an adverse inference as to those answers that were coached. *Id.* at 15-16, 18. Second, Plaintiffs request leave to present portions of the deposition to the jury in order to impeach Ms. Williams' credibility as a witness. *Id.*

In any event, Plaintiffs request that the court refer Mr. Rosin to the Massachusetts Board of Bar Overseers for further investigation. *Id.*³

II. Discussion

[1] Under Fed. R. Civ. P. 30(d)(2), the court "may impose an appropriate sanction . . . on a person who impedes, delays, or frustrates the fair examination of the deponent." The court holds "considerable discretion in the selection and imposition of sanctions." *Baker v. St. Paul Travelers Ins. Co.*, 670 F.3d 119, 123 (1st Cir. 2012); see also *Francisco v. Verizon S., Inc.*, 756 F. Supp. 2d 705, 712 (E.D. Va. 2010), *aff'd*, 442 F. App'x 752 (4th Cir. 2011) ("Although Rule 30(d)(2) does not define the phrase 'appropriate sanc-

2. There are, therefore, two "official" records of the deposition: the stenographic transcription and the videographer's videoconference recording. The parties have submitted a copy of the video recording to the court and a disk containing that recording is filed, under seal, with the Clerk. The parties have not submitted a copy of the stenographic transcription.

After Plaintiffs filed their motion for sanctions, in an attempt to expedite matters, the court directed the parties to agree upon an independent transcriptionist to transcribe the video recording of the deposition. See Elec. Order [#51]. A copy of that transcription has been filed under seal but is of poor quality. See Tr. Williams Dep. [#58]. Accordingly, the court has relied on the video

recording itself, rather than the transcription of that recording.

In any event, as discussed below, Mr. Rosin does not dispute that he made the alleged statements.

3. Plaintiffs also sought their costs and fees associated with the motions for sanction and a stay of discovery until the motion for sanctions was resolved. Pls.' Mem. 17 [#47]. Following the hearing on this motion, Plaintiffs and Attorney Rosin resolved Plaintiffs' request for fees and costs. See Jt. Statement 3 [#73], and discovery has been stayed based on the parties' request for a referral to a magistrate judge for mediation. See Elec. Order [#78].

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tion,' the imposition of discovery sanctions is generally within the sound discretion of the trial court.').

[2] At the hearing on Plaintiffs' motion, the court inquired as to whether Mr. Rosin disputed making the alleged statements. While Mr. Rosin took issue with the context surrounding the statements—arguing that they were the product of frustration with opposing counsel's questioning—he did not dispute that he had made the challenged statements to Ms. Williams.

There can be little question that Mr. Rosin's actions during Ms. Williams' deposition constitute misconduct. By exploiting the remote nature of the deposition to improperly assist Ms. Williams, Mr. Rosin plainly frustrated Plaintiffs' rights to a fair examination of Ms. Williams. Making matters worse, Mr. Rosin's actions were not a momentary or single lapse of judgment but were repeated numerous times over the course of the day. In coaching Ms. Williams during her deposition, Mr. Rosin undermined the truth-seeking purpose of discovery. Furthermore, Mr. Rosin's conduct has the effect of sowing seeds of doubt in the minds of litigators and judges as to the effectiveness of remote deposition proceedings, which have become an important tool of the court during the public health crisis.

Although Defendants do not dispute that Mr. Rosin surreptitiously fed answers to Ms. Williams during the deposition, they nevertheless contend that they should not be subject to sanctions. Defendants' arguments for why sanctions are not appropriate are unpersuasive.

First, Defendants argue that the court should not grant Plaintiffs' request for sanctions where Plaintiffs have "unclean hands" as a result of "unprofessional" and "untoward" behavior exhibited by Plaintiffs' counsel towards Ms. Williams during the deposition. Defs.' Opp'n 12 [#52]. Defendants also point to Plaintiffs' alleged failure to disclose relevant and responsive documents during discovery. *Id.* Courts "have repeatedly held, however, that a defense of unclean hands may not be based on discovery misconduct." *Synopsys, Inc. v. Magma Design Automation, Inc.*, No. C-04-3923 MMC, 2007 WL 420184,

at *5 (N.D. Cal. Feb. 6, 2007). Instead, where a party contends that its opponent has failed to comply with their discovery obligations, the appropriate remedies are found within the Federal Rules (e.g., a motion for a protective order or a motion to compel). Mr. Rosin is not relieved of his obligation to engage in fair and ethical discovery practices simply because he perceives unfair play by the other side.

Second, Defendants contend that the answers provided by Ms. Williams during the deposition were always truthful. Defendants insist Ms. Williams required "professional help to make sure that her truth [was] not obscured in the face of substantial adversity" and that "there was no sanctionable conduct" where "[a]ll of Elizabeth's testimony [was] truthful." Defs.' Opp'n 14 [#52]. This argument is based on the untenable premises that Mr. Rosin's understanding of the facts is authoritative and that the formal modes of discovery set forth in the Rules of Civil Procedure may be ignored. It is the finder of fact, and not Ms. Williams' counsel, who will ultimately determine whether Ms. Williams' testimony was truthful or credible, and Plaintiffs are entitled to utilize the modes of discovery set forth in the Rules to test the truth of that testimony.

[3, 4] That leaves the question of the appropriate sanctions. Plaintiffs argue that the court should exercise its authority under the rules to dismiss all of Ms. Williams' claims and defenses with prejudice. As the First Circuit has noted, "dismissal ordinarily should be employed as a sanction only when a plaintiff's misconduct is extreme." *Young v. Gordon*, 330 F.3d 76, 81 (1st Cir. 2003) (citing *Enlace Mercantil Internacional, Inc. v. Senior Indus., Inc.*, 848 F.2d 315, 317 (1st Cir. 1988)). Here, Mr. Rosin's conduct was clearly unacceptable conduct by an attorney and, to his credit, Mr. Rosin acknowledges as much. However, the wrongdoing here was largely Mr. Rosin's; while Ms. Williams was complicit, the record before the court suggests that Ms. Williams was following her counsel's lead. Because the court finds that wrongdoing here is primarily the result of counsel's conduct and because the wrongdoing did not

unfairly prejudice Plaintiffs, dismissal is too severe a sanction.

[5] Next is Plaintiffs' alternative request to prohibit Ms. Williams from providing any testimony at trial on those questions where Mr. Rosin fed Ms. Williams answers and, furthermore, for the court to instruct the jury to make an adverse inference against Ms. Williams as to those questions. However, as previously discussed, where the level of Ms. Williams' complicity in the conduct is unclear, the sanctions requested would effectively punish Ms. Williams for Mr. Rosin's wrongdoing while not necessarily furthering the truth-seeking functions of the court.

[6] Plaintiffs ask further that they be permitted "the right to play and highlight to the jury the recorded exchanges of Rosin's witness-leading comments" Pls.' Mot. 2 [#46]. The court finds this relief is appropriate as it will allow the jury to assess Ms. Williams' credibility rather than substituting either Mr. Rosin's or Plaintiffs' counsel's assessment of her testimony.

[7-10] Finally, Mr. Rosin shall be disqualified from continuing to represent Ms. Williams and E-Illuminations in this action. Courts have held that disqualification is proper where "... the claimed misconduct in some manner taints the underlying trial or the legal system." *Rizzo v. Sears, Roebuck & Co.*, 127 F.R.D. 423, 425 (D. Mass. 1989) (quoting *Greenebaum-Mountain Mortg. Co. v. Pioneer Nat'l Title Ins.*, 421 F.Supp. 1348, 1353 (D. Colo. 1976)). Disqualification is not to be taken lightly since it "could well hang over an attorney's name and career for years to come." *Schlumberger Techs., Inc. v. Wiley*, 113 F.3d 1553, 1562 (11th Cir. 1997) (citations omitted). Moreover, disqualification "may deny a litigant of the right to counsel of his choice." *Borman v. Borman*, 378 Mass. 775, 787, 393 N.E.2d 847, 855 (1979). For these reasons, "[a]n attorney may be disqualified only when there is 'a reasonable possibility that some specifically identifiable impropriety' actually occurred and, in light of the interests underlying the standards of ethics, the social need for ethical practice outweighs the party's right to counsel of his choice." *Kitchen v. Aristech Chem.*, 769 F. Supp. 254,

257 (S.D. Ohio 1991) (quoting *United States v. Kitchin*, 592 F.2d 900, 903 (5th Cir. 1979)). Notwithstanding the gravity of a disqualification order for both Mr. Rosin and his clients, disqualification is necessary and appropriate here as permitting Mr. Rosin's continued representation in this proceeding would suggest a modicum of tolerance for Mr. Rosin's conduct where there is none.

Plaintiffs' request that Mr. Rosin be disciplined falls under Local Rule 83.6.5. The court has screened Plaintiffs' request, and having found the allegations of attorney misconduct both "reasonably plausible and potentially serious," see L.R. 83.6.5(b), the court refers this matter to the presiding judge for review and possible further action.

III. Conclusion

For the foregoing reasons, Plaintiffs' Motion for Sanctions [#46] is GRANTED IN PART and DENIED IN PART. Plaintiffs shall be permitted to play the recorded exchanges of Attorney Rosin's witness-leading comments at trial and Attorney Rosin is disqualified from representing Plaintiff in this matter. The Clerk is instructed to refer the request for attorney discipline to the presiding judge for further proceedings as provided in Local Rule 83.6.5.

IT IS SO ORDERED.



Lamont LEE, Plaintiff,

v.

The CITY OF TROY; Patrolman Christopher Parker; Patrolman Louis Perfetti; Patrolman Justin Ashe; and Patrolman Kyle Jones, Defendants.

1:19-CV-473

United States District Court,
N.D. New York.

Signed 09/08/2021

Background: Arrestee brought action against city and police officers, alleging

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

JOANNE COUVRETTE, MICHELLE
SULLIVAN, *as special administrator of the
estate of Ann M. Wisnovsky*; and
WISNOVSKY LAND, LLC, *an Oregon
limited liability company*,

Plaintiffs,

v.

MARK A. WISNOVSKY; MICHAEL J.
WISNOVSKY; and VALLEY VIEW
WINERY, INC., *an Oregon Domestic
Business Corporation*,

Defendants.

Case No. 1:21-cv-00157-CL

OPINION AND ORDER

CLARKE, United States Magistrate Judge.

The issue before the Court is the appropriate sanctions for Plaintiffs' misuse of generative artificial intelligence and continual violations of the Local Rules. In briefing the cross-motions for summary judgment, Plaintiffs filed three briefs containing citations to fifteen non-existent cases and fabricated quotations falsely attributed to eight legitimate authorities. This Opinion does not include the names of the fictitious cases doctored by Plaintiffs, as doing so could inadvertently amplify the lie that these cases exist.¹

¹ Defendants' Motion for Sanctions accurately details the fictitious cases and fabricated quotations filed in Plaintiffs' briefing. Defs.' Mot. for Sanctions at 4–11, ECF No. 184. The Court also

“[T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases.” *Combs v. Rockwell Int’l Corp.*, 927 F.2d 486, 488 (9th Cir. 1991) (quoting *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976)). In the quickly expanding universe of cases involving sanctions for the misuse of artificial intelligence, this case is a notorious outlier in both degree and volume. Plaintiffs and their counsel have not been adequately forthcoming, candid, or apologetic about their conduct. If there was ever an “appropriate case” to grant terminating sanctions for the misuse of artificial intelligence, this is it. *Combs*, 927 F.2d at 488. The Court recounts the factual record in detail and finds that Plaintiffs share responsibility with their attorney, Mr. Brigandi, for statements of fiction misrepresented to the Court as statements of law.

The parties consent to the jurisdiction of a U.S. Magistrate Judge. ECF No. 38. Defendants’ Motion for Imposition of Sanctions (ECF No. 184) is GRANTED in part and DENIED in part. The Court strikes the sanctionable briefs, orders Mr. Brigandi to pay monetary sanctions, orders Mr. Murphy to show cause, and dismisses Plaintiffs’ claims with prejudice.

LEGAL STANDARD

I. Fed. R. Civ. P. 11

Rule 11(b) of the Federal Rules of Civil Procedure “is intended to deter baseless filings in district court and imposes a duty of ‘reasonable inquiry’ so that anything filed with the court is ‘well grounded in fact, legally tenable, and not interposed for any improper purpose.’” *Islamic Shura Council of S. California v. F.B.I.*, 757 F.3d 870, 872 (9th Cir. 2014) (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990)). Rule 11(b) provides in relevant part:

identified an additional fabricated quotation falsely attributed to the Restatement (Second) of Contracts, explained below.

By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law[.]

Fed. R. Civ. P. 11(b).

Under Rule 11(c)(2), a party may file a motion for sanctions that “describe[s] the specific conduct that allegedly violates Rule 11(b).” Fed. R. Civ. P. 11(c)(2). Under Rule 11(c)(3), the court, on its own initiative, may “order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).” Fed. R. Civ. P. 11(c)(3); *United Nat. Ins. Co. v. R&D Latex Corp.*, 242 F.3d 1102, 1116 (9th Cir. 2001).

“If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation.” Fed. R. Civ. P. 11(c)(1).

II. Local Rule 83-7

Local Rule 83-7 requires every attorney admitted to general or special practice to “[b]e familiar and comply with the Oregon Rules of Professional Conduct and this Court’s Statement of Professionalism.” LR 83-7. Rule 3.3(a) of the Oregon Rules of Professional Conduct prohibits a lawyer from knowingly “mak[ing] a false statement of fact or law to a tribunal or fail[ing] to correct a false statement of material fact or law previously made to the tribunal by the lawyer.” Or. Rules Prof. Conduct R. 3.3(a). The Court’s Statement of Professionalism prohibits attorneys from “knowingly misstat[ing] facts or law.” General Guidelines 1.9, Statement of

Professionalism and Notice of Rule 83-6, <https://www.ord.uscourts.gov/index.php/attorneys/statement-of-professionalism> (last visited November 26, 2025).

FINDINGS OF FACT

I. The Wisnovsky Brothers, Ms. Couvrette, and Plaintiffs' Counsel

This case arises from a dispute over the family winery between the adult children of an aging mother. On January 29, 2021, Joanne Couvrette ("Ms. Couvrette") filed this case as trustee of the Ann M. Wisnovsky Trust and on behalf of her mother, Ann M. Wisnovsky ("Ann"). Defendants and Counter Claimants Mark and Michael Wisnovsky were Ann's sons (and Ms. Couvrette's brothers). After the case was filed, Ann passed away and the Court granted Plaintiffs' Motion to Substitute Michelle Sullivan as Trustee and Special Administrator of Ann's Estate for Ms. Couvrette for the limited purpose of litigating the estate's elder abuse claim against Defendants. Opinion and Order at 11, ECF No. 137. When granting Plaintiffs' motion to substitute, the Court noted that the substitution "does not relieve Ms. Couvrette of any of the Defendants' counterclaims alleged against her." *Id.* For ease of reference in this Opinion, the term "Plaintiffs" includes Counter Defendant Ms. Couvrette, who is also the sole member of Plaintiff Wisnovsky Land, LLC.

On February 7, 2024, attorney Stephen Brigandi appeared *pro hac vice* on behalf of Plaintiffs. Mr. Brigandi appeared by association with local counsel Timothy Murphy. On December 16, 2024, the Court found that when filing a motion on behalf of Plaintiffs, Mr. Brigandi failed to comply with the Conferral Rule, LR 7-1. Opinion and Order at 4, ECF No. 137. The Court declined to deny Plaintiffs' motion on that basis but gave notice that:

[n]oncompliance with Local Rules is not something this Court takes lightly, and further noncompliance may result in denial or dismissal of this case. The Court recognizes that Plaintiffs' lead attorney is admitted to practice in this jurisdiction

pro hac vice and encourages local counsel [(Mr. Murphy)] to help ensure compliance with Local Rules.

Id.

On March 22, 2024, Ms. Couvrette's brother, non-party Robert Wisnovsky, called and left a voicemail for his brother, Defendant Michael Wisnovksy. Robert explained that Ms. Couvrette's daughter was dating attorney Mr. Brigandi's son. Michael Wisnovsky Decl. ¶ 4, ECF No. 207. The purpose of the call, however, was not to gossip about their niece's love life but instead to leverage the relative costs in prosecuting and defending the case. Robert explained in his voicemail:

When I meant that we don't have an attorney, I really meant we're not paying for an attorney. . . . [Mr. Brigandi] was a corporate attorney for Jack-in-the-Box for 13 years and he's representing us for nothing. So, if you want to continue on, we're not spending a dollar compared to what you're spending. I filed a motion today to delay this other trial of this May 2nd thing, which they're going to grant. And you're just going to continue hemorrhaging money. Like I told you, when I saw him at the hearing, I saw you there. I ripped fucking Dole's heart out right there. I didn't even go to law school. And your boy, Jim. Oh, my God. What a failure that guy is. What about Brooks? 7 hour deposition. Took him out too, so I'm fully engaged now with this. Walk away. Make money and quit losing money. So if you're interested in that, call me.

Wisnovsky Decl. ¶ 4, ECF No. 207.² Unsurprisingly, Robert's voicemail did not lead to settlement of the case.

II. Plaintiffs' Fabrications of Law

A. Plaintiffs' Motion Cites Two Non-Existent Cases

On January 31, 2025, Plaintiffs filed a motion for summary judgment that contained purported legal arguments supported by citations to two non-existent cases. ECF No. 142. Defendants filed a cross motion for partial summary judgment that same day. ECF No. 143.

² Defendants' attorneys in this case include James "Jim" Dole and Brooks Foster. *See* ECF No. 29.

B. Plaintiffs' Response Cites Seven Non-Existent Cases

On April 4, 2025, Plaintiffs filed their response brief to Defendants' cross motion for partial summary judgment. ECF No. 155. Plaintiffs' response cited seven non-existent cases. Later that day, Defendants filed their brief in response to Plaintiffs' motion for summary judgment and identified the two non-existent cases cited in Plaintiffs' summary judgment motion. Defs.' Resp. at 35, 80, ECF No. 160. Defendants suggested that these non-existent cases were "perhaps hallucinated by artificial intelligence." *Id.* at 35. Defendants' response also noted that Plaintiffs' summary judgment motion violated the Local Rules on word count limits (falsely certifying compliance), formatting of exhibits, filing requirements for declarations, and factual citation specificity on summary judgment briefing.

C. Plaintiffs File a Notice of Errata that Ignores their Use of Non-Existent Cases

On April 25, 2025, Plaintiffs filed a Notice of Errata. ECF No. 165. Despite Defendants' response brief noting Plaintiffs' use of non-existent cases, Plaintiffs' Notice of Errata did not acknowledge, explain, or amend the portions of their briefs that relied on non-existent cases. Instead, Plaintiffs asked the Court to ignore two benign sentences which were "included by mistake" in Plaintiffs' motion for summary judgment. *Id.* at 2.³

D. Plaintiffs' Reply Cites Six Non-Existent Cases and Ten Fabricated Quotations

On May 2, 2025, Plaintiffs filed their reply brief in support of their motion for summary judgment. ECF No. 168. Plaintiffs' reply cited six additional non-existent cases, bringing the total to fifteen fake cases cited across three briefs. Plaintiff's reply brief quoted three of the

³ Plaintiffs Notice of Errata asked the Court to ignore a sentence in the introduction of their summary judgment motion that stated, "[t]his Motion highlights the undisputed facts, including Defendants' admissions, independent professional evaluations, and contractual terms, to show that no genuine issues of material fact exist." Notice of Errata at 2, ECF No. 165. Plaintiffs also asked the Court to ignore a sentence in the legal standard section of their summary judgment motion that stated, "[t]he additional case law cited reinforces the principles outlined and provides further support for the arguments presented." *Id.*

non-existent cases, contained fabricated quotations falsely attributed to seven real cases, and contained a fabricated quotation falsely attributed to the Restatement (Second) of Contracts. Plaintiffs' reply brief acknowledged Defendants' assertion that Plaintiffs' motion for summary judgment violated the Local Rules, but Plaintiffs' reply brief did not acknowledge Defendants' assertion that Plaintiffs submitted non-existent cases. *Id.* at 8.

Later that day, Defendants filed their reply brief, which identified the seven non-existent cases cited in Plaintiff's April 4, 2025, response. Defendants also noted Plaintiffs' failure to correct or explain the inclusion of two non-existent cases in Plaintiffs' January 31, 2025, motion for summary judgment.

III. Defendants' Motion for Sanctions and Plaintiffs' Response

A. Defendants Send Plaintiffs Notice of Intent to File a Motion for Sanctions

On May 7, 2025, Defendants served Plaintiffs with a proposed motion for sanctions in accordance with Rule 11(c)(2). ECF No. 177-1. Defendants' counsel asserted that Plaintiffs' citation to non-existent cases and inclusion of fabricated quotations violated LR 83-7 and Rule 11(b) by submitting legal contentions not warranted by existing law. Defendants demanded that Plaintiffs (1) withdraw the sanctionable briefing, (2) stipulate to dismissal with prejudice of Plaintiffs' claims, and (3) agree to pay Defendants' reasonable attorney's fees for the work performed since the date that Plaintiffs filed the first brief containing citations to non-existent cases. In accordance with Rule 11(c), Defendants' counsel demanded that these corrective measures be taken within 21-days.

B. Plaintiffs' Local Counsel Withdraws

On May 19, 2025, Plaintiffs' local counsel, Timothy Murphy, filed a motion to withdraw as local counsel, citing "that circumstances have arisen that allow for withdrawal." ECF No. 174. The Court granted the motion, allowing thirty days for Plaintiffs to retain new local counsel.

ECF No. 175. Because the summary judgment briefing was only recently under advisement and Defendants' motion for sanctions had not yet been filed, the Court was not aware of Plaintiffs' apparent misconduct when it granted local counsel's motion to withdraw. On June 11, 2025, Plaintiffs filed a notice of appearance of new local counsel. ECF No. 185.

C. Plaintiffs Respond to Defendants' Notice of Intent to File for Sanctions

On May 21, 2025, Plaintiffs' lead counsel, Mr. Brigandi, responded by letter to Defendants draft sanctions motion. ECF No. 177-2. Mr. Brigandi did not dispute, acknowledge, or accept responsibility for the use of non-existent cases and fabricated quotations. His response stated, in full: "This letter is in response to your letter dated May 7, 2025 regarding your stated intention to file a Motion for Sanctions in the Sullivan v. Wisnovsky litigation. Plaintiffs will not agree to the sanctions requested. If such Motion is filed, Plaintiffs will respond with a Notice of Errata and Corrections." *Id.*

D. Defendants File a Motion for Imposition of Sanctions

Because Mr. Brigandi stated that he would not take corrective action until after Defendants filed the sanctions motion, Defendants did not wait 21-days after service to file the motion. Sixteen days after service, on May 23, 2025, Defendants filed a motion for imposition of sanctions for Plaintiffs' use of non-existent cases, fabricated quotations, and violations of the Local Rules. ECF No. 176.

E. Plaintiffs File a Notice of Errata, Amended Response, and Amended Reply

On May 26, 2025, Plaintiffs filed a notice of errata of their motion for summary judgment, an amended response to Defendants' motion for summary judgment, and an amended reply in support of their motion for summary judgment (collectively, "amended briefing"). ECF No. 178. Plaintiffs subsequently filed a second amended response to Defendants' motion for summary judgment. ECF No. 182. The only difference was that Plaintiffs' second amended

response added Mr. Murphy to the case caption, despite the fact that Mr. Murphy's motion to withdraw was granted before the first amended response was filed.

Plaintiffs' notice of errata proclaimed that Plaintiffs were withdrawing the citations to two non-existent cases "which were inadvertently included in their Motion for Summary Judgment (ECF 142) . . . No other changes to ECF 142 are necessary." *Id.* at 2. Plaintiffs' amendments to their response brief and reply brief were similarly superficial: Plaintiffs deleted the non-existent cases and fabricated quotations while leaving the surrounding text intact. The algorithmically generated statements of purported law that were not in quotes remained in place without citation.⁴

There is no evidence that Mr. Brigandi or Plaintiffs took any steps to verify the veracity of the legal arguments contained in the amended briefing. In at least one instance, Mr. Brigandi deceptively deleted only the quotation marks surrounding the fabricated statement of law: Plaintiffs' reply brief originally stated "[a]s the Restatement (Second) of Contracts § 2, cmt. b (1981) explains, 'Recitals of fact or intent in a written contract are not promises and do not impose duties.'" Pls.' Reply at 25, ECF No. 168. Plaintiffs' amended reply omitted only the internal quotation marks, Pls.' Am. Reply at 24, ECF No. 178-2, but the Restatement (Second) of Contracts § 2, cmt. b (1981) does not explain whether recitals of fact or intent in a written contract are promises or impose duties.⁵ Therefore, the statement included in Plaintiffs' amended

⁴ E.g., *compare* Pls.' Resp. at 28, ECF No. 155 ("Oregon law is clear that a party cannot recover fees under a contract alleged to be void or unenforceable unless and until the contract is upheld." (citing a non-existent case) *with* Plaintiffs' Sec. Am. Resp. at 28, ECF No. 182 (stating identical purported rule without citation to any authority).

⁵ What the Restatement (Second) of Contracts § 2, cmt. b (1981) actually explains is "*Manifestation of intention*. Many contract disputes arise because different people attach different meanings to the same words and conduct. The phrase 'manifestation of intention' adopts an external or objective standard for interpreting conduct; it means the external expression of intention as distinguished from undisclosed intention. A promisor manifests an intention if he believes or has reason to

reply continued to be misattributed, even after the purported correction.

F. Plaintiffs' Response to Defendants' Sanctions Motion Violates the Local Rules

On May 30, 2025, Plaintiffs filed a motion to strike or deny Defendants' motion for sanctions. Pls.' Mot. to Strike and Resp., ECF No. 181. Despite the Court's previous warning to Plaintiffs that "further noncompliance [with the Local Rules] may result in denial or dismissal of this case," Opinion and Order at 4, ECF No. 137, Mr. Brigandi did not confer with Defendants' counsel prior to filing the motion, violating LR 7-1(a). Gustitus Decl. ¶ 3, ECF No. 187. Plaintiffs' response also violated LR 7-1(b) by improperly combining the motion to strike with a response in opposition to Defendants' sanctions motion.

Plaintiffs' motion/response did not provide a meaningful explanation for the repeated use of non-existent cases and fabricated quotations. Instead, Plaintiffs passively stated that "[t]he inclusion of inaccurate citations was inadvertent and the result of reliance on an automated legal citation tool." Pl.'s Mot. to Strike and Resp. at 2, ECF No. 181. Plaintiffs argued that Defendants' sanctions motion should be stricken or denied because (1) it was filed before the expiration of the 21-day safe harbor period under Rule 11(c); (2) Plaintiffs took corrective action before the safe harbor period expired; and (3) Defendants demand letter exceeded the scope of Rule 11.

G. Defendants Withdraw and Refile Their Motion for Sanctions

On June 4, 2025, Defendants filed a notice of withdrawal of their May 23, 2025, motion for sanctions (ECF No. 176). ECF No. 183. Defendants then refiled their motion for sanctions

believe that the promisee will infer that intention from his words or conduct. Rules governing cases where the promisee could reasonably draw more than one inference as to the promisor's intention are stated in connection with the acceptance of offers (see §§ 19 and 20), and the scope of contractual obligations (see §§ 201, 219))."

and argued that the 21-day safe harbor period had now elapsed, and Plaintiffs had still not taken appropriate corrective action. ECF No. 184.

H. The Court Holds a Status Conference and Issues an Order to Show Cause

On June 16, 2025, the Court held a status conference to address Plaintiffs' apparent misconduct. ECF No. 188. The Court did not find Plaintiffs' explanation satisfactory to avoid the requested sanctions and ordered Plaintiffs to show cause in writing as to why Defendants' requested sanctions should not be imposed and this action dismissed. Order to Show Cause at 2, ECF No. 189. The Court subsequently granted Plaintiffs an extension of time, and Plaintiffs' response was due July 7, 2025. ECF No. 192.

IV. Post Show-Cause Events

A. Mr. Brigandi's Medical Emergency and Plaintiffs' Response to Show Cause

On July 7, 2025, Plaintiffs filed an Emergency Notice Regarding Incapacitation of Plaintiffs' Counsel. ECF No. 193. Plaintiffs' local counsel stated that on June 30, 2025, Mr. Brigandi suffered a medical emergency, was admitted to the intensive care unit, and was unable to continue representing Plaintiffs. Later that day, Plaintiffs filed their response to the Court's Order to Show Cause and Defendants' Motion for Imposition of Sanctions. ECF No. 194. Plaintiffs' response placed all the blame on the unavailable Mr. Brigandi while simultaneously failing to explain what had even happened. Despite Defendants' articulated suspicions that Ms. Couvrette was the one pulling the strings, Plaintiffs provided no evidence or explanation of who drafted the summary judgment briefs, nor did they provide evidence that Ms. Couvrette had no knowledge or involvement in drafting or submitting the briefs.

In response to Mr. Brigandi's medical emergency, the Court stayed all deadlines and hearings. On July 29, 2025, Mr. Brigandi was discharged from the hospital. Dr. Lakhera Decl. ¶ 5, ECF No. 213. A declaration from Mr. Brigandi's treating physician later explained that Mr.

Brigandi was suffering from severe kidney disease, which “materially and significantly impaired his cognitive function and mental capacity during the weeks and months leading up to his hospitalization on June 30, 2025. Also, he was severely hypercalcemic on admission which could cause delirium and altered mental states.” Dr. Lakhera Decl. ¶ 18. The doctor opined that “Mr. Brigandi may not have been fully aware of the extent of his cognitive decline or his diminished capacity to fulfill his professional responsibilities during this period.” Dr. Lakhera Decl. ¶ 20. Mr. Brigandi was now on dialysis and his doctor did not opine on his mental state following discharge from the hospital. *Id.* ¶ 11.

The physician’s declaration was filed on October 27, 2025, and was in support of their July 7, 2025, response to Defendants’ sanctions motion. However, Plaintiffs did not seek leave prior to filing the declaration, nor did they show cause as to why the declaration should be accepted more than three months after the Court-imposed deadline to respond. *See* Fed. R. Civ. P. 16 and LR 16-3 (requiring a motion and good cause for extending a deadline). Plaintiffs filed the declaration two days before the October 29, 2025, sanctions hearing, but did not contact the courtroom deputy to give prompt notice of their eleventh-hour submission. *See* LR 5-3(d) (requiring notice to the courtroom deputy by telephone or email of electronic filings submitted within three business days of a related hearing). Because of Plaintiffs’ untimely filing of Mr. Brigandi’s doctor’s declaration, Defendants did not have the opportunity to challenge the doctor’s opinion through deposition or presentation of their own expert witness.

B. Mr. Brigandi’s Motion to Withdraw

By order of the Court, on August 11, 2025, the parties filed a Joint Status Report. ECF No. 196. Plaintiffs reported that Mr. Brigandi’s current physical and cognitive limitations were preventing him from working and that he was experiencing “significant cognitive difficulties, including confusion regarding his whereabouts, circumstances, and recent events.” *Id.* at 2.

On August 12, 2025, the Court scheduled a hearing on Defendants' motion for sanctions. Mr. Brigandi then filed what he falsely described as an "unopposed" motion to withdraw. ECF No. 199. Mr. Brigandi asserted that his motion was unopposed by his client and all counsel in this case. However, Mr. Brigandi had conferred with no one, and Defendants opposed the motion. Defs.' Resp. to Motion to Withdraw at 2–3, ECF No. 200; Gustitus Decl. ¶ 7, ECF No. 206-3.

On August 28, 2025, the Court held a status conference on Mr. Brigandi's motion to withdraw. Following the status conference, Mr. Brigandi emailed Defendants' counsel a draft reply and proposed order in support of his motion for leave to withdraw as counsel. Gustitus Decl. at 1, ECF No. 206-1. Mr. Brigandi's draft reply explained that he had left a message with Defendants' counsel's receptionist and the draft provided (flawed) reasoning for how Mr. Brigandi had satisfied the conferral requirement. *Id.* at 3. Defendants' counsel responded to Mr. Brigandi's email and noted that his explanation of who and when he called to confer was demonstrably false. Gustitus Decl. at 1, ECF No. 206-2. Defendants' counsel also noted:

[g]iven that you appear to be in adequate health to explain your side of the story with respect to your desire to withdraw from this lawsuit, we hope you are also able to finally provide an explanation regarding Plaintiffs' sanctionable filings that the Court ordered you and Plaintiffs to provide in the June 16, 2025 show cause order.

Id. Defendants' counsel requested a prompt response so that they could address Mr. Brigandi's explanation in their reply in support of the motion for sanctions. *Id.* Mr. Brigandi did not respond. Gustitus Decl. ¶ 6, ECF No. 206.

On August 29, 2025, the Court denied Mr. Brigandi's motion to withdraw and later clarified that Mr. Brigandi was ordered not to file anything on behalf of Plaintiffs, who were adequately represented by local counsel. ECF No. 212.

C. Hearing Regarding Motion for Imposition of Sanctions

On October 29, 2025, the Court held a sanctions hearing. ECF No. 214. Defendants' reply in support of their motion for sanctions cited circumstantial evidence that Ms. Couvrette likely drafted or participated in drafting Plaintiffs' sanctionable summary judgment briefs. Defs.' Reply at 10–19, ECF No. 204. The Court found Defendants' evidence and reasoning concerning Ms. Couvrette's direct involvement persuasive and asked Plaintiffs' counsel if there was any evidence that Ms. Couvrette was merely an innocent client. In response, Plaintiffs' counsel asserted that Ms. Couvrette's involvement was irrelevant because the burden falls on the attorney to sign off on the legal merits of the arguments filed.

For the reasons explained in Discussion Sections III(E) and III(F) below, the Court finds that Ms. Couvrette shares responsibility for the use of non-existent cases and fabricated quotations, warranting dismissal of Plaintiffs' claims with prejudice.

DISCUSSION

Plaintiffs argue that the Court should deny Defendants' motion for sanctions because (1) Plaintiffs corrected the summary judgment briefing within the safe harbor period and (2) the requested sanctions exceed the scope of Rule 11. The Court disagrees.

I. Defendants Filed Their Motion for Sanctions After the 21-day Safe Harbor Period

Plaintiffs argue that Defendants' motion should be denied because Defendants improperly filed their motion for sanctions before expiration of the 21-day safe harbor period. A party may not file a motion for sanctions “unless there is strict compliance with Rule 11’s safe harbor provision.” *Islamic Shura Council of S. California*, 757 F.3d at 872. “That provision provides that any motion for sanctions must be served on the offending party at least 21-days before the motion is filed with the court.” *Id.* “The safe harbor provision further dictates that the motion may not be filed if the offending party timely ‘withdraws or appropriately corrects’ the

challenged contention during the safe harbor period.” *Id.* at 872–73 (brackets omitted) (quoting Fed. R. Civ. P. 11(c)(2)). The purpose of the safe harbor provision is to ensure “that a party will not be subject to sanctions on the basis of another party’s motion unless, after receiving the motion, it refused to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation.” *Barber v. Miller*, 146 F.3d 707, 710 (9th Cir. 1998) (emphasis added) (quoting Fed. R. Civ. P. 11 Adv. Comm. Notes, 1993 Am.).

Plaintiffs overlook the procedural history of the case. On May 7, 2025, Defendants served Plaintiffs with a proposed motion for sanctions in accordance with Rule 11(c)(2). On May 21, 2025, Mr. Brigandi responded by letter to Defendants; he did not dispute, acknowledge, or accept responsibility for the use of non-existent cases and fabricated quotations. Instead, Mr. Brigandi affirmatively stated that he would refuse to act until after Defendants filed their motion. Two days later (sixteen days after service), Defendants filed a motion for sanctions (ECF No. 176). Mr. Brigandi hypocritically objected to Defendants’ decision to file the motion within the safe harbor period. Defendants then withdrew and refiled their sanctions motion (ECF No. 184) after the 21-day safe harbor period.

Plaintiffs cannot seek refuge in the harbor that Mr. Brigandi abandoned. Defendants’ argument that Plaintiffs should be estopped from asserting the safe harbor period as a defense is well taken. Regardless, the issue is a red herring because Defendants withdrew their original motion for sanctions, refiled it after the safe harbor period, and Plaintiffs have failed to take appropriate corrective action.

II. Plaintiffs Failed to Take Appropriate Corrective Action

Plaintiffs argue that “[w]hile the use of inaccurate or fictitious citations is potentially grounds [for] sanctions, in this case, the appropriate corrections were made within the time and

scope required under Rule 11.” Pls.’ (Sec.) Response at 10, ECF No. 194. Plaintiffs understate the severity of the misconduct at issue and overstate the corrective action taken. The Court finds it disingenuous for Plaintiffs to characterize the use of fifteen non-existent cases and eight fabricated quotations across three briefs as “potentially grounds” for sanctions.

Non-existent cases and fabricated quotations are not “existing law” and do “not provide a non-frivolous ground for extending, modifying, or reversing existing law, or for establishing new law.” *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443, 461 (S.D.N.Y. 2023) (footnote omitted). Numerous courts across the country have sanctioned parties and their attorneys under Rule 11(b)(2) for the use of non-existent cases and fabricated quotations in legal briefs generated by artificial intelligence. Such misconduct “degrades or impugns the integrity of the Court and interferes with the administration of justice.” *United States v. Hayes*, 763 F. Supp. 3d 1054, 1064 (E.D. Cal. 2025) (quotation marks omitted).

Plaintiffs repeatedly disguised statements of fiction as statements of law and failed to take appropriate corrective action. In addition to wasting judicial resources, the use of artificial intelligence to generate legal arguments without meaningful review “jeopardizes the rule of law.” *Id.* at 305. As the Oregon Court of Appeals recently explained:

By reviewing and applying precedent to each case that comes before it, a court ensures that similarly situated parties are treated equally and that differences in treatment are justified by principled reasons. It is by studying, learning, and applying precedent, that we maintain the rule of law and develop the competency needed to maintain the rule of law.

...

The injection of false precedent into the practice of law shakes the foundation of our judicial system. Although courts no doubt are equipped to catch false citations and statements of law, as noted above, any time we must spend verifying and directing attorneys to address a false statement of law is time away from our core mission: deciding cases that have been briefed under law that, in fact, exists.

Id.

Importantly, to date, Plaintiffs have failed to take appropriate corrective action. Rather than a correction, Mr. Brigandi attempted a coverup. He failed at both. Simply removing the non-existent cases and fabricated quotations did not abate the harm of Plaintiffs' deceptive practices. There is no evidence that Mr. Brigandi took any steps to verify the veracity of the legal arguments contained in the amended briefing, which continue to contain misstatements of law.⁶ It is well known and documented that:

chatbots, including legal 'AI' chatbots, are large-language models (LLMs), not a true 'artificial intelligence' out of the pages of science fiction. They are not designed to answer questions factually. They are designed to mimic patterns of words, probabilistically. When they are 'right,' it is because correct things are often written down in the dataset they were trained on.

Green Bldg. Initiative, Inc. v. Peacock, No. 3:24-CV-298-SI, 2025 WL 3002143, at *2 (D. Or. Oct. 27, 2025) (quoting *Seither & Cherry Quad Cities, Inc. v. Oakland Automation, LLC*, 2025 WL 2105286, at *1 (E.D. Mich. July 28, 2025)). Mr. Brigandi submitted Plaintiffs' amended briefing without conducting "an inquiry reasonable under the circumstances" to determine whether the legal contentions contained therein were "warranted by existing law." Fed. R. Civ. P. 11(b)(2). The amended briefing as it stands is independently sanctionable and falls far short of the appropriate corrective action necessary to avoid sanctions.

Mr. Brigandi also violated LR 83-7 per a violation of Rule 3.3(a) of the Oregon Rules of Professional Conduct, which prohibits lawyers from knowingly "mak[ing] a false statement of fact or law to a tribunal or fail[ing] to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Or. Rules Prof. Conduct R. 3.3(a).

⁶ For example, Plaintiffs' Notice of Errata to their motion for summary judgment failed to correct Plaintiffs' false statement that ORS 127.545(1) relates to dismissal of a claim as moot, *see* ECF No. 142 at 6, and Plaintiffs' amended reply contains a statement of law falsely attributed to the Restatement (Second) of Contracts, ECF No. 178-2 at 25.

III. The Scope of Sanctions Imposed Under Rule 11(b) and the Local Rules

Defendants seek (1) an order striking Plaintiffs' summary judgment briefs under Rule 11(c)(4); (2) an award of attorney's fees against Plaintiffs under Rule 11(c)(2); (3) monetary sanctions against Plaintiffs' attorneys under Rule 11(c)(4); and (4) dismissal of Plaintiffs' claims and defenses with prejudice under Rule 11(c)(4) and pursuant to the Court's warning to Plaintiffs that continued noncompliance with the Local Rules may result in dismissal.

"An attempt to persuade a court or oppose an adversary by relying on fake opinions is an abuse of the adversary system." *Mata*, 678 F. Supp. 3d at 461. "[A] court should discipline those who harass their opponents and waste judicial resources by abusing the legal process." *United Nat. Ins. Co.*, 242 F.3d at 1115 (quoting *Schlaifer Nance & Co., Inc. v. Estate of Warhol*, 194 F.3d 323, 341 (2d Cir.1999)). Under Rule 11, "[t]he court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons." Fed. R. Civ. P. 11 Adv. Comm. Notes, 1993 Am. The Court also has significant discretion when enforcing the Local Rules and "may impose sanctions including, where appropriate, default or dismissal." *Thompson v. Hous. Auth. of City of Los Angeles*, 782 F.2d 829, 831 (9th Cir. 1986).

A. Striking Plaintiffs' Summary Judgment and Amended Briefs

The Court strikes without leave to refile Plaintiffs' summary judgment briefing (ECF Nos. 142, 155, and 168) and amended briefs (ECF No. 178 and 182) for violation of Rule 11(b)(2) and for failure to comply with the Court's previous warning that noncompliance with the Local Rules would not be tolerated. This is an obvious consequence for the egregious misconduct and failure to meaningfully accept responsibility or take appropriate corrective action.

B. Monetary Sanctions Against Plaintiffs

Defendants seek an award of attorney's fees against Plaintiffs under Rule 11(c)(2).

Plaintiffs respond that monetary sanctions against a represented party are prohibited for a Rule 11(b)(2) violation. The Court agrees.

Plaintiffs' sanctionable misconduct arises under Rule 11(b)(2). Courts are prohibited from imposing a "monetary sanction . . . against a represented party for violating Rule 11(b)(2)." Fed. R. Civ. P. 11(c)(5). "Monetary responsibility for such violations is more properly placed solely on the party's attorneys." Fed. R. Civ. P. 11 Adv. Comm. Notes, 1993 Am. Defendants' request for an award of attorney's fees against Plaintiffs is therefore denied. However, Plaintiffs are still in hot water. Rule 11's "restriction does not limit the court's power to impose sanctions or remedial orders that may have collateral financial consequences upon a party, such as dismissal of a claim, preclusion of a defense, or preparation of amended pleadings[.]" discussed below. *Id.*

C. Monetary Sanctions Against Mr. Brigandi

Defendants move for an award of monetary sanctions against Plaintiffs' attorneys pursuant to Rule 11(c)(4). Monetary sanctions may include "an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation." Fed. R. Civ. P. 11(c)(4). Plaintiffs respond that if the Court finds that monetary sanctions are warranted, they should only be imposed against counsel who submitted the offending pleadings.

"At its core, an attorney who signs a legal document certifies that they have 'read the document, have conducted a reasonable inquiry into the facts and the law and are satisfied that the document is well grounded in both, and is acting without any improper motive.'" *Wadsworth*

v. Walmart Inc., 348 F.R.D. 489, 495 (D. Wyo. 2025) (quoting *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 542 (1991) (brackets omitted)). This is a “nondelegable responsibility.” *Pavelic & LeFlore v. Marvel Ent. Grp.*, 493 U.S. 120, 126 (1989).

Mr. Brigandi signed and submitted the sanctionable briefs and must be held accountable. Mr. Brigandi’s medical emergency, which left him hospitalized from June 30, 2025, to July 29, 2025, adds some complexity to the factual record. The Court does not question the credibility of Mr. Brigandi’s treating physician, who opined that Mr. Brigandi’s medical condition would have caused his mental faculties to gradually deteriorate during the weeks and months leading up to his hospitalization. However, given the history of this case, the Court does not give full weight to Dr. Lakhera’s declaration, which was untimely filed and without prompt notice to the Court. To the extent that the declaration sheds light on Mr. Brigandi’s mental state leading up to his hospitalization, it provides no evidence explaining Mr. Brigandi’s fraudulent attempt to withdraw from the case following his discharge from the hospital.⁷ Mr. Brigandi’s total lack of remorse is underscored by the fact that, to date, he has utterly failed to explain his conduct, meaningfully accept responsibility, or take appropriate remedial action. Mr. Brigandi willfully abused the judicial process, multiplying the proceedings and increasing costs.

Determining what amount of monetary sanction would “not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons” is difficult. Fed. R. Civ. P. 11 Adv. Comm. Notes, 1993 Am. The Oregon Court of Appeals recently sanctioned an attorney (for violation of the state court equivalent to Rule 11(b)(2)) \$500 per non-existent case and \$1,000 per fabricated quotation

⁷ Plaintiffs’ counsel’s statement in the August 11, 2025, Joint Status Report that Mr. Brigandi “continues to experience significant cognitive difficulties” is not evidence in the record. ECF No. 196 at 2.

included in an appellate brief. *Ringo*, 345 Or. App. at 303. The Court adopts this valuation. Mr. Brigandi submitted fifteen non-existent cases and eight fabricated quotations falsely attributed to legitimate authorities.⁸ Mr. Brigandi is ordered to pay the Clerk of the Court \$15,500 within 30 days of the date of this order.

Additionally, the Court finds that imposing reasonable attorney's fees and expenses against Mr. Brigandi (and potentially Mr. Murphy) is necessary to deter similarly situated persons from engaging in this kind of misconduct. Attorneys weigh risks and rewards for a living. With a known price tag, an attorney could decide that the risk paying \$500 per non-existent case or \$1,000 per fabricated quotation is outweighed by the potential reward of getting away with outsourcing to a chatbot the time intensive work of legal research and writing. Defendants are entitled to an award of reasonable attorney's fees and other expenses directly resulting from Plaintiffs' and their attorneys' violations of the Federal and Local Rules, dating back to Plaintiffs' January 31, 2025, motion for summary judgment (ECF No. 142). The Court orders Defendants to submit a bill of costs and reasonable attorney's fees supported by affidavits or declarations. Plaintiffs have already received notice and an opportunity to be heard and shall not file a response. Fed. R. Civ. P. 54(2)(E); *see Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 766–67 (1980).

D. Plaintiffs' Former Local Counsel, Timothy Murphy

Defendants move to vacate the order allowing Mr. Murphy to withdraw and ask the Court to issue a show cause order demanding that Mr. Murphy explain why sanctions should not be imposed on him as well.

⁸ The briefs submitted by Mr. Brigandi included seven fabricated quotations falsely attributed to real cases and one fabricated quotation falsely attributed to the Restatement (Second) of Contracts. The Court does not impose an additional monetary sanction for the three fabricated quotations attributed to non-existent cases.

The Court previously encouraged Mr. Murphy “to help ensure compliance with Local Rules” when it warned Plaintiffs that further noncompliance may result in dismissal of this case. Opinion and Order at 4, ECF No. 137. Local Rule 83-3 requires local counsel to “meaningfully participate in the preparation and trial of the case.” LR 83-3(a)(1). Mr. Murphy was local counsel of record when Plaintiffs filed their summary judgment briefing and when Defendants responded and replied with notice of Plaintiffs’ apparent use of non-existent cases and fabricated quotations. Mr. Murphy either failed to meaningfully participate in the case or violated Rule 11 and LR 83-7 by allowing those briefs to be filed.

The Court was not yet aware of Plaintiffs’ misconduct when it granted Mr. Murphy’s motion to withdraw, and that order (ECF No. 175) is vacated. Mr. Murphy is ordered to appear in writing within fourteen days and show cause as to why he should not be subject to sanctions or, in the alternative, to propose what sanctions are appropriate. Such sanctions may include but are not limited to sharing a portion of the attorney’s fees and costs imposed on Mr. Brigandi.

E. Dismissal of Plaintiffs’ Claims and Defenses with Prejudice under Rule 11

Defendants move to dismiss Plaintiffs’ claims and defenses with prejudice under Rule 11(c)(4). The Court dismisses Plaintiffs’ claims with prejudice. Having stricken Plaintiffs’ response in opposition to Defendants’ motion for partial summary judgment, dismissing with prejudice Plaintiffs’ defenses to Defendants’ counterclaims would be more severe than reasonably necessary.

Plaintiffs previously attempted to justify their misconduct by claiming “[t]he inclusion of inaccurate citations was inadvertent and the result of reliance on an automated legal citation tool.” Pls.’ (First) Resp. at 2, ECF No. 181. The Court rejected this position but generously allowed Plaintiffs another opportunity to explain what had happened and to show cause as to why the Court should not grant Defendants’ requested relief. Order to Show Cause at 1–2, ECF

No. 189. In response, Plaintiffs new counsel regurgitated the previously rejected position that terminating sanctions were inappropriate because “the admittedly erroneous citations” were corrected during the 21-day safe harbor period. Pls.’ (Sec.) Resp. at 9, ECF No. 194. Plaintiffs’ repeated attempt to minimize the misconduct at issue by characterizing it as an “erroneous citation” is not well taken. The Court also rejects Plaintiffs’ assertion that Mr. Brigandi took appropriate corrective action.

Sanctions under Rule 11 should be imposed on the people “responsible for the violation.” Fed. R. Civ. P. 11 Adv. Comm. Notes, 1993 Am. “The person signing, filing, submitting, or advocating a document has a nondelegable responsibility to the court, and *in most situations* is the person to be sanctioned for a violation.” *Id.* (emphasis added). However, under “unusual circumstances,” a represented party may share responsibility for a violation of Rule 11(b)(2). Fed. R. Civ. P. 11 Adv. Comm. Notes, 1993 Am.

The Court finds that Plaintiffs share responsibility with Mr. Brigandi for the submission of fifteen non-existent cases and eight fabricated quotations. Plaintiffs have submitted no evidence to rebut Defendants’ persuasive evidence that Ms. Couvrette is a serial self-represented litigator who was likely the person responsible for using artificial intelligence to draft the summary judgment briefs in this case. Nor did Plaintiffs submit any evidence that Ms. Couvrette mistakenly believed that Mr. Brigandi was verifying her drafts prior to submission. Ms. Couvrette’s and Mr. Brigandi’s silence, despite multiple opportunities to explain their side of the story, speaks volumes. Plaintiffs share responsibility with Mr. Brigandi for the inclusion of non-existent cases and fabricated quotations misrepresented to the Court as statements of law.

The Court finds that terminating sanctions are appropriate under the circumstances. Although Plaintiffs are now represented by new counsel, who appear less reckless than Mr.

Brigandi, the Court must also consider the importance of deterring “comparable conduct by similarly situated persons.” Fed. R. Civ. P. 11 Adv. Comm. Notes, 1993 Am. “[T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases.” *Combs*, 927 F.2d at 488 (quoting *National Hockey League*, 427 U.S. at 643). The number of cases involving sanctions for the misuse of artificial intelligence is growing at an alarming rate.⁹ Yet the misconduct at issue in this case is a notorious outlier in both degree and volume. Moreover, Plaintiffs have not been adequately forthcoming, candid, or apologetic about their conduct. The declaration of Mr. Brigandi’s treating physician provides some context, but conspicuously missing from the record is a declaration by Ms. Couvrette, Mr. Brigandi—or anyone—explaining what happened and why the Court can be certain it won’t happen again. Plaintiffs referenced the attorney client privilege and work product doctrine in the August 11, 2025, Joint Status Report, ECF No. 196 at 3, but that argument was never presented on motion or in a response brief. In any event, the Court placed the burden on Plaintiffs to show cause as to why Defendants’ requested sanctions should not be imposed, and Plaintiffs bear the consequences of their decision to stonewall. If there was ever an “appropriate case” to grant terminating sanctions for the misuse of artificial intelligence, this is it. *Combs*, 927 F.2d at 488. Plaintiffs’ claims are dismissed with prejudice under Rule 11(c)(4).

F. Dismissal with Prejudice Against Plaintiffs Under the Local Rules

Defendants also move to dismiss Plaintiffs’ claims and defenses with prejudice in accordance with the Court’s prior warning that further noncompliance with the Local Rules may result in dismissal of the case. The Court finds that Plaintiffs’ continual noncompliance with the

⁹ Court decisions addressing non-existent cases and fabricated quotations generated by artificial intelligence are compiled at <https://www.damiencharlotin.com/hallucinations/> (last visited December 4, 2025) (identifying 431 cases in the United States) [<https://perma.cc/KL5E-S95Y>].

Local Rules provides an additional basis for terminating sanctions against Plaintiffs' claims. The Court declines to dismiss Plaintiffs' defenses with prejudice.

District courts have broad "discretion in connection with the application of local rules." *Grove v. Wells Fargo Fin. California, Inc.*, 606 F.3d 577, 582 (9th Cir. 2010) (quoting *United States v. Warren*, 601 F.2d 471, 474 (9th Cir. 1979) (per curiam)). In exercising this discretion in connection with the power to control their docket, district courts "may impose sanctions including, where appropriate, default or dismissal." *Thompson*, 782 F.2d at 831. "Because dismissal is so harsh a penalty, it should be imposed only in extreme circumstances." *Raiford v. Pounds*, 640 F.2d 944, 945 (9th Cir. 1981). Before imposing the sanction of dismissal, district courts must "weigh several factors: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits and (5) the availability of less drastic sanctions." *Thompson*, 782 F.2d at 831. No single factor is determinative. *Henderson v. Duncan*, 779 F.2d 1421, 1425 (9th Cir. 1986).

The Court recounts Plaintiffs' violations of the local rules,¹⁰ weighs the factors described above, and finds that terminating sanctions against Plaintiffs are warranted for the continual violation of the Local Rules.

On December 16, 2024, the Court warned Plaintiffs that "[n]oncompliance with Local Rules is not something this Court takes lightly, and further noncompliance may result in denial or dismissal of this case." Opinion and Order at 4, ECF No. 137. Despite this warning:

1. Plaintiffs' Motion for Summary Judgment (ECF No. 142): (1) contained a false certification that it contained fewer than 11,000 words, violating LR 7-2(b); (2) failed to comply with the formatting and filing requirements of attaching exhibits

¹⁰ These violations are in addition to the violations of LR 83-7 for the use of non-existent cases and fabricated quotations.

and declarations, violating LR 10-1(e)(2) and LR 10-3(a); and (3) failed to comply with factual citation requirements on summary judgment, violating LR 56-1.

2. Plaintiffs' response in opposition to Defendants' motion for sanctions (ECF No. 181): (1) contained a motion to strike without conferral, violating LR 7-1(a); and (2) improperly combined a response brief with a motion, violating LR 7-1(b).
3. Following his discharge from the hospital, Mr. Brigandi's motion to withdraw as counsel (ECF No. 199): (1) was filed without conferral, violating LR 7-1(a); and (2) falsely certified that the motion was unopposed, violating LR 83-7.
4. Plaintiffs' new local counsel—which the Court notes bear no responsibility for the misuse of artificial intelligence at issue in this case—filed a declaration in support of their response to Defendants' sanctions motion (ECF No. 213): (1) after the deadline to file a response and without leave of the Court, violating LR 16-3; and (2) without notice to the Court's courtroom deputy, despite the declaration's relation to a scheduled court proceedings within three business days of the filing, violating LR 5-3(d).

The following factors weigh in favor of a finding that extreme circumstances exist, justifying terminating sanctions:

1. Public Interest in Expedient Resolution of the Litigation

The public's interest in expeditious resolution of the litigation weighs in favor of terminating sanctions. Plaintiffs' misconduct has multiplied the proceedings and there is circumstantial evidence that Plaintiffs sought undue delay as a strategy for increasing costs to Defendants. Wisnovsky Decl. ¶ 4, ECF No. 207 (voicemail from Ms. Couvrette's brother bragging that Mr. Brigandi was representing them for free and "if you want to continue on, we're not spending a dollar compared to what you're spending."). Terminating sanctions are an appropriately expeditious resolution of the case under the circumstances.

2. The Court's Management of Its Docket

The Court's need to manage its docket also weighs in favor of terminating sanctions. Plaintiffs' Complaint was filed nearly five years ago, and management of this case as a result of the misconduct at issue has required the Court to spend excessive time and resources managing

this case. For example, in response to Plaintiffs' misconduct, the Court held a status conference, entered a show cause order, granted Plaintiffs an extension of time, stayed the proceedings pending Mr. Brigandi's medical emergency, ordered a joint status report, held another status conference, and heard oral argument on Defendants' sanctions motion. Plaintiffs have placed a disproportionate burden on the Court's docket compared to the nature and complexity of the claims.

3. The Risk of Prejudice to Defendants

Dismissal of Plaintiffs' claims will not result in undue prejudice to Defendants. To the contrary, Defendants will benefit from dismissal of Plaintiffs' claims. The Court does not seek to reward Defendants for Plaintiffs' misconduct, but any prejudice appropriately lies with the offending party, Plaintiffs.

4. The Public Policy of Favoring Disposition of the Case on the Merits

Dismissing Plaintiffs' claims with prejudice weighs against the public policy favoring disposition of the case on the merits. This factor weighs against terminating sanctions but is not determinative. *See Henderson*, 779 F.2d at 1425.

5. The Availability of Less Drastic Sanctions

The Court finds that less drastic sanctions are inappropriate under the circumstances. "The district court need not exhaust every sanction short of dismissal before finally dismissing a case but must explore possible and meaningful alternatives." *Id.* Meaningful alternatives include warning counsel of the consequences of further noncompliance or "the issuance of an order to show cause why sanctions should not be imposed against the attorneys involved." *Raiford*, 640 F.2d at 945 n.1. To no avail, the Court has explored both of these alternatives and provided additional meaningful opportunities for Plaintiffs to be heard.

The legitimacy of the judiciary depends, in part, on its predictability. Plaintiffs have failed to show cause as to why the Court should not follow through with its warning about the consequences for further noncompliance with the Local Rules. Dismissal of Plaintiffs' claims with prejudice is a harsh penalty, appropriately matched with the "extreme circumstances" of this case. *Id.* at 945.

CONCLUSION

For the reasons stated above, the Court ORDERS the following sanctions for violation of Federal Rule of Civil Procedure 11(b) and noncompliance with the Local Rules:

1. Plaintiffs' summary judgment briefs (ECF Nos. 142, 155, 168) and amended filings (ECF Nos. 178 and 182) are STRICKEN without leave to refile.
2. The Court ORDERS Mr. Brigandi to pay the Clerk of the Court \$15,500 within 30 days of the date of this Order. Payments may be made in person at the Clerk's Office or mailed to the Clerk's Office at 310 W 6th St., Medford, OR 97501 for processing. Mr. Brigandi must include the case number and a copy of this Order with his payment.
3. Defendants are entitled to an award of reasonable attorney's fees and other expenses directly resulting from Plaintiffs' and their attorneys' violations of the Federal and Local Rules, dating back to Plaintiffs' January 31, 2025, motion for summary judgment (ECF No. 142). The Court ORDERS Defendants to submit a bill of costs and reasonable attorney's fees supported by affidavits or declarations within fourteen days. Following review of Mr. Murphy's response to this Order to Show Cause, the Court will enter an order specifying the amount and apportionment of reasonable attorney's fees and expenses owed to Defendants' attorneys.

4. The Order granting Mr. Murphy's motion to withdraw (ECF No. 175) is VACATED. Plaintiffs are ORDERED to serve Mr. Murphy a copy of this Order and to submit proof of service within fourteen days. Mr. Murphy is ORDERED to appear in writing within fourteen days of Plaintiffs' service of this Order and to show cause as to why he should not be subject to sanctions, or in the alternative, to propose the appropriate sanctions to be imposed.
5. Plaintiffs' claims are DISMISSED with PREJUDICE. The parties are ORDERED to submit a joint status report within fourteen days explaining how this case should proceed. This is not an invitation to move for reconsideration, the joint proposal shall be reasonable and in accordance with this Order.
6. The Court DIRECTS the Clerk of the Court to send a copy of this Order to the Oregon State Bar and to Mr. Murphy.

IT IS SO ORDERED.

DATED this 12 day of December, 2025.



MARK D. CLARKE
United States Magistrate Judge

In re Desilets, 291 F.3d 925 (2002)

48 Collier Bankr.Cas.2d 1412, 39 Bankr.Ct.Dec. 179, Bankr. L. Rep. P 78,666...

291 F.3d 925

United States Court of Appeals,
Sixth Circuit.

In re Ernest J. DESILETS, Debtor.

Allan J. Rittenhouse, Plaintiff–Appellant,

v.

Delta Home Improvement, Inc., Defendant–Appellee.

No. 00–2411.

|

Argued Jan. 24, 2002.

|

Decided and Filed June 3, 2002.

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Rehearing and Suggestion for Rehearing En Banc Denied Sept. 3, 2002.*

Synopsis

On creditor's motion, the Bankruptcy Court, [James D. Gregg](#), Chief Judge, levied fine and disgorgement order against lawyer for Chapter 7 debtor on basis that lawyer engaged in unauthorized practice of law, [247 B.R. 660](#). Lawyer appealed. The United States District Court for the Western District of Michigan, [255 B.R. 294](#), [David W. McKeague](#), J., affirmed. Lawyer appealed. The Court of Appeals, [Boggs](#), Circuit Judge, held that lawyer licensed to practice law in Texas could practice bankruptcy law before bankruptcy court in Western District of Michigan, without being admitted to Michigan state court, where lawyer was eligible for admission to bar of Western District of Michigan and was properly admitted pursuant to local rule.

Reversed.

[Merritt](#), Circuit Judge, filed a dissenting opinion.

West Headnotes (4)

[1] **Bankruptcy** 📌 **Conclusions of law; de novo review**

The Court of Appeals determines statutory questions de novo.

[2] **Attorneys and Legal Services** 📌 **Admission in federal court**

Lawyer licensed to practice law in Texas could practice bankruptcy law before bankruptcy court in Western District of Michigan, without being admitted to Michigan state court, where lawyer was eligible for admission to bar of Western District of Michigan and was properly admitted pursuant to local rule. [11 U.S.C.A. § 101\(4\)](#); [28 U.S.C.A. §§ 1654, 2071](#).

[20 Cases that cite this headnote](#)

[3] **Attorneys and Legal Services** 📌 **Federal preemption**

In re Desilets, 291 F.3d 925 (2002)

48 Collier Bankr.Cas.2d 1412, 39 Bankr.Ct.Dec. 179, Bankr. L. Rep. P 78,666...

When a state licensing law excludes a lawyer from practice that federal rules expressly allow, the two rules do conflict, and the state law must give way. 11 U.S.C.A. § 101(4); 28 U.S.C.A. §§ 1654, 2071.

[12 Cases that cite this headnote](#)

[4] Attorneys and Legal Services 🔑 Power to Admit and License

Federal courts have the right to control the membership of the federal bar. 28 U.S.C.A. §§ 1654, 2071.

[12 Cases that cite this headnote](#)

Attorneys and Law Firms

***926** [Allan J. Rittenhouse](#) (argued and briefed), Iron Mountain, MI, for Plaintiff–Appellant.

[Daniel M. Morley](#) (briefed), Butch, Quinn, Rosemurgy, Jardis, Bush, Burkhart & Parks, Escanaba, MI, [Victoria V. Kremski](#) (argued), State Bar of Michigan, Lansing, MI, for Defendant–Appellee.

Before [MERRITT](#), [BOGGS](#), and [MOORE](#), Circuit Judges.

[BOGGS](#), J., delivered the opinion of the court, in which [MOORE](#), J., joined. [MERRITT](#), J., (pp. 931–32), delivered a separate dissenting opinion.

OPINION

[BOGGS](#), Circuit Judge.

Allan J. Rittenhouse appeals the judgment of the district court that he is not an attorney as defined by the Bankruptcy Code, 11 U.S.C. § 101(4). Because the district court erred in its interpretation of the relevant section of the Bankruptcy Code, we reverse.

I

Allan J. Rittenhouse was counsel of record for debtor Ernest J. Desilets. During Desilets's bankruptcy proceeding, Delta Home Improvement, Inc. (Delta) moved the court to suspend Rittenhouse from practicing before the bankruptcy courts, to require him to disgorge fees, and to sanction him for the unauthorized practice of law.

Because Rittenhouse had not been authorized by the State Bar of Michigan to practice law in the State of Michigan, the bankruptcy court held that Rittenhouse was not an “attorney” within the meaning ***927** of the Bankruptcy Code, 11 U.S.C. § 101(4). The bankruptcy court held that Rittenhouse was a “bankruptcy preparer” under 11 U.S.C. § 110(a), and because he had failed to comply with several requirements imposed by the Code on bankruptcy preparers, ordered him to pay a \$3500 fine and disgorge fees of \$872.

A brief factual synopsis is useful. Rittenhouse graduated from the South Texas College of Law, and was admitted to practice law in Texas in 1992. In December 1992, he moved to Wisconsin. His applications for admission to the Wisconsin and Michigan bars were denied. In February 1994, Rittenhouse applied for admission to the bar of the United States District Court for the

In re Desilets, 291 F.3d 925 (2002)

48 Collier Bankr.Cas.2d 1412, 39 Bankr.Ct.Dec. 179, Bankr. L. Rep. P 78,666...

Western District of Michigan, and was admitted. Rittenhouse has an office in his home in Wisconsin. He also has an office in Iron Mountain, Michigan. His practice was limited to bankruptcy matters in federal court.

In July 1995, the State Bar of Michigan informed Rittenhouse by letter that his conduct constituted the unauthorized practice of law. Rittenhouse responded to the letter and argued that a practice limited to federal bankruptcy did not constitute the unauthorized practice of law. The Michigan Bar took no further action until December 9, 1999, when it instituted a suit in state court to enjoin Rittenhouse from unauthorized practice. This state court action was terminated on August 18, 2000, by the issuance of a stipulated injunction prohibiting Rittenhouse from engaging in conduct deemed to be the unauthorized practice of law.

The bankruptcy court fined Rittenhouse and required him to return fees for engaging in the unauthorized practice of law, while referring the matter of his suspension for *en banc* consideration by the bankruptcy court. *En banc* review resulted in an order indefinitely suspending Rittenhouse from appearing before the bankruptcy court.

Rittenhouse appealed to the district court, which affirmed the bankruptcy court determination. Rittenhouse now timely appeals the district court's decision.

II

[1] [2] Rittenhouse does not dispute any of the facts established by the bankruptcy or district courts. We determine the remaining statutory questions *de novo*. *In re Baker & Getty Financial Services, Inc.*, 106 F.3d 1255, 1259 (6th Cir.1997).

All parties agree that Rittenhouse was eligible for admission to the bar of the Western District of Michigan, and was properly admitted pursuant to Local Rule (W.D.Mich.) 83.1, which reads in pertinent part:

Eligibility—A person who is duly admitted to practice in a court of record of a state, and who is in active status and in good standing, may apply for admission to the bar of this Court....

Local Rule (W.D.Mich.) 83.1(c)(i). We look to 11 U.S.C. § 101(4) for the definition of “attorney” for purposes of the bankruptcy code:

‘attorney’ means attorney, professional law association, corporation, or partnership, authorized under applicable law to practice law;

The central issue of the case is, therefore, whether the “applicable law” authorizing an attorney to practice before the bankruptcy court consists solely of the federal rules for admission to the federal bar, or also includes the state rules for admission to the state bar, even when not referenced in the federal rules.

This question has not been resolved by our Circuit. We turn therefore to persuasive authority. In *928 *In re Poole*, 222 F.3d 618 (9th Cir.2000), the Ninth Circuit determined that federal standards control admission to the federal bar. *Poole* concerned an attorney admitted to the Illinois State Bar, and admitted to practice in the Arizona federal courts. The trustee in a bankruptcy proceeding moved to require the attorney to disgorge his fees because he was not an “attorney” under 11 U.S.C. § 101(4). The Ninth Circuit rejected this argument. In so doing, the court noted:

Admission to practice law before a state's courts and admission to practice before the federal courts in that state are separate, independent privileges. The two judicial systems of courts, the state judiciaries and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included.... In short, a federal court has the power to control admission to its bar and to discipline attorneys who appear before it.

Poole, 222 F.3d at 620 (citations and quotations omitted).

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The plaintiff in *Poole* argued, as does Delta here, that a lawyer not admitted in the forum state is not an “attorney” as defined in 11 U.S.C. § 101(4). The *Poole* plaintiff argued that the “applicable law” was Arizona law, and that under Arizona law, the defendant attorney could not practice law, including practice before a federal court.

The *Poole* court found that the states did not have the power to determine who could be admitted to the federal bar. The court stated:

As we have discussed, and as nearly a century of Supreme Court precedent makes clear, practice before federal courts is not governed by state court rules. Further, and more importantly, suspension from federal practice is not dictated by state rules. *Poole*, 222 F.3d at 622. See also *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) (“a federal court has the power to control admission to its bar”); *Theard v. United States*, 354 U.S. 278, 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1957) (disbarment by federal courts does not necessarily flow from disbarment by state courts); *In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968) (accord). Since the state and federal systems are separate and independent, the court held that the “applicable law” to which 11 U.S.C. § 101(4) refers was federal rather than Arizona law.

[3] Further, in *Sperry v. Florida ex rel. the Florida Bar*, 373 U.S. 379, 385, 83 S.Ct. 1322, 10 L.Ed.2d 428 (1963), the United States Supreme Court held that the State of Florida could not apply its licensing provisions to the defendant attorney to prevent him from preparing patent applications, because he was registered to practice before the United States Patent Office. The district court in the instant case cited *Sperry* as holding that when federal and state law do not directly conflict, state law need not give way. This misstates the holding of *Sperry*. There, the Court held that when a state licensing law excludes a lawyer from practice that federal rules expressly allow, the two rules *do* conflict, and the state law must give way. *Sperry*, 373 U.S. at 385, 83 S.Ct. 1322.

Sperry provides strong guidance for the current case. The *Sperry* Court noted:

A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give the State's licensing board [in *Sperry*, the Florida Bar Association] a virtual power of review over the federal determination that a person or agency is qualified and entitled to perform certain functions, or *929 which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress. *Ibid.* (citations and quotations omitted). The only plausible distinction between *Sperry* and *Poole* is that the enabling Congressional statute in *Sperry* expressly allowed for the prosecution of patents by non-lawyers.¹ This is a distinction without a difference, given that Rittenhouse is a duly licensed lawyer who meets the requirements for admission to the Bar of the Western District of Michigan.

There is countervailing persuasive authority. The bankruptcy court and district court relied primarily on a Connecticut bankruptcy court decision, *In re Peterson*, 163 B.R. 665 (Bankr.D.Conn.1994). In *Peterson*, the court determined that an attorney was engaged in the unauthorized practice of law because he maintained an extensive federal bankruptcy practice in Connecticut, while being licensed in New York. The *Peterson* court held that when the attorney maintained an office and conducted significant business in Connecticut, he violated Connecticut state rules prohibiting the unauthorized practice of law.

In response to the argument that the attorney was allowed to practice law before the federal courts because he was admitted to the federal bar, the *Peterson* court held that there was a difference between the right to practice law, and the right to practice before a court. *Peterson*, 163 B.R. at 673. The court cited *Leis v. Flynt*, 439 U.S. 438, 99 S.Ct. 698, 58 L.Ed.2d 717 (1979), as holding that the licensing and regulation of lawyers is generally left to the states. The *Peterson* court reasoned that since state law was the source of the ability to practice law, federal law did not, alone, grant that ability. Thus, the court held, state law governed who was allowed to practice law in federal courts. *Peterson*, 163 B.R. at 673.

The persuasive weight of *Peterson* is dependent on the soundness of its reading of *Leis*. In *Leis*, the Supreme Court held that state rules governed practice in state courts. *Leis*, 439 U.S. at 441–42, 99 S.Ct. 698. *Leis* does not hold that state rules govern

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practice in *federal* courts. Although federal courts often reference state rules in their requirements (as did the rule at issue here—an applicant must be properly licensed by a state to be admitted), they need not do so.

[4] Contrary to *Peterson's* reading of *Leis*, federal courts have the right to control the membership of the federal bar. “Congress has provided in 28 U.S.C. § 2071 that the district courts may prescribe rules for the conduct of their business. It is clear from 28 U.S.C. § 1654 that the authority provided in § 2071 includes the authority of a district court to regulate the membership of its bar.” *Frazier v. Heebe*, 482 U.S. 641, 107 S.Ct. 2607, 96 L.Ed.2d 557 (1987) (Rehnquist, dissenting). See also *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) (accord). The power to admit and regulate attorneys is not, as the *Peterson* court asserts, the sole bailiwick *930 of the states. Since both the federal courts and state bars have the ability to regulate attorneys, the question becomes which has the greater power to regulate admission to the federal bar. The bankruptcy judge, below, answered this question succinctly: “if this court is unable to reconcile Michigan's laws governing the practice of law with the federal court rules relating to the subject, the State's rules must yield.” *In re Desilets*, 247 B.R. 660, 668 (Bankr.W.D.Mich.2000).

The bankruptcy court in the instant case determined that the applicable state and federal rules are compatible. The bankruptcy court argued that the sole power granted by the federal rules was the ability to practice in federal court; the grant, the court argued, was not of a general power to practice law. *Desilets*, 247 B.R. at 669–70. Since the bankruptcy court interpreted the local federal rules only to authorize practice in the court, and not the practice of law, the court found no conflict between state and federal rules.

We disagree, on two grounds. First, this argument is incorrect on the face of the federal rule. Local Rule (W.D.Mich.) 83.1(a) (iii) defines the phrase “practice in this Court” to mean:

in connection with an action or proceeding pending in this Court, to appear in, commence, conduct, prosecute the action or proceeding; appear in open court; sign a paper; participate in a pretrial conference; represent a client at a deposition; counsel a client in the action or proceeding for compensation; or otherwise practice in this Court or before an officer of this Court.

This statement authorizes activities beyond those involved in appearance before the bankruptcy court. In particular, the rule authorizes the attorney to “counsel a client in the action or proceeding for compensation.” This is what Rittenhouse did, and what the courts below determined he was not allowed to do, based on their reading of state law. When state licensing laws purport to prohibit lawyers from doing that which federal law expressly entitles them to do, the state law must give way. *Sperry*, 373 U.S. at 385, 83 S.Ct. 1322.

Second, Rittenhouse does have a valid state source of the authority to practice law: he is properly licensed by Texas. There is no slip ‘twixt the cup and the lip’; Rittenhouse is admitted to the practice of law in Texas, and the local rule requires only that an attorney be duly admitted to practice in a court of record of a state in order to practice before the Western District of Michigan.

The bankruptcy court, district court, and the Michigan Bar seem in fact to be exercised on practical, not legal, grounds. They have noticed that Rittenhouse has an office and practices federal bankruptcy law in a state in which he is not licensed to practice law generally; presumably he competes for federal bankruptcy business with properly licensed Michigan lawyers. However, this was also the motivating force behind the controversy in *Sperry*, where the Florida Bar sought to prevent attorneys not licensed by Florida from practicing patent law in Florida.

The bankruptcy court's analysis also suffers from a practical failing; it did not realistically distinguish between Rittenhouse and those attorneys who have their offices across the border, but do all of their work before the Michigan federal courts.² *931 The bankruptcy court's analysis would equally extend to lawyers working for large New York firms, who happened to do most of their legal work in Michigan for Michigan (or multistate, or multinational) clients. We do not believe that the Western District of Michigan Local Rules and 11 U.S.C. § 101(4) can be read to prohibit Rittenhouse's practice, while permitting these other quotidian forms of practice.

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Because Rittenhouse was properly admitted to the federal bar under the applicable rule, and because federal standards govern practice before the federal bar, we reject the bankruptcy court's determination as adopted by the district court.

III

For the foregoing reasons, the district court's judgment is REVERSED.

[MERRITT](#), Circuit Judge, dissenting.

I did not know until I read Judge Boggs' opinion that for lawyers it is now a regular, everyday practice—part of the profession's “quotidian forms of practice” (to use the court's words)—for lawyers to practice daily in the federal courts of State A, say Michigan or Tennessee, while living and being licensed to practice only in State B, say New York or Florida. I recognize that law practice is changing. But I had thought that a lawyer still needs to pass the bar exam and be admitted to practice in the state where the lawyer routinely engages in state and federal litigation. I did not know that the routine, “quotidian” practice of law in the federal courts of a state where a lawyer is not licensed to practice is a right that may not be regulated or affected by the local rules of the federal court in which the lawyer appears.

In this case, both of the courts below, the Bankruptcy Court, an adjunct of the District Court, and the District Court itself, have interpreted their own local rules to forbid routine practice in the bankruptcy courts in Michigan by a lawyer not licensed to practice in Michigan. I see nothing in any federal statute or rule that withdraws from these courts the authority to regulate practice before them, nor do I see any reason to say that the phrase “authorized under applicable law to practice law” in [§ 101\(4\), title 11](#), does not include those Michigan rules of law practice recognized by the Michigan federal courts. As Chief Justice Marshall wrote for a unanimous Court in the *Burr* case, “the Court is not inclined to interpose [by reversing the lower federal court's removal of Burr from the bar], unless it were in a case where the conduct of the Circuit or District Court was irregular, or was flagrantly improper.” This is because “no other tribunal can decide, in a case of removal from the bar, with the same means of information as the Court itself” and because “the power ... is, we think, incidental to all Courts, and is necessary for the preservation of decorum and for the respectability of the profession.” *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 6 L.Ed. 152 (1824).

In addition, if we follow Judge Boggs' reasoning for the court, licensing in federal court becomes an exclusively federal matter without giving credence or comity to the licensing requirements of the state courts. Federalism may be waning, but I ***932** am not ready to set up a national system for licensing, removing and regulating federal practice. I am not ready to say, along with my colleagues, that “ ‘applicable law’ authorizing an attorney to practice ... consists solely of the federal rules for admission to the federal bar” without regard to “state rules for admission to the state bar.” (Op. p. 4.) I would continue the longstanding practice of the federal courts in rendering comity to the state courts in regulating the practice of law. *See, e.g., Leis v. Flynt*, 439 U.S. 438, 442, 99 S.Ct. 698, 58 L.Ed.2d 717 (1979) (noting that it is well established that the States, not federal courts, “prescribe the qualifications for admission to practice and the standards of professional conduct” as well as be “responsible for the discipline of lawyers”). We do not need an elaborate national agency to regulate licensing, removing and disciplining federal lawyers, and the federal courts themselves are not equipped to handle this task alone without the help of the state courts and their rules of practice. Further, if Rittenhouse can practice regularly before the Michigan bankruptcy court with a Texas law license, he has successfully circumvented the Michigan state bar exam and requirements for admission. Opening the door to such a practice places an undue burden on federal courts to regulate and discipline attorneys who are no longer under the oversight of their local state bar and additionally encourages prospective attorneys to forum shop among state bars for the easiest requirements.

All Citations

291 F.3d 925, 48 Collier Bankr.Cas.2d 1412, 39 Bankr.Ct.Dec. 179, Bankr. L. Rep. P 78,666, 2002 Fed.App. 0196P

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Footnotes

* Judge [Merritt](#) would grant rehearing for the reasons stated in his dissent.

1 The court in *In re Peterson*, 163 B.R. 665 (Bankr.D.Conn.1994) attempted to distinguish *Sperry* by arguing that patent practice cases were different than bankruptcy practice cases, because the federal government enacted a specific statute that gave the power to practice law to patent attorneys. In both cases, Congress has confided the ability to control a federal bar to a federal entity. Although it seems clear, we need not go so far as to hold that the statutes granting federal courts the ability to regulate their bars would allow federal courts to admit practitioners unlicensed by any state. A state (Texas) has licensed Rittenhouse to practice law.

2 In fact, Rittenhouse does have an office in his home in Wisconsin, and has undertaken to rent office space in Texas in response to the court's rulings below. The argument that would be advanced to distinguish Rittenhouse from out-of-state attorneys who regularly take cases in Michigan is presumably that the reason out-of-state attorneys may represent clients before the Western District of Michigan is that the state rules allow them to, on a *pro hac vice* basis. This is a circular argument: that Michigan chooses not to exclude all out-of-state attorneys from federal court is better evidence for the proposition that it lacks the power to do so, rather than the proposition that it may do so but has simply exercised extraordinary restraint up until now.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Medford Division

JOANNE COUVRETTE, as Trustee of The
Ann M. Wisnovsky Trust; and **WISNOVSKY**
LAND, LLC,

PLAINTIFFS,

vs.

MARK A. WISNOVSKY, an individual; and
MICHAEL J. WISNOVSKY, an individual;
PATRICK HUYCKE, an individual;
VALLEY VIEW WINERY, INC., an Oregon
corporation; **JARVIS, DREYER, GLATTE**
& LARSEN, LLP, an Oregon partnership, fka
Huycke O'Connor Jarvis, LLP.

DEFENDANTS.

Case No. 1:21-cv-00157-CL

**TIMOTHY L. MURPHY'S RESPONSE
TO ORDER TO SHOW CAUSE**

Timothy L. Murphy ("Respondent"), on his own behalf, submits the following response to the court's order to show cause included in its Opinion and Order dated December 12, 2025 (ECF No. 215). This response is supported by Respondent's declaration filed herewith ("Murphy Declaration").

TIMOTHY L. MURPHY'S RESPONSE TO ORDER TO SHOW CAUSE - 1

1. Introduction.

At the outset, Respondent wishes to make clear that he understands the seriousness of the matter now before the court. Even though, as will be addressed below, Respondent had absolutely no involvement in the citation of the fake cases at issue, he is embarrassed to have his name associated with this case, and regrets that he ever agreed to serve as local counsel for Ms. Couvrette and Mr. Brigandi.

That being said, Respondent submits that there is no basis to sanction him for any violation of Rule 11. The preparation and filing of the summary judgment papers was handled solely by Mr. Brigandi. Respondent did not sign or file the offending briefs; he did not advocate for the positions taken in those briefs; and he did not draft, review or contribute in any way to the briefs nor was he asked to do so. As explained in his declaration, Respondent did a cursory review of the plaintiffs' initial motion for summary judgment, three days after it was filed; and he did not review the subsequent briefing by either party. He had no idea whatsoever the motion included fake legal authorities until Sandra Gustitus emailed him on May 5, 2025. In fact, before receiving a copy of defendants' notice of intent to seek sanctions in May 2025, Respondent does not recall ever hearing about the dangers of "hallucinated cases" being generated by AI.

Although Respondent did not draft, sign, file, or advocate for the any of the offending briefs, and had no knowledge of the fake case citations until long after the fact, he understands that the court is considering sanctions against him for failing to "meaningfully participate" in the case as required by LR 83-3. While Respondent acknowledges that rule, he did not understand his responsibility would require him to review Mr. Brigandi's motion and briefing

to confirm that the submitted legal arguments and case citations were accurate and proper, or that he could be held responsible for Mr. Brigandi's failings in this regard. Respondent is not aware of any reported interpretation of that phrase in LR 83-3, nor any other rule or guidance, that would place such responsibilities on local counsel and, in effect, could make Respondent vicariously liable for Mr. Brigandi's serious misdeeds.

Finally, Respondent is aware that the court has inherent authority to impose sanctions on attorneys who violate its rules. But in order to do so, the court must make specific findings that the attorney acted in bad faith. Sanctions are not allowed where the attorney's conduct was inadvertent, an oversight, or ordinary negligence. Therefore, to the extent the court were to find Respondent violated LR 83-3 for failing to "meaningfully participate" in this litigation, there is no evidence to find that he acted in bad faith in doing so.

2. Timeline of Respondent's involvement in this case.

A. Respondent agrees to serve as local counsel.

As set out in more detail in Respondent's declaration, Respondent first was contacted by Joanne Couvrette in early January 2024 regarding some questions she had related to a commercial property that was involved in pending federal litigation (this case). (Murphy Decl. ¶2.) Soon after, Ms. Couvrette told Respondent that Stephen Brigandi, an attorney in California, was taking over as her attorney in the federal lawsuit, replacing Bonnie Richardson. (*Id.*, ¶3.) Respondent began consulting with Ms. Couvrette and Mr. Brigandi about potential options relating to the commercial property that might resolve the federal case. (*Id.*, ¶5.) Ms. Couvrette then asked Respondent to serve as local counsel for Mr. Brigandi's pro hac vice admission in the federal case. (*Id.*, ¶5.) Satisfied that Mr. Brigandi was knowledgeable and

capable, Respondent agreed. Mr. Brigandi's application was granted on February 7, 2024. (*Id.*, ¶¶4-5)

Mr. Brigandi was primarily responsible for the federal case, including litigation strategy and all dispositive motion practice. (*Id.*, ¶6) Respondent's role mostly involved strategizing with Mr. Brigandi and Ms. Couvrette about a potential resolution to the underlying dispute between her and the defendants related to the commercial property, that would hopefully lead to a resolution of the lawsuit. (*Id.*)

B. Respondent plans to withdraw as of December 2024.

Long before Plaintiffs' Motion for Summary Judgment or any offending briefing was filed in this case, Respondent made the decision that he needed to withdraw his representation in late December 2024. (*Id.*, ¶8) In late November 2024, Respondent learned that Ms. Couvrette, in consultation with Mr. Brigandi, had filed two lawsuits in Oregon small claims court back in July 2024 that involved the same commercial property and the same named defendants in the federal court case. The subject matter of those small claims court cases involved landlord tenant law. Those small claims cases were later removed to circuit court, which dismissed the cases and entered a supplemental judgment against Wisnovsky Land LLC for attorney fees and costs. Despite the fact that this is the area of law that is precisely the focus of Respondent's practice, Respondent had never been consulted by Ms. Couvrette or Mr. Brigandi about these two lawsuits. This incident raised serious concerns about his ability to effectively represent Ms. Couvrette and work with Mr. Brigandi going forward. (*Id.*, ¶7)

For this, and other reasons, Respondent concluded that due to a breakdown in the attorney-client relationship he needed to withdraw his representation.¹ (*Id.*, ¶8.) Respondent first notified Ms. Couvrette in late December 2024 that he planned to withdraw and that she needed to find replacement counsel. (*Id.*) At that time Respondent was aware that Mr. Brigandi planned to file a motion for summary judgment. In early January 2025 Respondent confirmed with both Ms. Couvrette and Mr. Brigandi that Mr. Brigandi would be entirely responsible for drafting the motion for summary judgment. (*Id.*, ¶¶8-9.)

After consulting with the Oregon State Bar, Respondent determined that to avoid causing prejudice to his client, he should remain as local counsel until the briefing on impending dispositive motions was complete so that Mr. Brigandi's could file the motion and any related briefing. He determined that he would withdraw on March 28, 2025, and notified both Ms. Couvrette and Mr. Brigandi of his intent in writing on January 28, 2025 and January 29, 2025 respectively. (*Id.*, ¶¶10-13.)

Without consulting Respondent, the parties extended the briefing schedule to April 25, and then again to May 2. At Ms. Couvrette and Mr. Brigandi's repeated requests, Respondent agreed to remain as local counsel until the final brief was filed. (*Id.*, ¶16)

C. Dispositive motions are filed.

Plaintiffs' Motion for Summary Judgment was filed by Mr. Brigandi on January 31, 2025. Respondent did not review plaintiffs' motion, or any drafts, before it was filed. Respondent did not sign or file the motion. Respondent was not consulted about any of the

¹ **Error! Main Document Only.** Respondent is only ethically permitted here to disclose client confidential information to the extent he "reasonably believes is necessary." ORPC 1.6(b)(4).

arguments or case citations contained in the motion. Respondent did not participate whatsoever in the preparation of that motion. (Murphy Decl., ¶13)

On February 3, 2025, three days after they were filed, Respondent reviewed Plaintiffs' Motion for Summary Judgment and Defendants' Motion for Partial Summary Judgment. The case law argued and cited in plaintiffs' motion were unfamiliar to Respondent, and admittedly he skimmed past them. Respondent had no idea that, as it turned out, the motion contained fictitious case citations. (*Id.*, ¶14)

Respondent was not involved whatsoever in the preparation of Plaintiffs' Response to Defendants' Motion for Summary Judgment, or Plaintiffs' Reply to Defendants' Response to Plaintiffs' Motion. Respondent did not review the briefs, or any drafts, before they were filed by Mr. Brigandi. Respondent was not consulted about the arguments or case citations contained in those briefs. (*Id.*, ¶17)

Respondent did not review any of the briefing subsequent to initial motions filed by plaintiffs and defendants (ECF Nos. 155, 160, 168, and 170). He was not asked or expected to do so, and because the legal issues involved were largely outside of Respondent's expertise and practice area, he believed his review would have only created additional unnecessary expense for his client if he had reviewed the many hundreds of pages of dispositive motion practice and associated declarations. (*Id.*, ¶18).

D. Respondent receives first notice regarding fake case citations.

On Monday May 5, 2025, Respondent emailed defense counsel Sandra Gustitus to explain that he would be filing a motion to withdraw, stating that "I believe professional considerations require this withdrawal." (*Id.*, ¶20.) Respondent emphasizes that at this time

he had no knowledge of the fake case citations. His determination that he needed to withdraw dates back to December 2024 and was confirmed in writing prior to any dispositive motion being filed. (*See* section B. above)

Ms. Gustitus responded to Respondent's email saying that defendants intended to file a motion to strike plaintiffs' briefs which included "fake cases" and were working on a motion for sanctions for the same reason. (*Id.*, ¶21.) This was the first time that Respondent learned or heard anything about citations to fake cases in this federal litigation. (*Id.*, ¶22.) In fact, prior to this event, Respondent does not recall ever hearing about the danger of "hallucinated cases" being generated by AI. (*Id.*, ¶15.)

On May 7, 2025, Respondent received a letter from Ms. Gustitus that included a motion for sanctions that defendants intended to file if certain corrections were not made within 21 days. (*Id.*, ¶24.) Respondent emailed Ms. Couvrette on May 8, 2025 to provide her with a copy of the letter from Ms. Gustitus with the proposed motion for sanctions. (*Id.*, ¶25.) Also on May 8, 2025, Respondent emailed Stephen Brigandi asking how he intended to address the issues raised in the motion for sanctions. Stephen Brigandi replied and confirmed that he would "cure the alleged faults within the 21-day period." (*Id.*, ¶26.) At this point Respondent recognized that he had an obvious direct conflict of interest with his client and could not take any action on plaintiffs' behalf in connection with the impending motion or the federal case. (*Id.*, ¶27.)

E. Respondent moves to withdraw.

On May 19, 2025, Respondent moved to withdraw, requesting that plaintiffs be allowed 30 days to retain new local counsel. (ECF No. 174.) The court granted Respondent's

motion on May 21. (ECF No 175.) Defendants filed their original Motion for Sanctions on May 23. (ECF No. 176.)

3. The court orders Respondent to show cause.

After finding cause to order substantial sanctions against plaintiffs and Mr. Brigandi, the court has now ordered Respondent “to show cause as to why he should not be subject to sanctions, or in the alternative, to propose sanctions to be imposed.” In the court’s Opinion and Order on sanctions addressing Respondent’s conduct directly, it states:

The Court previously encouraged Mr. Murphy “to help ensure compliance with Local Rules” when it warned Plaintiffs that further noncompliance may result in dismissal of this case. Opinion and Order at 4, ECF No. 137. Local Rule 83-3 requires local counsel to “meaningfully participate in the preparation and trial of the case.” LR 83-3(a)(1). Mr. Murphy was local counsel of record when Plaintiffs filed their summary judgment briefing and when Defendants responded and replied with notice of Plaintiffs’ apparent use of non-existent cases and fabricated quotations. Mr. Murphy either failed to meaningfully participate in the case or violated Rule 11 and LR 83-7 by allowing those brief to be filed.

A. Respondent did not violate Rule 11 or LR 83-7.

First, there is no evidence to find that Respondent “allowed” any of the offending papers to be filed. The record demonstrates that Mr. Brigandi was solely tasked with handling the dispositive motions. Respondent confirmed this with Ms. Couvrette and Mr. Brigandi in early January 2025. Respondent was not consulted in the preparation of the motion or briefs, and did not review them, nor was provided the briefs for review, before they were filed. Respondent did not participate with or prepare the dispositive motions in any way. Further, he did not learn about the fake case citations until Ms. Gustitus’ May 5, 2025 email. Respondent did not knowingly fail to assert himself earlier based on defendants’ response brief

which first identified the problem; he did not review that brief or those that followed. Had he known about the fake case citations and failed to act he might be held accountable under LR 83-7, but that is not what occurred.²

Second, Respondent did not sign, file, or advocate for Plaintiffs' Motion for Summary Judgment or any of the subsequent briefs. Respondent did not make any representations under Rule 11(b). Rule 11 sanctions apply to "signed writings filed with the court." [*Fink v. Gomez*, 239 F3d 989, 991 \(9th Cir, 2001\)](#); *see also* [*Christian v. Mattel, Inc.*, 286 F3d 1118, 1131 \(9th Cir, 2002\)](#)("Rule 11 sanctions are limited to 'papers' signed in violation of the rule."). Because he did not sign any of the offending papers, the court should not sanction Respondent under Rule 11.

B. The court's inherent authority to impose sanctions.

The court has inherent authority to sanction attorneys for violations of local rules. [*Zambrano v. Tustin*, 885 F2d 1473, 1477 \(9th Cir, 1989\)](#). However, "to insure that restraint is properly exercised, we have routinely insisted upon a finding of bad faith before sanctions may be imposed under the court's inherent power" *Id.* at 1478. "A specific finding of bad faith by the trial judge or magistrate must accompany the sanction order in **all** such cases." *Id.*(*emphasis added*); *see also*, [*Leon v. IDX Systems Corp.*, 464 F3d 951, 961 \(9th Cir, 2006\)](#)(The court may "award sanctions in the form of attorneys' fees against a party or counsel who acts 'in bad faith, vexatiously, wantonly, or for oppressive reasons.'" (citation omitted)).

² When Respondent received notice of the fake cases, he contacted Mr. Brigandi to confirm the record would be corrected by Mr. Brigandi. Respondent then moved to withdrawal and the court allowed his withdrawal within the 21-day safe harbor period.

“Attorneys should not be ‘disciplined by financial reprisal for conduct attributable to mistake, inadvertence or error of judgment.’” [Zambrano, 885 F2d at 1480](#) (citation omitted). Finally, “any sanctions imposed against [an attorney] should be based solely on his ‘own improper conduct without considering the conduct of the parties or any other attorney.’” [Primus Auto. Financial Services, Inc. v. Batarse, 115 F3d 644, 650 \(9th Cir, 1977\)](#) (citation omitted).

C. No evidence that Respondent acted in bad faith.

LR 83-3(a)(1) provides that out-of-state counsel who are admitted *pro hac vice* must associate with local counsel “who will meaningfully participate in the preparation and trial of the case.” Respondent understands the court believes that Respondent may have violated LR 83-3 by failing to “meaningfully participate” in this case. The court’s order to show cause, however, does not state exactly how Respondent failed in this regard. See [In re Lehtinen, 564 F3d 1052, 1060 \(9th Cir, 2009\)](#)(Due process requires “sufficient, advance notice of exactly which conduct was alleged to be sanctionable, and [was] furthermore aware that [he] stood accused of having acted in bad faith.” (citation omitted), *overruled on other grounds by In re Gugliuzza 852 F3d 884, 896-98 (9th Cir, 2017)*).

Respondent will assume that the court believes that in order to meet his obligation to “meaningfully participate” as local counsel he should have participated in the preparation and filing of plaintiffs’ motion and subsequent briefing, and should have reviewed defendants’ briefs which noted the fake cases. But Respondent submits that the term “meaningfully participate” is vague and uncertain as to what is expected of local counsel in regard to the preparation of legal briefing. Requiring local counsel to review all briefing creates

considerable additional expense to a client, sometimes for little purpose. Respondent is unaware of any reported decision which addresses the meaning of that phrase in any manner.

In contrast, local rules from some other districts provide much more specific guidance. For example, in the Western District of Washington the rules for *pro hac vice* admission, set out responsibilities for local counsel in detail, including: “Unless waived by the court in addition to those responsibilities [above] and any assigned by the court, local counsel must review and sign all motions and other filings, ensure that all filings comply with all local rules of this court, and remind *pro hac vice* counsel of the court’s commitment to maintaining a high degree of professionalism and civility from the lawyers practicing before this court as set forth in the Introduction to the Civil Rules.” LCR 83.1(d)(2); *see also* Eastern District of Washington Local Civil Rule 83.2(c)(1)(“There shall be joined of record in such appearance an associated attorney admitted to practice in this Court who shall sign all pleadings, motions, and other papers prior to filing and shall meaningfully participate in the case.”)

Neither this court’s local rules, nor the court’s prior admonition from its December 16, 2024 order, direct that Respondent was expected to serve as a check on, or guarantor of, Mr. Brigandi’s legal work. And even if such requirement was expected by this court (without an express directive to that effect), there is no evidence to suggest or find that Respondent knew that was his responsibility, willfully failed to undertake that responsibility, or did so for an improper purpose. At most, any failure on the part of Respondent in this regard was unintentional, inadvertent, and an error in judgment. There is no basis to conclude the Respondent acted in bad faith and should be subject to sanctions.

4. Conclusion.

Based on the foregoing, Respondent submits that there is no basis to hold him accountable for the actions of Mr. Brigandi. There is no evidence that he took part in the subject misconduct in any manner, or that he was aware of it until it was too late. There is no basis to find that he acted in bad faith. Respondent sincerely apologizes to the Court that he acted as local counsel in federal litigation sullied by use of fake AI citations, but Respondent took no part at all in the offensive summary judgment motion practice and respectfully requests that no sanctions be ordered against him.³

DATED this 31 day of December, 2025.

/s/ Timothy Murphy
Timothy L. Murphy, OSB No. 003348
333 NE Russell Street, Ste. 200
Portland, OR 97212
E-mail: tim@oregonlandlord.net
Telephone: 503-550-4894

³ Nonetheless, Respondent promises that he will never again serve as local counsel in this court.

DECLARATION OF SERVICE

I hereby certify that I served the foregoing **TIMOTHY L. MURPHY'S RESPONSE TO ORDER TO SHOW CAUSE** and **DECLARATION OF TIMONTHY L. MURPHY IN SUPPORT OF TIMOTHY L. MURPHY'S RESPONSE TO ORDER TO SHOW CAUSE** on the following:

Stephen M. Brigandi
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Curtis M. Glaccum
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Plaintiffs Joanne Couvrette and Wisnovsky Land LLC

by the following method(s):

___xx___ by emailing a full, true and correct copy thereof to the parties at the email addresses shown above, which are the last-known email addresses of the parties, on the date set forth below.

_____ by e-serving a full, true and correct copy thereof to the parties through OJD eFile, on the date set forth below.

___xx___ by mailing a full, true and correct copy thereof in a sealed, first-class, postage pre-paid envelope, addressed to the last-known address of the parties as shown above, and deposited with the United States Postal Service on the date set forth

below.

_____ by hand delivering a full, true and correct copy thereof to the parties at the last known business address of the parties above.

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it may be used as evidence in court and is subject to penalty for

Dated: December 31, 2025

/s/ Mai Pelham

Mai Pelham, Legal Assistant

Timothy L. Murphy, OSB No. 003348

Murphy Law Group P.C.

330 NE Russell Street, Ste. 200

Portland, OR 97212

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Telephone: 503-550-4894

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Medford Division

JOANNE COUVRETTE, as Trustee of The
Ann M. Wisnovsky Trust; and **WISNOVSKY**
LAND, LLC,

PLAINTIFFS,

vs.

MARK A. WISNOVSKY, an individual; and
MICHAEL J. WISNOVSKY, an individual;
PATRICK HUYCKE, an individual;
VALLEY VIEW WINERY, INC., an Oregon
corporation; **JARVIS, DREYER, GLATTE**
& LARSEN, LLP, an Oregon partnership, fka
Huycke O'Connor Jarvis, LLP.

DEFENDANTS.

Case No. 1:21-cv-00157-CL

**DECLARATION OF TIMOTHY L.
MURPHY IN SUPPORT OF TIMOTHY
L. MURPHY'S RESPONSE TO ORDER
TO SHOW CAUSE**

I, Timothy Murphy, hereby declare as follows:

1. I have been practicing law since 2000. The focus of my practice is residential and commercial landlord tenant law.

DECLARATION OF TIMONTHY L. MURPHY IN SUPPORT OF TIMOTHY L. MURPHY'S
RESPONSE TO ORDER TO SHOW CAUSE - 1

2. I was contacted by Joanne Couvrette in early January 2024 regarding some questions she had related to a commercial property in Jacksonville, Oregon that was involved in ongoing federal litigation (this case).

3. On January 12, 2024, Joanne Couvrette advised me that Stephen Brigandi, an attorney in California, was taking over as her attorney in the federal lawsuit, replacing Oregon attorney Bonnie Richardson.

4. I reviewed Stephen Brigandi's profile on LinkedIn.com and saw he graduated law school in 1986. He was actively practicing law in California. His profile indicated he had law firm and in-house legal experience with a generalized focus.

5. I began consulting with Ms. Couvrette and Mr. Brigandi about potential options relating to the commercial property that might resolve the federal case. I had a 2-hour phone call with Mr. Brigandi on January 22, 2024. On January 30, 2024, Joanne Couvrette asked me to sign on to a *pro hac vice* application for Stephen Brigandi and serve as local counsel in the federal case. Based on my review of Stephen Brigandi's experience and conversations with him, I believed him to be knowledgeable and capable, and I agreed to substitute into the case and serve as local counsel. The court granted Mr. Brigandi's application on February 7, 2024.

6. At all times Mr. Brigandi was primarily responsible for the federal case; including litigation strategy and all dispositive motion practice. My role mostly involved strategizing with Mr. Brigandi and Ms. Couvrette on how to fashion a settlement in connection to the commercial property. I understood Ms. Couvrette's goal was to somehow fashion a resolution with regard to the underlying dispute between her and the defendants (her brothers) regarding the ownership and use of the commercial property, that would in turn hopefully

resolve the federal lawsuit. I believed that my expertise in landlord tenant law would be helpful.

7. In late November 2024, I learned that Ms. Couvrette, in consultation with Mr. Brigandi, had filed two lawsuits in Oregon small claims court back in July 2024 that involved the same commercial property and the same named defendants in the federal court case. The subject matter of those small claims court cases involved landlord tenant law. Despite the fact that this is the area of law that is the focus of my practice, I had not been consulted by Ms. Couvrette or Mr. Brigandi. My law firm only became involved in those cases after they had already been removed to circuit court and were pending dismissal, at which time I was asked to assist at the last minute to raise objections to defendants' attorney fee petitions as prevailing parties. This incident raised serious concerns about my ability to effectively represent Ms. Couvrette and work with Mr. Brigandi going forward.

8. At this point I concluded that due to a breakdown in the attorney-client relationship I needed to withdraw my representation. I spoke with Ms. Couvrette and told her that she needed to immediately find a new attorney to serve as local counsel. I said I would try to find someone, but that she should also be looking. On January 8, 2025, I emailed Ms. Couvrette to let her know I had not located a replacement attorney and to confirm I needed to withdraw. At this time, I was aware that Mr. Brigandi was planning to file a dispositive motion and confirmed my understanding to Ms. Couvrette that he would be doing so.

9. On January 8, 2025, I emailed Stephen Brigandi to confirm that he would be drafting the dispositive summary judgment motion. Ms. Couvrette intended that Mr. Brigandi would be entirely handling all aspects of the dispositive summary judgment motion. I also

understood that Mr. Brigandi would be entirely handling all aspects of the summary judgment motion.

10. On January 16, 2025, I phoned the Oregon State Bar to seek advice about withdrawal from the federal litigation without causing prejudice to my client. The federal litigation had begun in 2021. I was concerned about the impending dispositive motion deadlines and whether my withdrawal would prevent Stephen Brigandi from being able to file dispositive motions in a case already 4 years old. Local Rule 83-3 does not provide any guidance about how a local attorney can withdraw from federal litigation without a replacement attorney being immediately available to replace that local attorney. I was concerned that my withdrawal would cause Stephen Brigandi to be prevented from continued representation in the case, including filing dispositive motions in the impending weeks. As of that date, by my calculation, the final briefing was due on March 7.

11. On January 28, 2025, I emailed Ms. Couvrette to advise her that I would be withdrawing as her attorney on March 28, 2025, so as to allow for a three-week transition period to new counsel after the summary judgment briefing was complete.

12. On January 29, 2025, I emailed Stephen Brigandi to explain my intent to withdraw on March 28, 2025.

13. Plaintiff's Motion for Summary Judgment was filed by Mr. Brigandi on January 31, 2025. I did not review the motion, or any drafts, before it was filed. I did not sign or file the motion. I was not consulted about the arguments or case citations contained in the motion. I did not participate in the preparation of that summary judgment motion whatsoever.

DECLARATION OF TIMONTHY L. MURPHY IN SUPPORT OF TIMOTHY L. MURPHY'S
RESPONSE TO ORDER TO SHOW CAUSE - 4

14. On February 3, 2025, three days after they were filed, I cursorily reviewed Plaintiff's Motion for Summary Judgment and Defendants' Motion for Partial Summary Judgment. As for the cases cited in plaintiff's motion, I skimmed past them and presumed they were valid. I had no idea that, as it turned out, the motion contained fictitious case citations.

15. Prior to being notified by defense counsel on May 5, 2025 about the fake case citations contained in plaintiffs' briefing, I do not recall ever hearing about the danger of "hallucinated cases" being generated by AI. I had never used, and do not use, AI for my legal work. This issue was not on my radar at all.

16. Without my involvement or consent, the end of the briefing schedule was extended through April 25, and again until May 2. At Ms. Couvrette and Mr. Brigandi's repeated requests, I agreed to hold off on my motion to withdraw until April 25, and then May 2, so Mr. Brigandi could file plaintiff's final reply brief. After the final extension Mr. Brigandi confirmed in writing that he expected my withdrawal on Monday, May 5, 2025. During these brief but repeated communications with Ms. Couvrette and Mr. Brigandi, neither raised the issue or allegation of improper or fake citations in this federal litigation.

17. I was not involved in the preparation of Plaintiffs' Response to Defendants' Motion for Summary Judgment (ECF No. 155), or Plaintiff's Reply to Defendants' Response to Plaintiffs' Motion (ECF No. 168). I did not sign or review the briefs, or any drafts, before they were filed by Mr. Brigandi. I was not consulted about the arguments or case citations contained in those briefs. I did not participate in the preparation of the Response or Reply whatsoever.

DECLARATION OF TIMONTHY L. MURPHY IN SUPPORT OF TIMOTHY L. MURPHY'S
RESPONSE TO ORDER TO SHOW CAUSE - 5

18. I did not review any of the briefing subsequent to initial motions filed by plaintiffs and defendants (ECF Nos. 155, 160, 168, and 170). I was not asked or expected to do so, and because the legal issues involved were largely outside of my expertise and practice area, I believed my review would have only created additional unnecessary expense for Ms. Couvrette.

19. On May 2, 2025, I received a Notice of Withdrawal indicating that defendants' attorney Brooks Foster was being replaced with Sandra Gustitus.

20. On May 5, 2025, I emailed Ms. Gustitus to explain that "I will be motioning the court to withdraw as attorney of record for plaintiffs. I believe professional considerations require this withdrawal."

21. Ms. Gustitus responded via email on May 5, 2025, that defendants were intending to file a motion to strike plaintiff's response and reply brief and were working on a motion for sanctions based on citations to fake cases.

22. Ms. Gustitus' email of May 5, 2025 was the first time that I heard anything about or became aware of citations to fake cases or AI "hallucinated" cases in this federal litigation.

23. I contacted the Oregon State Bar after receiving Ms. Gustitus' email of May 5, 2025.

24. On May 7, 2025, I received a letter from Sandra Gustitus that included a motion for sanctions that defendants intended to file if certain corrections were not made within 21 days.

25. I emailed Ms. Couvrette on May 8, 2025 to provide her with a copy of the letter from Sandra Gustitus with the proposed motion for sanctions.

DECLARATION OF TIMONTHY L. MURPHY IN SUPPORT OF TIMOTHY L. MURPHY'S
RESPONSE TO ORDER TO SHOW CAUSE - 6

26. Also on May 8, 2025, I emailed Stephen Brigandi asking how he intended to address the issues raised in the motion for sanctions. Stephen Brigandi replied and confirmed that he would “cure the alleged faults within the 21-day period.”

27. At this point I recognized that I had an obvious direct conflict of interest with my client and could no longer represent her in connection with the impending motion or the federal case.

28. On May 19, 2025, I filed my Motion to Withdraw.

29. On May 21, 2025, the court granted my motion allowing me to withdraw and allowing plaintiffs 30 days to retain new local counsel.

30. On May 23, 2025, defendants filed their Motion for Sanctions.

31. I want the court to know that I understand the seriousness and severity of the issues raised by this motion. I am sincerely embarrassed to be associated with this matter, and regret that I ever was involved in this lawsuit or Ms. Couvrette. I have been an attorney for 25 years and I take pride in my legal work and strive to uphold my professional and ethical obligations at all times. I have never knowingly made a misrepresentation to a client, another attorney, opposing party, or the court. The idea that I would ever be associated in any way with the submission of made-up case law in support of an argument to the court is abhorrent to me. Although I took no part in the citation of fake cases, I apologize to the defendants, opposing counsel, and the court for what occurred during my time as local counsel.

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32. This was the first time I ever served as local counsel in a federal lawsuit. This was the first time I was asked to serve as local counsel. I promise and represent to the court that I will never agree to serve as local counsel in US District Court again.

I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE AS EVIDENCE IN COURT, AND IS SUBJECT TO PENALTY FOR PERJURY.

Respectfully submitted.

DATED this 31st day of December 2025.

/s/ Timothy L. Murphy

Timothy L. Murphy, OSB No. 003348

2022 WL 965286

Only the Westlaw citation is currently available.
United States Bankruptcy Court, District of Columbia.

IN RE: Sherry EASLEY, Debtor.

Case No. 21-00196-ELG

|

Signed March 30, 2022

Attorneys and Law Firms

Sari Karson Kurland, Rockville, MD, for Debtor.

Chapter 13

MEMORANDUM OPINION AND ORDER IMPOSING SANCTIONS PURSUANT TO FED. R. BANKR. P. 9011(c)

Elizabeth L. Gunn, U.S. Bankruptcy Judge

*1 On November 4, 2021, the Court held a hearing (the “Motions Hearing”) on, *inter alia*, the chapter 13 trustee’s *Motion to Dismiss Case with Prejudice for Bad Faith* (ECF No. 35) (the “Motion to Dismiss”) and *Motion for Order to Justify and Disgorge Attorney Fees* (the “Motion to Disgorge”) (ECF No. 38) (collectively, the “Trustee’s Motions”). At the Motions Hearing, the Court raised questions regarding issues related to the representation of the above-captioned debtor (the “Debtor”) by counsel Sari Kurland (“Counsel”) raised by the Trustee’s Motions. Due to the Court’s questioning and other factual issues related to the Trustee’s Motions, the Motions Hearing was continued to December 8, 2021. After the Motions Hearing, on November 10, 2021, the Court entered its *Order to Show Cause Why Sanctions Should Not Be Imposed for Failure to Comply with Federal Rule of Bankruptcy Procedure 9011(b)* (ECF No. 60) (the “Show Cause Order”), which ordered Counsel to show cause as to whether there were violations of [Federal Rule of Bankruptcy Procedure 9011\(b\)](#) (the “Bankruptcy Rules,” and each individually a “Bankruptcy Rule”) in this case. The Show Cause Order was scheduled for a hearing in January and ultimately combined with the continued Motions Hearing (the “Show Cause Hearing”). On December 1, 2021, Counsel filed a written response to the Show Cause Order.

At the combined Motions Hearing and Show Cause Hearing on January 21, 2022,¹ counsel for the chapter 13 trustee and Counsel indicated that they were in negotiations as to resolution of the Trustee’s Motions. A *Consent Order on Trustee’s Motion to Justify and Disgorge Fees* (ECF No. 73) (the “Consent Order”) was submitted by the parties and entered by the Court on February 2, 2022. However, the agreement set forth in the Consent Order neither addressed nor resolved, the Court’s pending Show Cause Order. After entry of the Consent Order, the parties requested the Court cancel the continued hearing and rule on the Show Cause Order without further argument.

Upon review of the docket, the pleadings in this case, the response to the Show Cause Order filed by Counsel, the arguments, statements, and representations of Counsel at the Motions Hearing, and for the reasons set forth below, the Court finds that Counsel’s conduct in this case violated Bankruptcy [Rule 9011\(b\)](#) and sanctions are appropriate. Therefore, taking into consideration the agreed disposition of the Trustee’s Motion to Disgorge, and for the reasons set forth herein, the Court orders sanctions against Counsel and the Kurland Law Firm in the amount of \$2,200.

I. Background

On July 22, 2021 (the “Petition Date”), the Debtor, by Counsel, commenced the above-captioned case by filing a voluntary chapter 13 petition (the “Initial Petition”) and no other documents.² The Initial Petition is rife with errors on its face, beginning with an incorrect designation of the Bankruptcy Court in which the case was filed – listing the District of Maryland, not the District of Columbia. ECF No. 1. Given the proximity of this Court to the District of Maryland, this single error is one that on its own would not raise concern with the Court; however, the document contained numerous other material errors despite this being the third case filed by the Debtor in this Court in less than two (2) years.

*2 An examination of part 1 of the Initial Petition shows two material issues. Question 5 of the Initial Petition stated that the Debtor lived at 2101 Q St. S.E., Washington, DC 20020 (the “Q Street Property”) but had a mailing address of 4701 Kenmore Ave #11017, Alexandria, VA 22304. ECF No. 1. Question 6 indicated that the Debtor had resided in this District more than any other over the past 180 days. *Id.* However, at the Motions Hearing, it was disclosed both that the Q Street Property is uninhabitable and that the Debtor did not reside therein. In fact, in a case filed in this Court on April 29, 2021 (84 days prior to the Petition Date in this case), the Debtor listed the address where she resided as 4701 Kenmore Ave Unit 1017, Alexandria, VA 22304 (the “Kenmore Avenue Property”). *See In re Easley*, Case No. 21-00116-ELG (Bankr. D.D.C. Apr. 29, 2021), ECF No. 1. Further, the Kenmore Avenue Property was the only address used by the Debtor in her case filed in this Court in 2019. *See In re Easley*, Case No. 19-00150-SMT (Bankr. D.D.C. March 13, 2019), ECF No. 1. Thus, the Court finds that Questions 5 and 6 were inaccurate as to both the Debtor’s actual mailing address (listing the wrong unit number) and how long (if at all) she resided at the Q Street Property or otherwise in this district. Based upon the Debtor’s prior filings, it is clear to the Court that the Debtor certainly did not reside in this District “more than any other over the past 180 days” prior to the Petition Date as stated in Question 6.

These were not the only significant errors in the Initial Petition. The response to Part 2, Question 9—“Have you filed for bankruptcy within the last 8 years?”—was blank. This material omission is particularly concerning to the Court because a basic PACER search of the Debtor’s name or social security number shows that the Debtor had three (3) prior cases within the 8 years prior to the petition date, two of which were filed in this Court as described above.³ ECF No. 1. Part 5, Question 15 of the Initial Petition—“Tell the Court whether you have received a briefing about credit counseling”—was also blank, not disclosing whether the Debtor had taken a prepetition credit counseling course nor referencing the still-valid certification from her most recent previous case. ECF No. 1. Again, even a cursory review of the Debtor’s filing history and former case docket would have provided information regarding the existing, still valid, certificate of credit counseling. In each of these instances the Initial Petition was not just inaccurate, but incomplete despite information readily available to Counsel in CM/ECF. While the Court recognizes the reasoning and/or necessity, at times, to file a “skeletal” or “bare-bones” petition and supplement the petition at a later date, Counsel’s filings in this case fail to meet the minimal standards of care and diligence for an acceptable skeletal petition.

Beyond the errors and omissions contained in the Initial Petition itself, and because it was the *only* document filed on the Petition Date, the documents commencing this case failed to meet other case-initiation requirements, including disclosure of the Debtor’s complete social security number or information regarding the pre-petition credit counseling certificate. *See* Bankruptcy Rule 1007. In addition, despite later pleadings and representations to the Court at the Motions Hearing that this case was filed to stop an imminent foreclosure sale of the Q Street Property, the list of creditors attached to the Initial Petition included only a single creditor, “BWW Law Group, LLC.”⁴ *Id.* Once again, a cursory review of the Debtor’s April 2021 case reveals a creditor list of at least 13 creditors, including BWW Law Group, LLC. Case No. 21-00116-ELG, ECF No. 1 at 14-15. Nothing in the record suggests that the other 12 creditors’ obligations were satisfied or otherwise paid in the short period between the dismissal of the April 2021 case and the Petition Date herein, and therefore the creditors should have been included in the Debtor’s list of creditors.

*3 On July 23, 2021, following the filing of the deficient Initial Petition and case opening documents, the clerk of court entered the following four orders providing Counsel and the Debtor the statutorily required periods to cure both (i) the errors and omissions described above and (ii) others more commonly associated with a skeletal petition:

- Order to File Form 121 Statement of Social Security Number (ECF No. 3) with a compliance date of July 30, 2021.
- Order to Show Cause Why Case Ought Not be Dismissed for Failure to File the Pre-Petition Date Credit Counseling Certificate (ECF No. 4) with a compliance date of July 30, 2021.
- Order to File Required Documents (ECF No. 5) indicating that the Debtor needed to file Schedules A/B-J (Official Form 106), Copies of All Payment Advices or Other Evidences of Payment/Statement That No Evidence of Payment Exists; Chapter 13 Plan of Reorganization; Statement of Your Financial Affairs (Official Form 107); and Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period all with a compliance date of August 5, 2021.
- Order Directing Debtor's Attorney to File Local Bankruptcy Rule 2016-2(a) Statement (Local Form No. 10) (ECF No. 6) with a compliance date of August 5, 2021.

On July 29, 2021, Counsel filed an amended voluntary petition (ECF No. 16) (the “Second Petition”). The Second Petition included the correct court designation on the first page and answered Question 15 to reflect that the Debtor had received a pre-petition credit briefing. Second Pet., ECF No. 16. Counsel also filed the *Statement of Your Social Security Number* (ECF No. 17), a *Certificate of Credit Counseling* (ECF No. 18), a *Disclosure of Compensation of Attorney for Debtor* on the correct local form (ECF No. 19), and a *Response to the Order to Show Cause* (ECF No. 20). The Certificate of Credit Counseling indicated that the Debtor completed the class on “July 28, 2021 at 12:51 o'clock PM CDT,” six days *after* the Petition Date. ECF No. 18.⁵ The Statement of Social Security Number and Disclosure of Compensation of Attorney resolved the clerks’ orders on the related deficiencies but failed to resolve all of the issues with the credit counseling certificate or the unfiled statements, schedules, and other forms. In addition, the Second Petition continued to contain material errors. Despite having been put on actual notice of the Debtor's prior filings by the Court's docket entries, Question 9 on the Second Petition was again blank as to the Debtor's filings in the last 8 years. As filed, the Certificate of Credit Counseling was dated post-petition and did not either (i) reference the certificate filed in the April 2021 case or (ii) seek an exception under § 109(h)(3). *Id.* But-for the certificate in the April 2021 case, the Debtor would not have been an eligible debtor when this case was filed based upon the Certificate of Credit Counseling filed on July 29, 2021. *See* 11 U.S.C. § 109(h)(1) (requiring an individual to have received in the 180-day period prior to the petition date a credit counseling briefing). It was not until August 6, 2021, that Counsel filed a Second Amended Certificate of Credit Counseling with the certificate from the April 2021 case such that the Debtor was eligible to be a debtor. ECF No. 24.

*4 On August 4, 2021, Counsel filed a *Motion to Extend Deadline to File Schedules or Provide Required Information* (the “Motion to Extend Time”) seeking an extension of fourteen (14) days through and including August 19, 2021 to file the remaining missing required documents in this case. The Court granted the Debtor's motion to extend time.⁶ Notwithstanding the Motion to Extend Time, on August 6, 2021, Counsel filed a Second Amended Voluntary Petition (the “Third Petition”). ECF No. 25. The Third Petition finally answered Question 9 accurately and disclosed the two previous chapter 13 cases the Debtor filed in this Court that were listed on the docket on July 23, 2021, but continued to indicate in Question 6 that in the 180 days prepetition the Debtor had resided in this district longer than in any other district. *Id.* In addition, with the Third Petition, Counsel included a list of creditors with ten (10) entries, nine (9) listed for the first time in this case. *Id.* Despite listing the new creditors, there is no indication on the docket that Counsel ever served the added creditors with notice of this case.

On August 18, 2021, the chapter 13 trustee indicated that neither Counsel nor the Debtor appeared at the August 16, 2021 § 341 first meeting of creditors and as a result, the chapter 13 trustee noted her intent to file a motion to dismiss the case. Docket Entry Sept. 18, 2021. Later that same day, the Debtor, by Counsel, filed the remaining required case opening documents including a Third Amended Voluntary Petition (the “Fourth Petition”) (ECF No. 27), a Third Amended Certificate of Credit Counseling (ECF No. 28), Schedules A/B-J (ECF No. 29) (the “Schedules”), the Statement of Financial Affairs (ECF No. 30), Form 122C-2 (ECF No. 31) (the “Means Test”), and a Chapter 13 Plan (ECF No. 32).

While the August 18, 2021 filings finally addressed many (but certainly not all, as described below) of the errors and omissions associated with the case opening documents, they themselves contained new errors and inconsistencies. For the first time in the Fourth Amended Petition, the Debtor modified her answer to Question 6 indicating that the Debtor chose to file in this District due to “real property ownership interest in Washington, DC,” and not due to residing in the District for longer than any other district during the 180 days pre-petition. In the schedules themselves, Schedule C (Exemptions) was entirely black, Schedules D/E/F included only two (2) creditors despite having listed 10 entities on the creditor list filed with the Third Petition, and Schedule G disclosed a “residential lease” for the Kenmore Avenue Property in Virginia, but failed to provide any further details including length of lease, the property address, or any other information.⁷ See Schedules A/B-J at 9, ECF No. 29. The Means Test disclosed that the Debtor has above-median income for a household size of one (1), and therefore the required commitment period for her chapter 13 plan would have to be either five (5) years or 100 percent payment to all creditors. Notwithstanding this disclosure, the Debtor's proposed Chapter 13 Plan included payments of \$0.00 for two months, and \$100.00 for thirty-four (34) months, for a total commitment period of three (3) years and total plan funding of only \$3,400.00. In addition, the proposed Chapter 13 Plan for the first time listed or disclosed the secured lender on the Q Street Property as BSI Financial and proposing a treatment, per the nonstandard provision of Section 10, that the “Debtor is in the process of a short sale of property located at 2101 Q St. S.E., Washington, D.C. 20020.” ECF No. 32. The proposed Chapter 13 Plan did not describe or otherwise disclose whether the Debtor was personally liable on the loan to BSI Financial, and, if so, how the Debtor would treat or classify any unsecured portion of the secured claim as a result of the short sale. The hearing on confirmation of the proposed Chapter 13 Plan was continued twice from the original date in September 2021 to November 4, 2021, the continued date of the Motions Hearing.

*5 On November 3, 2021, the eve of the Motions Hearing, the Debtor, by Counsel, once again filed more amended case opening documents including Amended Schedules A/B, C, D, E/F and Official Form 106Dec., Amended List of Creditors and Mailing Matrix to Add Previously Unlisted Entities (the “Amended Schedules”). See ECF No. 49. The Amended Schedules disclose, for the first time, a second vehicle of the Debtor, a Chevrolet Avalanche (*Id.* at 2) and a lien on a retirement account in Schedule I, but no other disclosures regarding any retirement account. See Schedules A/B-J at 16, ECF No. 49. The Court notes that the schedules filed in the Debtor's first case, 19-00150, at ECF No. 21, disclosed a retirement account valued at \$200,000 found nowhere in any of the schedules in this case, despite disclosing that she contributes \$324.57 a month to a retirement account and repays \$798.11 a month on a loan against a retirement account.⁸ Schedules A/B-J at 16, ECF No. 29. In the Amended Schedule C filed with the November 3, 2021 amendments, the Debtor for the first time claimed exemptions under the laws of the District of Columbia for which she is ineligible because she has resided in the Commonwealth of Virginia for at least the last three (3) years. See Statement of Financial Affairs at 1, ECF No 30.

In the midst of all filings of the Debtor, on October 6, 2021, Wilmington Savings, FSB d/b/a Christiana Trust filed a *Motion for Relief from Stay and Request for Imposition of an Equitable Servitude as to the Q Street Property* (the “Stay Motion”). ECF No. 43. The hearing on the Stay Motion was continued to the same date as the Motions Hearing.

a. The November 4, 2021 Hearing

At the Motions Hearing on November 4, 2021, in presenting the Trustee's Motions, counsel for the chapter 13 trustee elaborated on Counsel's various shortcomings in the Debtor's case, including failure to convey the necessary § 521 documents to the trustee, failure to provide notice of the § 341 meeting to any creditors, and failure to attend or request a continuation of the initial § 341 meeting. During argument on the Stay Motion, counsel for the secured lender disclosed to the Court that his client did not learn about this case until a post-petition hearing was held in the state court foreclosure case on the Q Street Property. Promptly thereafter, the Stay Motion was filed. In response to the Stay Motion arguments, Counsel made various representations about the status of the Q Street Property, including that the property was uninhabitable and that the Debtor had not lived there for several years. Counsel further explained that the Debtor had retained a realtor in the month prior to the Motions Hearing and obtained a contract for a short sale of the property. Notably, despite the passage of a month and apparently successful marketing efforts, there was never an application to employ the realtor filed by the Debtor. When questioned as to why an application had not been promptly filed, Counsel was unable to provide a substantive or otherwise adequate explanation.

In addressing the chapter 13 trustee's concerns with her handling of the case raised in the Motion to Disgorge Fees, Counsel did not offer any evidence and instead relied upon her argument, consisting primarily of partial contrition paired with various excuses. Counsel explained the failure of any party to attend § 341 meeting by stating she was out of town but nevertheless unable to attend the virtual § 341 meeting via Zoom. Counsel further went on to place blame on her office staff for failing to convey her request for a continuance of the § 341 meeting to the chapter 13 trustee prior to the meeting. Counsel was unable to explain how her "being out of town" prevented her attendance at a § 341 held via Zoom or to personally contact the chapter 13 trustee's office. The Court finds Counsel's explanations neither satisfactory nor completely credible.

Further, and of crucial importance with respect to the stated reason for the filing of this case (i.e., to stop a foreclosure), Counsel never filed a motion to extend the automatic stay under § 362(c)(3)(B). As such, under § 362(c)(3)(A) the automatic stay with respect to the Debtor terminated on August 23, 2021, 17 days after Counsel filed the amended petition disclosing the Debtor's prior cases. When questioned about why such a basic and standard motion was not filed in order to further the stated goal of the Debtor to protect the Q Street Property, Counsel once again was unable to provide the Court any explanation, justification, or reason for the failure. Notably, it appears that Counsel either did not recognize or otherwise understand the need to file such a motion or discuss whether such a motion was appropriate with the Debtor. There was simply a failure to review or address the issue despite the Debtor's clear desire to retain her interest in the Q Street Property. Thus, the Court finds that the failure to file any motion to extend the stay is completely incongruent with Counsel's stated reason for filing this case as a "skeletal petition" with such little preparation or other information.

*6 At the conclusion of the November 4, 2021 hearing, the Court granted the secured lender's motion for relief from the automatic stay and imposition of equitable servitude,⁹ continued the hearing on the Trustee's Motions for Counsel to file supplemental information, and denied confirmation of the Debtor's Chapter 13 Plan without leave to amend. The Court also indicated that it would be issuing a show cause order based upon Counsel's conduct in the case beyond those issues raised in the Trustee's Motions.

b. The Show Cause Order

The Court issued its Show Cause Order on November 10, 2021, which ordered Counsel to provide further documentation in support of her professional fees collected from the Debtor and to show cause at a hearing to be held on January 11, 2022 as to why she should not be sanctioned as a result of her actions in this case. On November 15, 2021, Counsel submitted her *Support Document* (ECF No. 64) ("Support Document") indicating her time spent on various tasks related to the Debtor's bankruptcy filing. Additionally, Counsel submitted her *Response to Order to Show Cause* (ECF No. 65) (the "Response"). The Response largely offers vague statements including "the lack of time to file the initial case, the complexity of the facts, confusion regarding the information in the previous cases and inadvertent errors" as explanation/justification for the myriad of inaccurate filings and other deficiencies in this case. Response at 5, ECF No. 65. Due to a conflict on the Court's calendar, the January 11, 2022 hearing on the Show Cause Order was continued to January 21, 2022.

On January 21, 2022, the Court called its hearing on the Trustee's Motions and the Order to Show Cause. At that time, Counsel and the chapter 13 trustee represented that they were close to a settlement on the issues raised by the Trustee's Motions. Therefore, the Court consented to a continuance of the hearing to February 2, 2022. On February 2, 2022, the Court entered the Consent Order between Counsel and the chapter 13 trustee, which required Counsel to disgorge fees to the Debtor in this case in the amount of \$2,725 no later than February 11, 2022. Upon the Court's entry of the Consent Order, the parties requested the Court cancel the continued hearing and rule on the Show Cause Order without further argument. Therefore, the sole issue remaining before the Court is the Show Cause Order.

II. Discussion

i. Legal Standard

*7 The Court has the authority to regulate the conduct of the attorneys appearing before it. See *In re T.H.*, 529 B.R. 112, 133 (Bankr. E.D. Va. 2015); *In re Shelton*, 428 B.R. 457, 459 (Bankr. N.D. Ohio 2010); *Office of the United States Trustee v. Jones (In re Alvarado)*, 363 B.R. 484, 492 (Bankr. E.D. Va. 2007). The Court's regulation of attorneys is guided and supported, in part, by Bankruptcy Rule 9011(b), which provides:

By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances,—

- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Fed. R. Bankr. P. 9011(b). Where an attorney violates any subsection of Bankruptcy Rule 9011(b), Bankruptcy Rule 9011(c) allows a court, in its discretion, to impose sanctions for that conduct. *Raymond Profl Group v. William A. Pope Co. (In re Raymond Profl Group)*, 420 B.R. 420, 461 (Bankr. N.D. Ill. 2009); see also *In re Freeman*, 540 B.R. 129, 138-39 (Bankr. E.D. Pa. 2015); *Fed. R. Bankr. P. 9011(c)*. A court may impose sanctions on its own initiative after entering “an order describing the specific conduct that appears to violate [9011(b)] and directing an attorney, law firm, or party to show cause why it has not violated subdivision [9011(b)] with respect thereto.” *Fed. R. Bankr. P. 9011(c)(1)(B)*. A court's order imposing sanctions “shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.” *Fed. R. Bankr. P. 9011(c)(3)*.

In deciding whether to exercise its discretion to impose sanctions on any party, the Court is guided by the purpose of Bankruptcy Rule 9011 and Civil Rule 11 – to “deter repetition of such conduct or comparable conduct by others similarly situated.” *Fed. R. Bankr. P. 9011(c)(2)*; *Desiderio v. Parikh (In re Parikh)*, 508 B.R. 572, 584 (Bankr. E.D.N.Y. 2014). Bankruptcy courts weigh several factors in deciding whether to impose sanctions under Bankruptcy Rule 9011, including, but not limited to, whether the attorney's action was willful, if the at-issue conduct is a part of a pattern, and the effect the conduct had on the litigation process. *Lafayette v. Collins (In re Withrow)*, 405 B.R. 505, 514 (1st Cir. B.A.P. 2009) (citing *In re Thomson*, 329 B.R. 359, 362 (Bankr. D. Mass. 2005)). In this case, the Court finds that the repeated and obvious errors and material misstatements in documents filed with the Court, coupled with Counsel's failure to offer anything other than generalized excuses in explanation for these errors, support an imposition of sanctions against Counsel.¹⁰

Representation of a consumer debtor in a bankruptcy case involves certain essential duties including assisting debtors to file the necessary petition, schedules, statements, and pleadings, and advising their clients in complying with their duties under § 521. See *In re DeSantis*, 395 B.R. 162, 169 (Bankr. M.D. Fla. 2008). In completion of these duties, Bankruptcy Rule 9011(b) requires that the attorney perform a reasonable investigation into the circumstances surrounding pleadings filed in the Court and verify the foundation for the contentions therein. *Fed. R. Bankr. P. 9011(b)(3)*; *In re Redante*, 579 B.R. 354, 362 (Bankr. E.D. Pa. 2018). As a result, counsel for a debtor is expected to exercise significant care in ensuring the completeness and accuracy of a petition, statements, and schedules, the same as any pleading in federal court. See *In re Tabor*, 583 B.R. 155, 185 (N.D. Ill. 2018). In preparing the necessary bankruptcy documents, an attorney “may not take his client's word concerning previous bankruptcy filings when it is so easy to check the Court's records.” *In re Oliver*, 323 B.R. 769, 774 (Bankr. M.D. Ala. 2005); see also *In re Withrow*, 405 B.R. at 512; *In re Alessandro*, 2010 Bankr. LEXIS 3116, 2010 WL 3522255 (Bankr. S.D.N.Y.

2010) (ordering disgorgement of fees from attorney who accepted debtor's word and failed to check PACER to find client's five previous bankruptcy filings prior to filing an emergency new case to stop a foreclosure). The written record in this case is clear that Counsel failed to meet a basic standard of inquiry as required by Bankruptcy Rule 9011(b) and, therefore, the Court issued the Show Cause Order to allow Counsel the opportunity to address the Court's concerns outlined therein before the imposition of sanctions.

ii. Sanctions are Appropriate in this Case

*8 The Court does not take the imposition of sanctions lightly. Furthermore, the Court has considered the resolution of the Motion to Disgorge with the chapter 13 trustee in contemplation of the imposition and scope of the sanctions herein. However, despite the resolution with the chapter 13 trustee, and as set forth above, this Court's Show Cause Order raised issues not limited solely to those raised by the Trustee's Motions. In applying the above legal standards to Counsel's filings and conduct in this case, it is abundantly clear to the Court that Counsel violated Bankruptcy Rule 9011 by failing to: verify the Debtor's past filing history through a pre-petition PACER search; determine whether the Debtor was eligible to be a Debtor by confirming the existence of a valid pre-petition credit counseling certificate; provide notice to all creditors of this case; file accurate pleadings including the petition, disclosures of assets and liabilities, exemptions, and basic information as to the Debtor such as her address; attend or timely request a continuance of the § 341 meeting (and blame such failure on staff which Counsel supervises); and file a motion to extend the automatic stay (not just timely, but at all) despite the stated goal of this case being to protect an interest in real property.

In the Response, Counsel asserts that her failure to conduct any kind of pre-petition inquiry into the Debtor's eligibility to file bankruptcy was due to the emergent nature of the Debtor's filing. However, the emergent nature of a client's petition does not relieve an attorney from ensuring the legality or accuracy of filing under the Bankruptcy Code. *In re Alessandaro*, 2010 Bankr. LEXIS 3116 at *10, 2010 WL 3522255 (sanctions imposed due to attorney's failure to conduct PACER search prior to filing emergency petition to stop foreclosure warranted sanctions); *In re Thomas*, 612 B.R. 46, 67 (Bankr. E.D. Pa. 2020) (noting that exigent circumstances do not excuse counsel from conducting a reasonable inquiry); *In re Schemelia*, 607 B.R. 455, 461 (Bankr. D.N.J. 2019) (reasonable inquiry still required to file debtor's schedules even during an emergency situation); *In re Parikh*, 508 B.R. at 593 (independent verification of information provided by debtor necessary even in emergent petition). The Debtor had filed for bankruptcy three times prior to the initiation of this case, something that even the most cursory of investigations would have revealed. Indeed, the Debtor's last bankruptcy petition was filed on April 29, 2021,¹¹ just three months prior to the instant case. Counsel's failure to conduct a simple PACER search to ensure the accuracy of filings in this Court could be by itself, *without more*, sanctionable under Bankruptcy Rule 9011(b). See *In re Withrow*, 405 B.R. at 512. However, in this case the Court does not have to determine whether solely failing to conduct a pre-petition PACER search is sanctionable as the failures herein occurred over a period multiple months and multiple amendments. Here, the failure to conduct a pre-petition PACER search and the material errors resulting therefrom are just one factor in the Court's analysis of the totality of the circumstances herein.

District of Columbia Rule of Professional Conduct 5.3 ("RPC 5.3") charges a supervisory attorney with ensuring that non-lawyer staff employed by the attorney or her firm comply with the professional obligations of the attorney. D.C. R. Prof. Conduct 5.3. In the Response and at the Motions Hearing, Counsel blamed, in large part, the failure of both her and the Debtor to attend a virtual § 341 meeting of creditors without a request to continue on the errors and omissions of her staff. In doing so, Counsel has violated RPC 5.3 because she is responsible for not only her actions, but the actions of all employees of the Kurland Law Firm. *In re Wenk*, 296 B.R. 719, 723-28 (Bankr. E.D. Va. 2002) (holding that an attorney may not shirk responsibility for errors by placing blame on her support staff). The Court is unpersuaded by Counsel's vague explanation as to why the § 341 meeting was missed and no communications were made with the chapter 13 trustee's office prior thereto. Counsel had the obligation to appear at the meeting from any location with internet connection via Zoom, she cannot overcome her professional responsibilities by placing the failure on staff whom she is charged with supervising.

*9 In this case, and by her own admission, Counsel did not conduct any investigation into the Debtor's filing history or the accuracy of many aspects of the petition prior to submitting the petition to the Court. Furthermore, Counsel signed the following

documents in this case, subject to the requirements of [Rule 9011\(b\)](#): the Initial Petition, the Second Petition, the *Disclosure of Compensation of Attorney for Debtor* (ECF No. 19), the Third Petition, the Fourth Petition, the Chapter 13 Plan. Each of the foregoing pleadings was filed on behalf of the Debtor through Counsel's CM/ECF account. In addition to [Rule 9011\(b\)](#), his Court's Administrative Order Relating to Electronic Case Filing states that Counsel "is solely responsible for all documents filed via [Counsel's CM/ECF] password,"¹² meaning the veracity of each filing was solely the onus of Counsel, despite her repeated attempts to blame her support staff for the shortcomings enumerated herein. By submitting these deficient and incorrect filings with the Court, Counsel continuously made misrepresentations, each of which may individually have been sanctionable under Bankruptcy Rule 9011(b) of the Bankruptcy Code.

The Court finds that Counsel has violated Bankruptcy [Rule 9011\(b\)](#) by making representations to the Court in the Petition, Schedules, Statements, and other case opening documents and the various amendments that were not true and accurate and did not have a factual or legal basis after reasonable inquiry. Furthermore, the Court finds that Counsel's failure to have reasonable explanations for her failure to file other required pleadings (i.e. a motion to extend automatic stay, application to employ a realtor) in order to further the stated interest of the Debtor in preserving her interest in the Q Street Property had a direct impact on the Debtor's success (or, more accurately lack thereof) in this case. Finally, the Court finds that Counsel's argument at the November 4, 2021 hearing and the Response lack credibility and a sufficient or satisfactory rationale or explanation for the multitude of errors by Counsel in this case.

To determine the appropriate sanctions, the Court must evaluate "whether the misconduct was part of a pattern, whether the attorney has engaged in similar conduct in other litigation, what effect the misconduct had on the litigation process, whether the attorney is experienced in the area of law, and whether the conduct was willful or negligent." *In re Brent*, 458 B.R. 444, 462 (Bankr. N.D. Ill. 2011). What constitutes a "reasonable inquiry" under Bankruptcy [Rule 9011\(b\)](#) must be evaluated on a case-by-case basis under the totality of the circumstances. *See In re Tabor*, 583 B.R. at 186. In calculating an appropriate sanction, the Court must endeavor to impose sanctions most likely to achieve the deterrent effect of Bankruptcy Rule. In this case, the Court factors into its analysis Counsel's agreed disgorgement to the Debtor of \$2,725 under the Consent Order as well as the fact that Counsel did assist the Debtor the process of completing a short sale of the Q Street Property, thus obtaining the Debtor's stated goal for the filing of this case. Taking into consideration the totality of the circumstances, the Court finds that a sanction in the amount of \$2,200, the balance of the fees received from the Debtor in this case, is appropriate. But-for the previous disgorgement of fees to the Debtor, the Court's sanctions herein would have been higher.

III. Conclusion

Therefore, based upon a review of the docket, the materially inaccurate, incomplete, and omitted pleadings discussed herein, and upon consideration of proffers and arguments made by Counsel at the Motions Hearing and in the Response, the Court finds that Counsel has violated Bankruptcy [Rule 9011\(b\)](#). Therefore, pursuant to Bankruptcy [Rule 9011\(c\)](#) the Court will impose sanctions upon Counsel in the amount of \$2,200, to be paid by certified funds to the Clerk of Court of the United States Bankruptcy Court for the District of Columbia within fourteen days of entry of this Order.

All Citations

Not Reported in B.R. Rptr., 2022 WL 965286

Footnotes

- 1 The hearings were originally scheduled for dates earlier in January but were continued and consolidated upon the consent of the parties.

- 2 All code section references herein shall be to Title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy Code”) unless otherwise indicated.
- 3 On July 23, 2021, the clerk of court entered a disclosure on the docket reflecting the past filings by the Debtor, as follows:

Case Number 19-00150, Chapter 13 filed in District of Columbia Bankruptcy Court on 3/13/2019, Dismissed for Other Reason on 8/14/2019; Case Number 21-00116, Chapter 13 filed in District of Columbia Bankruptcy Court on 4/29/2021, Dismissed for Other Reason on 5/14/2021, Case Number 05-11182, Chapter 7 filed in Virginia Eastern Bankruptcy on 4/4/2002, Standard Discharge on 7/12/2005.
- 4 Although never specifically set forth, it appears to the Court that BWW Law Group, LLC was the law firm conducting the foreclosure stale on behalf of Wilmington Savings Funds Society (“Wilmington Savings”), the secured lender on the Q Street Property.
- 5 The Certificate of Credit Counseling indicated that the Debtor had filed in the Eastern District of Virginia. This was corrected by the filing of an Amended Certificate of Credit Counseling on July 30, 2021. However, both certificates indicate that the Debtor had received the required course after the Petition Date.
- 6 Due to a delay in the submission of an appropriate order by Counsel granting the Motion to Extend Time, the order granting the extension was not entered until August 26, 2021 although the documents were filed prior to the requested extension date.
- 7 Given the Debtor's past filings and the representations at the hearing, the Court infers that the rental lease was for the Debtor's principal residence where she resided at all times during this Case.
- 8 It is possible that this retirement account is the insurance policy disclosed in the present case.
- 9 The order granting the Stay Motion was entered on November 5, 2021. ECF No. 56.
- 10 Much like the “death of a thousand paper cuts,” each error in this case individually may not have been fatal, but when considered in the totality, add up to a failure to act in a reasonable manner under the circumstances. As Sir Arthur Conan Doyle said in the *Adventures of Sherlock Holmes*, “the little things are infinitely the most important.” *A Case of Identity*, in *Adventures of Sherlock Holmes* 63 (New York, Harper & Brothers 1892).
- 11 *In re Sherry Easley*, No. 21-0166 (Bankr. D.D.C. 2021).
- 12 *Admin. Pro. for Filing, Signing, and Verifying Docs. by Elec. Means*, Admin. Order Related to Elec. Case Filing, at 5, (Bankr. D.D.C. Nov. 18, 2013), available at <https://www.dcb.uscourts.gov/sites/dcb/files/AdministrativeOrder.pdf>.

cumbrance, the earmarking doctrine precludes the avoidance, under § 547(b), of one security interest granted to replace another.

IV. CONCLUSION

For all the foregoing reasons, the "Motion of Defendant Greater Atlantic Mortgage Corporation for Summary Judgment" is GRANTED; the "Plaintiff's Motion for Summary Judgment" is DENIED.

Separate orders and a judgment in conformity with this Memorandum of Decision shall enter herewith.

ORDER

For reasons stated in this Court's Memorandum of Decision of even date, the "Motion of Defendant Greater Atlantic Mortgage Corporation for Summary Judgment" is GRANTED.

ORDER

For reasons stated in this Court's Memorandum of Decision of even date, the "Plaintiff's Motion for Summary Judgment" is DENIED.

JUDGMENT

The Court having allowed the "Motion of Defendant Greater Atlantic Mortgage Corporation for Summary Judgment," for reasons stated in this Court's Memorandum of Decision of even date, JUDGMENT IS HEREBY GRANTED TO THE DEFENDANT.



In re KOLLEL MATEH EFRAIM, LLC, and Mateh Ephraim LLC, d/b/a Kollel Mateh Ephraim, LLC, Debtor.

Nos. 04-16410(SMB), 04-17525(SMB).

United States Bankruptcy Court,
S.D. New York.

Dec. 15, 2005.

Background: Chapter 11 debtor-purchaser moved to enforce settlement that was entered in open court of dispute between itself and property owner, and property owner resisted based on its attorney's alleged lack of authority to enter into settlement.

Holding: On debtor's motion for summary judgment, the Bankruptcy Court, Stuart M. Bernstein, Chief Judge, held that genuine issue of material fact, as to apparent authority of property owner's attorney to enter into settlement which was entered in open court of stay relief and other claims between property owner and Chapter 11 debtor-purchaser, precluded entry of summary judgment for debtor.

Motion denied.

1. Attorney and Client ⇨101(1)

Decision to settle case rests with client, and attorney can bind client to settlement only where client has authorized him to so, or where attorney, though lacking actual authority to settle, nonetheless has apparent authority and opposing attorney has no reason to doubt it.

2. Federal Courts ⇨433

In case arising under federal law, scope of agent's authority is determined under federal common law.

3. Attorney and Client ⇨70, 101(1)

Attorney who enters into settlement, particularly one on record in open court, is

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presumed to have actual authority to bind his client.

4. Attorney and Client ¶72

Any party challenging attorney's authority to settle case, particularly upon settlement entered in open court, bears burden of proving, by affirmative evidence, that attorney lacked such authority.

5. Attorney and Client ¶70

Presumption arising as to actual authority of property owner's attorney to enter into settlement which was entered in open court of stay relief and other claims between property owner and Chapter 11 debtor-purchaser was merely a rebuttable presumption.

6. Principal and Agent ¶99

Apparent authority consists of two elements: (1) a manifestation by principal that agent has authority; and (2) reasonable reliance on that manifestation by person dealing with agent.

7. Attorney and Client ¶78

Only client, by his manifestations, can confer apparent authority on attorney; attorney cannot create apparent authority by his manifestation alone.

8. Attorney and Client ¶78

Attorney's apparent authority cannot be based on private communications between attorney and client that are not disclosed to opposing counsel.

9. Attorney and Client ¶101(1)

Client does not create apparent authority for his attorney to settle case merely by retaining attorney.

10. Attorney and Client ¶72

In addition to affirmative statements or acts by client directed at third party, indicia of attorney's apparent authority to settle cause of action include attorney's unrefuted statements, made in client's

presence, that he has authority to settle, attorney's participation in settlement discussions with client's knowledge, attorney's appearance at court conferences conducted pursuant to rules which require attorney to have settlement authority, and client's delay in denying attorney's authority.

11. Bankruptcy ¶2164.1

Genuine issue of material fact, as to apparent authority of property owner's attorney to enter into settlement, which was entered in open court, of stay relief and other claims between property owner and Chapter 11 debtor-purchaser, precluded entry of summary judgment for debtor-purchaser on motion to enforce settlement; while attorney appeared on property owner's behalf at conference that resulted in alleged settlement, there was no announcement that settlement would be discussed at this conference, and property owner's delay in objecting to settlement was too thin a basis, given existing record, to permit bankruptcy court to determine as matter of law that attorney had apparent authority to settle.

Backenroth, Frankel & Krinsky, LLP, Mark Frankel, Scott Krinsky, of Counsel, New York City, for Debtors.

Law Offices of David Carlebach, David Carlebach, of Counsel, New York City, for Helen-May Holdings LLC.

OPINION AND ORDER DENYING MOTION FOR SUMMARY JUDGMENT

STUART M. BERNSTEIN, Chief Judge.

The debtor, Kollel Mateh Efraim, LLC, is the assignee of a contract to purchase

certain real property owned by Helen-May Holdings, Inc. ("Helen-May"). After a dispute arose between the parties, the debtor filed this chapter 11 case, and the parties engaged in litigation over the contract and the chapter 11 case. At the conclusion of an evidentiary hearing, counsel for the parties stipulated to a settlement of their disputes on the record in open court.

Helen-May contends that its (former) attorney lacked the authority to settle, and refuses to consummate it. The debtor moved to enforce the settlement, and initially, the motion is being treated as one for summary judgment on the issue of apparent authority. For the reasons that follow, the motion is denied.

BACKGROUND

A. Pre-Bankruptcy Transactions

On or about April 29, 2004, Helen-May entered into a contract (the "Contract") to sell certain real property located in Fosterdale, New York (the "Property") to the debtor's assignor, Aron Fixler, for \$1.4 million. Helen-May received a down payment of \$140,000. On May 18, 2004, Fixler assigned the Contract to the debtor.

The Contract contained a "time is of the essence clause," but by agreement, the parties adjourned the closing twice, first to September 27, 2004, and thereafter, to November 29, 2004. Shortly after the parties agreed to the second extension, the debtor allegedly discovered that the property consisted of 60 acres instead of 77. As a result, the debtor stopped payment on a \$30,000 check paid in connection with the second extension agreement.

1. Irene is a member of Helen-May. Although Paul does not hold any office with Helen-May, he advises his wife on Helen-May mat-

B. The Bankruptcy Proceedings

The debtor filed this chapter 11 case on October 4, 2004, and on November 15, 2004, commenced an adversary proceeding against Helen-May for relief arising from Helen-May's alleged misrepresentation of the acreage. Helen-May's attorney, David Carlebach, Esq., filed an answer, but in May, 2005, Carlebach was replaced by Gerald Orseck, Esq.

Orseck was more aggressive. In June 2005, he filed a motion for summary judgment in the adversary proceeding. In addition, he filed a motion to convert the chapter 11 case to chapter 7, or alternatively, for relief from the stay. Both sets of motions were returnable on June 28, 2005, and were vigorously opposed by the debtor. In addition, the Court scheduled a pre-trial conference in the adversary proceeding for the same day.

The parties, including Paul and Irene Griffin, Helen-May's principals,¹ attended the June 28th session. The Court treated the conversion motion to include a request for dismissal, and the request for stay relief to include a demand for adequate protection. Decision was reserved on the summary judgment motion, and an evidentiary hearing on Helen-May's motion to dismiss or convert, for adequate protection or for relief from the stay, was scheduled for July 20th. The Court also scheduled the debtor's motion for approval of its disclosure statement for July 20th. The Griffins were present in Court when the adjournments were announced and the adjourned date was selected.

Orseck appeared on July 20th, but without Paul or Irene Griffin. He and the debtor's counsel initially requested a chambers conference to explore the possi-

ters, and has played an active role on Helen-May's behalf in these matters.

bility of settlement. They were unable to reach an agreement during the conference, and returned to the courtroom to begin the hearing. Helen-May withdrew its motion to dismiss or convert due to insufficient notice to creditors, (Transcript of hearing, held July 20, 2005, at 4-5) (ECF Doc. # 54), and the Court proceeded to take evidence on two issues: (1) the amount of use and occupancy the debtor had to pay while in possession of the Property, and (2) the amount of the "cure" that the debtor would have to pay in the event that it assumed the Contract under its proposed plan. During the ensuing discussion about the contents of the order memorializing the day's rulings, the Court asked counsel if there was anything else. They responded: "We may have a settlement." (*Id.*, at 53.)

C. The Settlement

Following the lunch recess, counsel announced that the parties had agreed to settle for a purchase price of \$1,725,000, less the \$140,000 down payment, and plus or minus a few other closing adjustments. (*Id.*, at 54.) At several points, I advised counsel, and Orseck acknowledged, that the settlement was binding without regard to any further memorialization:

THE COURT: This is a settlement on the record.

MR. ORSECK: Yes.

THE COURT: This is binding.

MR. ORSECK: Yes, of course.

(*Id.*, at 55.)

After the parties explained how the tax adjustment worked, they confirmed their agreement to the settlement:

THE COURT: Right. Is that—

MR. FRANKEL:² Yes.

2. Mark Frankel, Esq. represented the debtor.

THE COURT: —agreeable to the debtor and is that agreeable to the seller?

MR. ORSECK: Yes.

THE COURT: Okay. The matter is deemed settled. I think you can do it in one of two ways.

MR. FRANKEL: Okay.

THE COURT: If you want me to retain jurisdiction then you should probably make a motion to assume the contract or stipulate to assume the contract, include the resolution. I deem it still settled. This is just a procedural issue.

(*Id.*, at 56.)

The Court and counsel then explored the timing and procedure for approving the settlement. Orseck was very anxious to consummate the deal as quickly as possible. I suggested that the parties settle a stipulation on ten days notice that provided for the assumption of the Contract on the terms set forth on the record. (*Id.*, at 57.) Orseck stated that he did not need ten days, and asked to shorten the time because his client was paying a premium mortgage interest rate. (*Id.*, at 58.) The debtor's attorney speculated that he might be able to obtain the consent of all of the creditors, implying that approval could be obtained sooner than ten days. (*Id.*) I advised the parties to try to agree on a stipulation within the next two days, but repeated once again that "I consider it settled under these terms and what we're really talking about is the mechanics now." (*Id.*)

D. Post-Settlement Events

The debtor scheduled the presentment of the proposed order approving the settlement for August 12, 2005, and sent notice by overnight mail to Helen-May and the creditors on August 4, 2005. (See ECF

Doc. # 40.) The debtor's notice elicited a surprising response from Orseck. He objected to the proposed order on three grounds: (1) the case had not been settled, (2) the settlement failed to include several material elements, and (3) the settlement required the written approval of Helen-May. (*Objections of Helen-May Holdings, LLC to Proposed "Order Approving Settlement"*, dated Aug. 11, 2005) ("Objection") (ECF Doc. # 41.)

After the debtor filed a reply, I received a supplemental objection³ from Helen-May, signed by its newly-retained and erstwhile counsel, Carlebach. The *Supplemental Objection* included affidavits signed by Paul and Irene Griffin in which they swore that Orseck never had the authority to settle the dispute.⁴ Furthermore, the Griffins had planned to attend the July 20th hearing, (*Affidavit of Irene Griffin*, sworn to Sept. 19, 2005, at ¶¶ 4-5) ("Irene Affidavit"), but on July 19th, Orseck's secretary advised them (falsely) that the hearing was adjourned, and they should not come. (*Id.*, ¶ 5.) Irene also heard Orseck's voice in the background telling his secretary to tell the Griffins that "the judge said there were too many witnesses and he needed to allocate more time." (*Id.*)

On July 20th, Orseck called the Griffins at 10:43 a.m. to advise them that he had spoken to Helen-May's business attorney, Dan Scher, Esq. He and Scher expected that the most Helen-May could expect to receive was between \$300,000 and

\$400,000, probably referring to the amount in excess of the \$1.4 million Contract price. (*Id.*, ¶ 6.) Paul Griffin responded "absolutely not get the property back." (*Id.*) Orseck was in this Courthouse when he made the call, but did not tell the Griffins that he was calling from Court. (*Id.*)

Paul Griffin immediately called Orseck back at his office, but his secretary said Orseck was out. (*Id.*, ¶ 7.) He then called Scher who denied the statements attributed to him by Orseck. (*Id.*)

The Griffins got wind of the settlement from Orseck's son, Kirk, the same day. (*Id.*, ¶ 8.) Paul Griffin sent Orseck a fax on July 20th, expressing concern about what Kirk had said, and stated that he and his wife wanted the stay lifted and the Property back. (*Irene Affidavit*, Ex. C.)

The Griffins met with Orseck on July 22nd. They discussed the rulings regarding the "cure" amount, but Orseck never told them that a hearing had taken place. (*Id.*, ¶ 10.) The Griffins learned about the hearing six days later, on July 28th, when they bumped into Helen-May's trial expert, Gene Barbanti, at a local restaurant. (*Id.*, ¶ 11.) The Griffins expressed shock. (*Id.*) By coincidence, Orseck and his wife walked into the same restaurant five minutes later, and Orseck asked the Griffins to come to his office the next morning. (*Id.*) When they arrived the next day, Orseck had already left and cancelled the meeting. (*Id.*)

3. See *Supplemental Objection of Helen-May Holdings and in Response to the Debtor's Reply to Helen-May's Objection to the Debtor's Proposed Order Approving Settlement*, dated Sept. 19, 2005 ("Supplemental Objection") (ECF Doc. # 43).

4. Orseck also submitted an affidavit in which he swore that although he held a good faith belief that he had actual authority to settle the case on July 20th, he was under a "mistaken

impression." After refreshing his recollection with the various communications from his client, he "realized that I never had authority to settle this case in any fashion." (*Affidavit of Gerald Orseck*, sworn to Sept. 16, 2005, at ¶¶ 5-6) ("Orseck Affidavit.") Orseck did not explain the basis of his "good faith" belief, or why the *Objection*, which he filed, did not assert that he lacked authority.

On August 5th, the Griffins received the debtor's proposed order.⁵ They were "mystified," (*id.*, ¶ 14), and Helen-May filed the *Objection* and the *Supplemental Objection* discussed earlier. The Court conducted a hearing, and at its suggestion, the debtor filed this motion to enforce the settlement on October 27, 2005. The Court has treated the matter, with the parties' consent, as a motion for summary judgment on the issue of whether Orseck had apparent authority to enter into the settlement. (*See* Transcript of hearing, held Nov. 22, 2005, at 11) ("11/22 Tr.") (ECF Doc. # 53.)

The debtor's position, as amplified at the November 22, 2005 hearing, is based on two premises. First, a settlement on the record in open court creates or is supported by an "irrebuttable presumption" of apparent authority. (*Id.*, at 6-7.) Second, Helen-May cloaked Orseck with apparent authority by knowingly permitting him to attend a conference conducted under Rule 16 of the Federal Rules of Civil Procedure. (*Id.*, at 8-9.) While Helen-May agrees that a trial counsel who settles on the record in open court is "presumed" to have authority, it rebutted the presumption by showing that Orseck lacked actual authority. (*Id.*, at 26-27.)

DISCUSSION

A. Introduction

[1,2] The decision to settle a case rests with the client. *Pereira v. Sonia Holdings, Ltd. (In re Artha Mgmt., Inc.)*, 91 F.3d 326, 329 (2d Cir.1996); *United States v. International Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 986 F.2d 15, 19 (2d Cir.1993) ("*Teamsters*"); *Fennell v. TLB Kent Co.*, 865 F.2d 498, 501 (2d Cir.1989). An attor-

ney can bind his client to a settlement only when the client has authorized him to so. An attorney may nevertheless enter into a binding settlement if he has apparent authority, and the opposing attorney has no reason to doubt it. *Teamsters*, 986 F.2d at 19; *Janneh v. GAF Corp.*, 887 F.2d 432, 436 (2d Cir.1989). In a case arising under federal law, the scope of the agent's authority is determined under the federal common law, *Artha Mgmt.*, 91 F.3d at 328; *Teamsters*, 986 F.2d at 20, but New York and federal law are essentially the same on this point. *See Fennell*, 865 F.2d at 501.

[3,4] Because of the unique nature of the attorney-client relationship and the public policy favoring settlements, an attorney who enters into a settlement, particularly one on the record in open court, is presumed to have the actual authority to bind his client. *Artha Mgmt.*, 91 F.3d at 329. "In accordance with that presumption, any party challenging an attorney's authority to settle a case under such circumstances bears the burden of proving by affirmative evidence that the attorney lacked authority." *Id.*; accord *Teamsters*, 986 F.2d at 20 ("The burden of proving that an attorney entered into a settlement agreement without authority is not insubstantial."); *Conway v. Brooklyn Union Gas Co.*, 236 F.Supp.2d 241, 247 (E.D.N.Y. 2002)("[C]ourts will presume that an attorney who enters into a settlement agreement has authority to do so."); *In re Cuf-fee*, 232 B.R. 53, 56 (E.D.N.Y.1999)("A stipulation of settlement on the record in Court is one of the strongest and most binding agreements in the field of law."); *Hallock v. State*, 64 N.Y.2d 224, 485 N.Y.S.2d 510, 474 N.E.2d 1178, 1180-81 (1984)(absent fraud, collusion, mistake or accident, the client challenging an oral settlement made on the record must show

5. The Griffins had spoken with Orseck on August 3, 2005 about getting the Property

back. Orseck failed to mention the settlement. (*Irene Affidavit*, ¶ 12.)

that the attorney "was without authority of any sort to enter into the settlement, and therefore no contract ever came into being").⁶

[5] The debtor argues that Orseek's agreement to settle on the record created an "irrebuttable" presumption that he had apparent authority, but no such "irrebuttable" presumption exists. Rather, the settlement creates a *rebuttable* presumption of actual authority. The debtor did not move for summary judgment on the issue of actual authority, and even if it had, the Griffins' denials of Orseek's authority raised a disputed issue of material fact. Accordingly, we turn to the question of apparent authority.

B. Apparent Authority

[6-8] Apparent authority consists of two elements: (1) a manifestation by the principal that the agent has authority and (2) reasonable reliance on that manifestation by the person dealing with the agent. See *FDIC v. Providence College*, 115 F.3d 136, 140 (2d Cir.1997); *Herbert Construction Co. v. Continental Ins. Co.*, 931 F.2d 989, 993-94 (2d Cir.1991); RESTATEMENT (SECOND) OF AGENCY § 27 (1958). Only the principal can manifest the attorney's authority; the attorney cannot create apparent authority by his manifestation alone. *Teamsters*, 986 F.2d at 20. Furthermore, apparent authority cannot be based on private communications between the lawyer and his client that are not disclosed to opposing counsel. See *Fennell*, 865 F.2d at 502.

[9, 10] "[A] client does not create apparent authority for his attorney to settle

a case merely by retaining the attorney."

Id.; accord *Artha Mgmt.*, 91 F.3d at 329. Accordingly, while the presumption that attends open court settlements is a powerful one, the cases require more to support a finding of apparent authority. In addition to affirmative statements or acts by the principal directed at the third party, indicia of apparent authority include the attorney's unrefuted statements, made in his client's presence, that he has authority to settle, *Conway*, 236 F.Supp.2d at 248; the attorney's participation in settlement discussions with the client's knowledge, *Clark v. Bristol-Myers Squibb & Co.*, 306 A.D.2d 82, 761 N.Y.S.2d 640, 643 (N.Y.App.Div.2003); see *Teamsters*, 986 F.2d at 20 (client allowed "unauthorized" attorney to negotiate modification to settlement); *Alvarez v. City of New York*, 146 F.Supp.2d 327, 335 (S.D.N.Y.2001)(client and attorney participated in two lengthy settlement conferences, without advising adversary or court of limit on attorney's authority); the attorney's appearance at court conferences conducted pursuant to rules that require the attorney to have settlement authority, *Hallock*, 485 N.Y.S.2d 510, 474 N.E.2d at 1182; *Stoll v. Port Auth. of New York and New Jersey*, 268 A.D.2d 379, 701 N.Y.S.2d 430, 431 (N.Y.App.Div.2000); *Bauer v. Lygren*, 113 A.D.2d 913, 493 N.Y.S.2d 815, 816 (N.Y.App.Div.1985); *Collazo v. New York City Health & Hosps. Corp.*, 103 A.D.2d 789, 477 N.Y.S.2d 662, 663 (N.Y.App.Div. 1984), and the client's delay in denying the attorney's authority. *Teamsters*, 986 F.2d at 20; *Conway*, 236 F.Supp.2d at 248; *Clark v. Bristol-Myers Squibb & Co.*, 761 N.Y.S.2d at 643.

6. *Hallock* referred to N.Y.C.P.L.R. 2104 (McKinney 1997 & Supp.2005) which provides, in substance, that a settlement made on the record in open court is binding even if it is not reduced to writing and signed by the parties. Although there is some question

whether this provision applies to oral stipulations governed by federal law, "the federal rule regarding oral stipulations does not differ significantly from the New York rule." *Monaghan v. SZS 33 Assocs., L.P.*, 73 F.3d 1276, 1283 n. 3 (2d Cir.1996).

IN RE KOLLEL MATEH EFRAIM, LLC

Cite as 334 B.R. 554 (Bkrtcy.S.D.N.Y. 2005)

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[11] Here, the record does not support summary judgment on the issue of apparent authority. Aside from Helen-May's retention of Orseck—which is not enough—the debtor has not shown as a matter of law that Helen-May made any express or implied manifestations regarding Orseck's authority to settle. The debtor relies heavily on Orseck's appearance at the pre-trial conference on June 28th and at the settlement conference on July 20th. The Court did not, however, announce that settlement would be discussed, did not discuss settlement with the parties, and did not require the presence or availability of someone with authority to discuss settlement on June 28th. See FED.R.Civ.P. 16(c)(At a pre-trial conference, "the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.")

Similarly, a settlement conference was not on the July 20th agenda. Instead, Orseck and the debtor's counsel requested one after they arrived. Orseck appeared alone on July 20th, after allegedly duping the Griffins into believing that the Court hearing had been adjourned. Consequently, the settlement conference on July 20th said nothing more about Orseck's authority than if he had represented his own authority to settle.

To be sure, the record raises several unresolved questions. First, Orseck attested to a good faith but mistaken belief in his authority to settle. (See *Orseck Affidavit*, ¶¶ 5–6.) The undisclosed basis of that belief might be relevant to the issue of his authority.

Second, the Griffins arguably authorized Orseck to engage in settlement negotiations. Paul Griffin's July 18th fax, (*Irene Affidavit*, Ex. B), gave Orseck certain

marching orders. He told Orseck that he "wanted to make sure that we are on the same page regarding any potential pre-trial settlement." Orseck was informed that the debtor's principal, Jack Lefkowitz (or his assignee), would have to be responsible for any real estate commissions and transfer taxes. Finally, Mr. Griffin advised Orseck regarding what Helen-May would accept: "[i]t makes no sense for us to settle for anything less than \$4,150,000.00." Thus, Helen-May recognized that Orseck might engage in settlement negotiations, implicitly authorized him to do so, and merely placed a limit on what he could accept. While Helen-May points to a June 3, 2005 letter, (*Irene Affidavit*, Ex. A), in which Orseck told his adversary that Helen-May adamantly refused to do any business with the debtor, the later June 28th fax confirmed that Helen-May was prepared to engage in settlement discussions.⁷

Third, Orseck actually engaged in negotiations with the debtor's counsel before and after the fax, possibly with the Griffins' knowledge. Between May 23, 2005 and June 3, 2005, Orseck and Scott Krinsky, Esq., the debtor's counsel, discussed settlement. (*Affidavit [of Scott Krinsky] in Support of Motion*, sworn to Oct. 27, 2005, at ¶ 8)(*"Krinsky Affidavit"*)(ECF Doc. # 44.) Discussions broke off in early June, but resumed in July. (*Id.*, ¶ 14.) The Griffins never denied knowledge of these discussions.

Fourth, Helen-May was remarkably slow to disavow the settlement and Orseck. By their own admission, the Griffins heard about the settlement from Orseck's son on July 20th, the day it occurred. That same day, they discovered that Orseck had lied about a conversation with Dan Scher, Esq.,

7. Orseck's subsequent participation in settlement negotiations strongly suggests that the

adamant tone of the June 3rd letter was just posturing.

regarding what Helen-May could expect to receive. On July 28th, they learned from Gene Barbanti, Helen-May's trial expert, that Orseck had also lied to them about the July 20th adjournment.

Despite the lies and the unauthorized settlement, the Griffins continued to use Orseck as Helen-May's attorney.⁸ Orseck filed Helen-May's *Objection*, dated August 11, 2005. Notably, the *Objection* did not state that Orseck lacked authority. In addition, Orseck tried, through the middle of September, to schedule further settlement meetings with the debtor's lawyers. (*Krinsky Affidavit*, ¶ 24.) It was not until Helen-May retained Mr. Carlebach, and he filed the *Supplemental Objection* 60 days after the discovery of the unauthorized settlement and Orseck's lies, that lack of authority was raised.

Nevertheless, the present record is too thin to grant the motion as a matter of law. Accordingly, the parties are directed to appear for an evidentiary hearing on January 25, 2006, at 10:00 a.m., to resolve the questions of Orseck's actual and apparent authority.

So ordered.



8. The Griffins claim they were mystified when they received the proposed order in early August, because they "had been repeatedly told by Mr. Orseck that the case was not settled." (*Irene Affidavit*, ¶ 14.) Irene's affidavit does not relate a single instance, much

**In re MK LOMBARD GROUP
I, LTD., Debtor.**

No. 02-36936 SR.

United States Bankruptcy Court,
E.D. Pennsylvania.

Dec. 15, 2005.

Background: Objection was filed to proof of claim filed by would-be purchaser of Chapter 11 debtor's land for damages for debtor's alleged breach of terms of amended real estate sales agreement. The Bankruptcy Court entered order sustaining objection, and would be purchaser appealed. The District Court, Davis, J., 2005 WL 735993, vacated and remanded.

Holdings: On remand, the Bankruptcy Court, Stephen Raslavich, J., held that:

- (1) debtor-vendor's material breach of terms of amended real estate sales agreement, in failing to obtain mortgagee's consent, prior to closing, to assumption of mortgage by purchaser, excused purchaser of its contractual obligation to provide ten-days written notice of default and opportunity to cure;
- (2) purchaser's sole and exclusive remedy for debtor's breach was return of its \$32,788 payment, as reduced by undesignated \$25,000 payment that purchaser had received under debtor's Chapter 11 plan; and
- (3) debtor-vendor's breach of terms of amended real estate sales agreement, in failing to supplement its earlier disclosure of pending litigation in which it was involved by notifying purchaser of

less repeated instances, in which Orseck told the Griffins that the "case was not settled." Rather, in recounting the chronology, she stated that Orseck gave them "the impression" that it was not settled. (*Id.*, ¶ 12.)

In re McCool, 172 So.3d 1058 (2015)

2015-0284 (La. 6/30/15)



KeyCite Yellow Flag

Distinguished by In re Randazzo, La., September 10, 2025

172 So.3d 1058

Supreme Court of Louisiana.

In re Joyce Nanine McCOOL.

No. 2015–B–0284.

I

June 30, 2015.

Synopsis

Background: Disciplinary proceedings were brought against attorney. Disciplinary Board recommended suspension of one year and one day.

Holdings: The Supreme Court, Knoll, J., held that:

[1] attorney violated rules, and

[2] disbarment was warranted.

Disbarment ordered.

Weimer, J., concurred in part and dissented in part, and assigned reasons.

Guidry, J., concurred in part and dissented in part, and assigned reasons.

Crichton, J., additionally concurred and assigned reasons.

Cannella, J., concurred in part and dissented in part, and assigned reasons.

West Headnotes (9)

[1] **Attorneys and Legal Services** 🚩 Impartiality and decorum of tribunal

Attorney's conduct, using the internet and social media to solicit public to make direct ex parte contact with Louisiana Supreme Court and trial judges in Mississippi and Louisiana in an

effort to influence decisions in sealed, pending domestic litigations, resulting in hundreds of members of public contacting judges, and making false and inflammatory statements including that judges ignored evidence of sexual abuse of children, violated rules prohibiting attorney from seeking to influence a judge by means prohibited by law, prohibiting attorney from communicating ex parte with a judge during a proceeding, prohibiting attorney from violating professional conduct rules, prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation, and prohibiting conduct prejudicial to the administration of justice. State Bar Articles of Incorporation, Art. 16, Rules of Prof.Conduct, Rules 3.5(a, b)Rules of Prof.Conduct, Rules 3.5(a, b), 8.4(a, c, d)8.4(a, c, d) LSA–R.S. foll. 37:222.

2 Cases that cite this headnote

[2] **Attorneys and Legal Services** 🚩 Particular Subjects of Review

Attorneys and Legal Services 🚩 Evidence, verdict, and findings

While the Supreme Court is not bound in any way by the findings and recommendations of the hearing committee and disciplinary board in an attorney discipline case, the manifest error standard is applicable to the committee's factual findings.

1 Case that cites this headnote

[3] **Attorneys and Legal Services** 🚩 Defenses, Excuses, and Justifications

Constitutional Law 🚩 Statements regarding judge or court officials

Constitutional Law 🚩 Internet

First Amendment did not shield attorney from being disciplined for conduct, including using the internet and social media to solicit public to make direct ex parte contact with judges to influence decisions in sealed, pending domestic litigations, and making false and inflammatory statements including that judges ignored evidence of sexual abuse of children, that violated rules including those prohibiting ex

parte communications and prohibiting conduct prejudicial to administration of justice; conduct did not involve protected speech, but rather was an orchestrated effort to inflame the public sensibility for the sole purpose of influencing litigation, and as such it threatened the independence and integrity of the courts. U.S.C.A. Const.Amend. 1; State Bar Articles of Incorporation, Art. 16, Rules of Prof.Conduct, Rules 3.5(a, b)Rules of Prof.Conduct, Rules 3.5(a, b), 8.4(a, c, d)8.4(a, c, d) LSA–R.S. foll. 37:222.

1 Case that cites this headnote

- [4] **Attorneys and Legal Services** ➡ Conduct as to Courts and Administration of Justice in General

Constitutional Law ➡ Attorneys, Regulation of

In the courtroom itself, during a judicial proceeding, whatever right to free speech an attorney has is extremely circumscribed; an attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

- [5] **Attorneys and Legal Services** ➡ Disbarment; Revocation of License

Disbarment was warranted for attorney whose conduct, using the internet and social media to solicit public to make direct ex parte contact with Louisiana Supreme Court and trial judges in Mississippi and Louisiana in an effort to influence decisions in sealed, pending domestic litigations, resulting in hundreds of members of public contacting judges, and making false and inflammatory statements including that judges ignored evidence of sexual abuse of children, violated rules prohibiting attorney from seeking to influence a judge by means prohibited by law, prohibiting attorney from communicating ex parte with a judge during a proceeding, prohibiting attorney from violating professional

conduct rules, prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation, and prohibiting conduct prejudicial to the administration of justice. State Bar Articles of Incorporation, Art. 16, Rules of Prof.Conduct, Rules 3.5(a, b)Rules of Prof.Conduct, Rules 3.5(a, b), 8.4(a, c, d)8.4(a, c, d) LSA–R.S. foll. 37:222.

- [6] **Attorneys and Legal Services** ➡ Nature and purpose

In determining a sanction, the Supreme Court is mindful that disciplinary proceedings are not primarily to punish the lawyer, but rather are designed to maintain high standards of conduct, protect the public, preserve the integrity of the profession, and deter future misconduct.

1 Case that cites this headnote

- [7] **Attorneys and Legal Services** ➡ Factors Considered

The discipline to be imposed for attorney misconduct depends upon the facts of each case and the seriousness of the offenses involved considered in light of any aggravating and mitigating circumstances.

1 Case that cites this headnote

- [8] **Attorneys and Legal Services** ➡ Aggravating factors

Aggravating factors to be considered in determining sanction for attorney who used internet and social media and made false and inflammatory statements to encourage public to make direct ex parte communications with judges, in an effort to influence the outcome of litigation, were a dishonest or selfish motive, a pattern of misconduct, multiple offenses, refusal to acknowledge the wrongful nature of the conduct, and substantial experience in the practice of law.

3 Cases that cite this headnote

[9] **Attorneys and Legal Services** 🗝️ Mitigating factors

Mitigating factor to be considered in determining sanction for attorney who used internet and social media and made false and inflammatory statements to encourage public to make direct ex parte communications with judges, in an effort to influence the outcome of litigation, was that attorney had no prior disciplinary record.

¹ Case that cites this headnote

Attorneys and Law Firms

***1060** Office of Disciplinary Counsel, Charles Bennett Plattsmier, Tammy Pruet Northrup, Baton Rouge, LA, for Applicant.

McCool Law, LLC, Mandeville, LA, Joyce Nanine McCool; Richard Ducote, PC, Richard Lynn Ducote, Metairie, LA, for Respondent.

ATTORNEY DISCIPLINARY PROCEEDING

KNOLL, Justice. *

****1** This disciplinary matter arises from formal charges filed by the Office of Disciplinary Counsel (“ODC”) against respondent, Joyce Nanine McCool,¹ an attorney licensed to practice law in Louisiana.

UNDERLYING FACTS

The underlying facts of this case are rather complex. By way of background, respondent was friends with Raven Skye Boyd Maurer (“Raven”). Following Raven's divorce in 2006, she and her former husband were involved in a bitter child custody dispute. Raven accused her ex-husband of sexually abusing their two young daughters, H. and Z.,² and unsuccessfully sought to terminate his parental rights in proceedings pending in Mississippi before Judge Deborah Gambrell.³ Respondent is not admitted to the Mississippi Bar and was not admitted *pro hac vice* in Raven's Mississippi case, but she did offer assistance to Raven as a friend.

Meanwhile, respondent filed a petition in St. Tammany Parish on behalf of Raven's ***1061** new husband, who sought to adopt H. and Z. The presiding judge, Judge ****2** Dawn Amacker, stayed the intrafamily adoption proceedings pending resolution of the Mississippi matter. Judge Amacker also declined to exercise subject matter jurisdiction in response to a motion for emergency custody filed by respondent on Raven's behalf. After Judge Amacker issued her ruling declining to exercise subject matter jurisdiction, respondent filed a writ application with the First Circuit Court of Appeal, which was denied.⁴ On August 31, 2011, this Court likewise denied writs. *Maurer v. Boyd*, 11–1787 (La.8/31/11), 68 So.3d 517.

Unhappy with the various rulings made by Judge Gambrell and Judge Amacker and believing those rulings were legally wrong, respondent drafted an online petition entitled “Justice for [H] and [Z]” which she and Raven posted on the internet at change.org, along with a photo of the two girls. With regard to the Mississippi proceeding before Judge Gambrell, the online petition stated:

To Judge Deborah Gambrell, we, the undersigned, ask that you renounce jurisdiction in this matter to the Louisiana court because the children have lived exclusively in Louisiana for the past three years. Their schools, teachers, physicians, therapists, little sister and brother and the vast majority of significant contacts are now in Louisiana. There is also an adoption proceeding pending in Louisiana over which Louisiana has jurisdiction and in the interest of judicial economy, and the best interest of the girls, Louisiana is the more appropriate forum to oversee ensure [sic] the “best interest” of the girls are protected. If you refuse to relinquish jurisdiction to Louisiana, we insist that you remove the Guardian Ad Litem currently assigned to the case, and replace him with one that has the proper training and experience in investigating allegations of child sexual abuse in custody proceedings. We further insist that, in keeping

[with]  S.G. v. D.C., 13 So.3d 269 (Miss.2009), you specifically define the Guardian Ad Litem's role in the suit; require the new Guardian Ad Litem [to] prepare a written report; require that the report be shared with all parties prior to a hearing; that all proceeding be conducted on the record, with advance notice and opportunity to be heard, and that an evidentiary hearing be conducted to review the ****3** allegations of child sexual abuse, and that no visitation be allowed until you have seen all of the evidence.

As to Judge Amacker and the Louisiana proceedings, the petition stated:

To Judge Amacker, we, the undersigned, insist that you withdraw the unlawful stay of the adoption proceedings currently pending in your court, and, in accordance with La.Ch.C. art. 1253, a hearing be set with all due speed to allow the girls' stepfather to show why it is in the girls' best interest that they be adopted by him, thereby terminating all parental rights of the girls' biological father.

Respondent re-posted the online petition on her blog site and in online articles she authored, one of which again included a photo of the two girls. She provided contact information for the judges' offices and this Court, and added comments in which she solicited and encouraged others to express their feelings to the judges and this Court about the pending cases:

In spite of overwhelming evidence that the girls have been abused by their father, ***1062** the judge in Mississippi, Judge Deborah Gambrell, of the Chancery Court of Marion County, Mississippi, refuses to even look at the evidence, and has now ordered the girls be sent to unsupervised visitation with their father.

Judge Dawn Amacker, in the 22nd JDC, Division L, for the Parish of St. Tammany in Louisiana also refused to protect the girls, even though she has the power and authority to protect them. RM now has an application to the LA supreme court, asking that it order Judge Amacker to protect the children.

Insist that Judge Amacker and Judge Gambrell do their jobs! If you want more info, go to [website] and read the writ application to the LA supreme court.

Please sign the petition, circulate it to all of your friends and families and call Judge Amacker and Judge Gambrell during the hours of 8:30 to 5:00 starting Monday, August 15 to ask why they won't follow the law and protect these children. Let them know you're watching and expect them to do their job and most of all, make sure these precious little girls are safe!

Call the Louisiana Supreme Court and tell them you want the law to protect these girls [phone number]. [A]sk ****4** about the writ pending that was filed by attorney Nanine McCool on Friday, August 12, 2011.

Let's turn this around and be [H's] hero. Please sign the Care2 petition and continue to call Judge Gambrell to ask her why she is unwilling to afford [H] and [Z] simple justice.

You can sign the petition and lend your voice to this cause *here*. Or, you can contact directly. Contact information is: [provided contact information for the judges].

In response to the postings made by respondent, on August 14, 2011—two days prior to a hearing in Mississippi on Raven's motion for contempt and to terminate her former husband's parental rights—Judge Gambrell's staff received an e-mail from Heather Lyons, a signer of the online petition. Ms. Lyons stated she lived and voted in Forrest County, Mississippi, and she would “be paying attention” to Raven's case “due to the fact that Judge Gambrell refused to hear evidence of abuse in the case of little girls who are likely being molested by their father. She has an obligation to protect our most vulnerable children. Please do not let them down judge!”

A copy of the online petition and comments thereto was then filed with the Marion County Chancery Clerk of Court's Office (“Marion County Court”) and faxed directly to Judge Amacker's office in Louisiana, apparently by Raven or her mother. On August 22, 2011, Judge Amacker had her

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administrative assistant return the petition to respondent with instructions respondent caution her client against *ex parte* communications with the judge.

Undaunted, respondent continued her online and social media campaign, further disseminating the sexual abuse allegations and even going so far as to link the audio recordings in which Raven and her children discussed the alleged abuse.⁵ ****5** Respondent also stated (falsely) that no ***1063** judge had ever heard these recordings because Judge Gambrell refused to allow the recordings into evidence and Judge Amacker refused to conduct a hearing:

Listen to their 1st disclosure to Raven: [link to recording] and a day later, their second: [link to recording]

Now consider that no judge has ever heard those recordings. Why? Because for 4.5 years, the judges have simply refuse [sic] to do so. On August 16, 2011, Judge Deborah Gambrell in the Chancery Court of Marion County, Mississippi, once again refused to admit all of Raven's evidence, including these recordings, and ordered that [H] and [Z] have visits with their father in the house where they both report having been molested by their father in the past.

Judge Dawn Amacker in the 22nd Judicial District Court for the Parish of St. Tammany in Louisiana is also refusing to hear any evidence or to protect [H] and [Z], even though the law requires her to have a hearing and to take evidence.

Their dad keeps calling them liars and saying that their mom is making them say it. All their mom wants is for a judge to look at ALL the evidence and THEN decide who to believe. Don't you think Judge Gambrell and Judge Amacker should look at the evidence before they make [H] and [Z] go back to their father's house where there is no one to protect them except the person they are most afraid of?

[H] still loves her daddy. She just wants him to stop doing what he is doing to her. She does not feel safe with him alone. She said as much in her journal, but Judge Gambrell refused to allow it as evidence and Judge Amacker just ignored her.

Sign our petition telling the judges that there can be no justice for [H] and [Z], or any child, if the law and evidence is ignored. Tell them they must look at the

evidence before they make a decision that will affect the rest of [H] and [Z]'s lives. Ask yourself, what if these were your daughters?

****6** Have questions want to do more to help? Email us at [address] and someone will respond within 24 hours. Want to see more, go to [website] and read the writ submitted to the Louisiana Supreme Court on August 12, 2011.

Horried? Call the judges and let them know: [contact information provided]

Respondent also used her personal Twitter account to promote the online petition and to otherwise draw attention to the audio recordings and the manner in which the judges were handling the cases. On August 16, 2011, the day of the Mississippi hearing, respondent tweeted 30 messages about the case and petition, including:

I realize most of u think the courts care about kids but too often there's no walk to go with the talk: [link to online petition].

Shouldn't judges base decisions about kids on evidence?: [link to online petition].

GIMME GIMME GIMME Evidence! Want some? I got it. Think u can convince a judge to look at it? Sign this petition: [link to online petition].

Judges are supposed to know shit about ... the law ... aren't they. And like evidence and shit? Due process? [link to online petition].

I am SO going 2 have 2 change jobs after this ...! I'm risking sanctions by the LA supreme court; u could be a HUGE help.

The very next day, she tweeted: "Make judges protect [H] and [Z] from abuse by their father!: [link to online petition]."

On August 24, 2011, respondent tweeted a local investigative news organization ***1064** should "focus ur lens on Y Judge Amacker won't protect these girls ..." and "ask Judge Amacker why she won't listen." Respondent also provided links to the audio recordings and the online petition in numerous tweets, asking various national news/media outlets and celebrities from *Dateline* to Oprah inquire "why 2 girls can't get a judge to listen to this." Another tweet said, "Judge ****7** Gambrell at it again—turned a 4 YO child over to

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a validated abuser—PLEASE TELL ME WHAT IT WILL TAKE FOR EVERYON [sic] TO SAY ‘ENOUGH’.”

These online articles and postings by respondent contain numerous false, misleading, and inflammatory statements about the manner in which Judge Gambrell and Judge Amacker were handling the pending cases. But respondent denies any responsibility for these misstatements, contending these were “Raven's perceptions of what had happened” and respondent was simply “helping [Raven] get her voice out there.” For example:

- In an article entitled “Make Louisiana and Mississippi Courts Protect HB and ZB!” it is alleged the children were being sexually abused by their father and in spite of “overwhelming” evidence, Judge Gambrell “refuses to even look at the evidence, and has now ordered the girls be sent to unsupervised visitation with their father.” This allegation refers to journals written by H., which Judge Gambrell excluded from evidence. Judge Gambrell gave reasons for her evidentiary rulings, but in any event, she did not simply “refuse” to look at the evidence. As for Judge Amacker, it is alleged she “refused to protect the girls, even though she has the power and authority to protect them.” Judge Amacker did not refuse to protect the minor children, but rather, she stayed proceedings in Louisiana because related proceedings were already pending in Mississippi.
- In an article entitled “Justice for [H] and [Z],” it was alleged the children were being sexually abused by their father, and the children's mother had evidence of the abuse, including an audio recording and video evidence, but this evidence “was excluded from consideration on one legal technicality or another” by Judge Gambrell. Once again, Judge Gambrell's evidentiary rulings were not arbitrary or capricious. She gave reasons for her evidentiary rulings and did not simply “refuse” to look at the evidence.
- In **8 a posting on her online blog, respondent linked to audio recordings of the minor children speaking to their mother about alleged sexual abuse by their father, contrary to the September 2, 2008 Agreed Judgment in the Mississippi proceedings. *See supra*, note 5. Respondent's blog stated no judge had ever heard the recordings because “for 4.5 years, the judges have simply refuse [sic] to do so. On August 16, 2011, Judge Deborah Gambrell in the Chancery Court of Marion County, Mississippi once again refused to admit all

of Raven's evidence, including these recordings, and ordered that [H] and [Z] have visits with their father in the house where they both report having been molested by their father in the past.” However, respondent later acknowledged the audio recordings were not offered into evidence at the August 16, 2011 hearing. In fact, the audio recordings were not even brought to court that day. Furthermore, the audio recordings have *never* been offered into evidence in any proceeding before Judge Gambrell. In the same blog, respondent stated Judge Amacker “is also refusing to hear any *1065 evidence or to protect [H] and [Z], even though the law requires her to have a hearing and to take evidence.” However, Judge Amacker did not refuse to have a hearing; she declined to exercise jurisdiction because related domestic proceedings were already pending in Mississippi. Judge Amacker's ruling was upheld when both the court of appeal and this Court denied writs. *Maurer; supra*.

Subsequently, respondent filed motions to recuse Judge Amacker in two matters unrelated to Raven's case. In response, Judge Amacker signed orders stating she was “voluntarily recus[ing herself] due to the possibility that the judge may be called as a witness” in disciplinary proceedings against respondent, “and out of an abundance of caution and to avoid the appearance of impropriety.” Notwithstanding the judge's stated reasons for her recusal, respondent filed two more motions for recusal in which she stated Judge Amacker had “voluntarily and *expressly admitted [her] extreme bias and conflict in recusing [herself]* in several **9 other cases, which grounds are equally applicable in the case at bar.” [Emphasis added.] Respondent testified this was not an untruthful statement because in her view, the mere fact Judge Amacker had voluntarily recused herself was an express admission by Judge Amacker of bias against her. She also noted Judge Amacker had not denied any of the allegations respondent made in the motions to recuse, nor did Judge Amacker impose sanctions against her or file a disciplinary complaint against her. These facts further reinforced respondent's view Judge Amacker had admitted being biased against her.

On September 14, 2011, Judge Gambrell signed an order commanding respondent to appear before the Marion County Court on October 5, 2011, to show cause why she should not be held in contempt of court by disclosing information from a “sealed” record. Respondent received a copy of the notice of the contempt hearing by regular United States mail; however,

she did not appear, contending she was not properly served and the Mississippi court did not have jurisdiction over her. On October 6, 2011, Judge Gambrell signed an order holding respondent in contempt of court. In October 2012, Judge Gambrell rescinded the order of contempt because “service of process was insufficient ... and though violations of this Court’s order relating to disclosure of audio transcriptions may have taken place, the Court is without authority to hold said Joyce Nanine McCool in contempt of this Court.” In January 2013, Judge Gambrell *sua sponte* recused herself from further action in Raven’s case “in accordance with the Mississippi Code of Judicial Conduct Canon 3 and to avoid the appearance of impropriety or bias.”

DISCIPLINARY PROCEEDINGS

In September 2011, Judge Gambrell filed a complaint against respondent with the ODC. Judge Amacker also provided information in connection with the ODC’s investigation. In May 2014, the ODC filed one count of formal charges ****10** against respondent, alleging her conduct as set forth above violated Rules 3.5(a) Rules 3.5(a) a lawyer shall not seek to influence a judge by means prohibited by law), 3.5(b)(a lawyer shall not communicate *ex parte* with a judge during the proceeding), 8.4(a)(it is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another), 8.4(c)(it is professional misconduct for a lawyer to engage in dishonesty, fraud, deceit, or misrepresentation), and 8.4(d)(it is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice) of the Rules of Professional Conduct.

***1066** Respondent answered the formal charges by denying any misconduct and asserting her actions are protected by the First Amendment. In her pre-hearing memorandum, respondent admitted she “did implore the electorate to communicate accountability to its elected judges” and “asked publically [sic] elected judges to ‘look at the evidence,’ ‘protect children,’ and ‘apply the law,’” but she denied this constituted ethical misconduct. Respondent also filed an exception of vagueness and a motion for more specific allegations of misconduct. The ODC opposed the exception and motion, arguing the formal charges give respondent fair and adequate notice of the alleged misconduct. Following a telephone conference conducted on December 11, 2013,

the chair of the hearing committee denied the exception and motion.

On January 10, 2014, respondent directed discovery to the ODC seeking a listing of each and every specific act or omission, which the ODC alleged to constitute a violation of the Rules of Professional Conduct, the date of each and every such act or omission, and the specific Rule purportedly violated by each such act or omission. The ODC responded to the discovery request, but refused to provide any additional information, noting the chair’s previous ruling denying the exception of vagueness and the motion for more specific allegations of ****11** misconduct. Respondent then filed a motion to compel the ODC to provide the requested information. Following a telephone conference conducted on February 11, 2014, the chair denied the motion to compel. Consequently, respondent filed a petition for writ of mandamus in this Court, seeking to compel the ODC to provide more specific details of the alleged misconduct set forth in the formal charges. She also sought a stay of the hearing on the formal charges set for February 27, 2014. We denied respondent’s writ and her request for a stay on February 21, 2014. *In re: McCool*, 14–0366 (La.2/21/14), 133 So.3d 669 (Hughes, J., recused).

Formal Hearing

The hearing committee conducted a two-day hearing on February 27, 2014, and March 27, 2014. Therein, the ODC called Judge Amacker and Judge Gambrell to testify before the committee. Respondent testified on her own behalf and was cross-examined by the ODC. During her testimony, respondent repeatedly denied she violated the Rules of Professional Conduct. Instead, she suggested her conduct was justified by what the judges had done in the underlying cases and in the interest of protecting the minor children:

Q. What does the law say, if anything, you can do after [the Supreme Court denies writs]? I mean you’ve exhausted what the law allows you to do. What is your recourse then under the law?

A. Weep for the children.

Q. Okay. Can you cite me a law that says you can take to an online campaign to try to get the Judge’s [sic] to change their mind?

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A. This is the United States of America. The land of the free. The home of the brave. Cite me a law that says I can't.

Q. The rules that you are charged with are in the formal charges.

A. They do not say that I can't take—I cannot assist a client to craft an online petition seeking whatever help ****12** she can to protect her children because the legal system absolutely failed her—

Q. Ms. McCool—

A. —because the Judge's [sic] and the processes will not follow the law, will not obey the law, but hold us to the letter of the law.

***1067** *Hearing Committee Report*

After considering the evidence and testimony presented at the hearing, the hearing committee made factual findings generally consistent with the facts set forth above. Based on these facts, the committee determined respondent violated the Rules of Professional Conduct as follows:

Rules 3.5(a), 3.5(b) *Rules 3.5(a), 3.5(b), and 8.4(a)*—Respondent used the internet, an online petition, and social media to spread information, some of which was false, misleading, and inflammatory, about Judge Gambrell's and Judge Amacker's handling of and rulings in pending litigation. Respondent circulated contact information for Judge Gambrell and Judge Amacker and solicited and encouraged others to make direct, *ex parte* contact with the judges to express their feelings about the pending cases, and attempted to influence the outcome of the pending cases. The clear intent of respondent's online campaign was an attempt to influence the judges' future rulings in the respective cases, and to do so through improper *ex parte* communication directed at the judges.

Rule 8.4(c)—Respondent disseminated false, misleading, and inflammatory information on the internet and through social media about Judge Gambrell and Judge Amacker and their handling of these pending domestic proceedings. She also instructed others to sign and circulate an online petition, and to call the judges and let them know they are “watching” them and are “horrificed” by their rulings. Finally, respondent made

blatantly false statements about Judge Amacker in multiple motions to recuse.

****13** *Rule 8.4(d)*—Respondent used the internet and social media in an effort to influence Judge Gambrell's and Judge Amacker's future rulings in pending litigation. Respondent's conduct threatened the integrity and independence of the court and was clearly prejudicial to the administration of justice. Respondent also used her Twitter account to publish tweets linking the audio recordings of the minor children discussing alleged sexual abuse; to publish false, misleading, and inflammatory information about Judge Gambrell and Judge Amacker; and to promote the online petition, all of which was designed to intimidate and influence the judges' future rulings in the underlying proceedings.

The committee determined respondent violated a duty owed to the public and the legal system. She acted knowingly, if not intentionally. She caused actual and potential harm by threatening the independence and integrity of the judicial system, and causing the judges concern for their personal safety and well-being. The applicable baseline sanctions, therefore, range from suspension to disbarment.

In aggravation, the committee found a dishonest or selfish motive, a pattern of misconduct, multiple offenses, refusal to acknowledge the wrongful nature of the conduct, and substantial experience in the practice of law (admitted 2000). In mitigation, the committee found respondent has no prior disciplinary record.

Considering this Court's prior jurisprudence addressing similar misconduct, the committee recommended respondent be suspended from the practice of law for one year and one day. The committee further recommended respondent be required to attend the Louisiana State Bar Association's Ethics School (“Ethics School”) and assessed with the costs and expenses of this proceeding.

Respondent filed a brief with the disciplinary board objecting to the hearing committee's report and recommendation.

Disciplinary Board Recommendation

****14** After review, the disciplinary board determined the hearing committee's factual findings are supported by the record ***1068** and are not manifestly erroneous. Based on these facts, the board agreed the committee correctly

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applied the Rules of Professional Conduct to the facts, except the board declined to find respondent engaged in *ex parte* communications with a judge, in violation of Rule 3.5(b)Rule 3.5(b). The board reasoned respondent did not have direct contact with either Judge Gambrell or Judge Amacker, and thus, no violation of Rule 3.5(b)Rule 3.5(b) occurred. Nevertheless, by circulating contact information for the judges and soliciting non-lawyer members of the public to make direct contact with the judges regarding a matter pending before them, respondent encouraged the public to do what she is forbidden to do by Rule 3.5(b)Rule 3.5(b). As such, she violated Rule 8.4(a) by attempting to communicate with Judge Gambrell and Judge Amacker “through the acts of another.”

By her own admission, respondent was unhappy with the decisions rendered in the matters she was litigating. After her legal options were exhausted, she decided to launch a social media campaign to influence the presiding judges. Consequently, respondent knowingly, if not intentionally, spearheaded a social media blitz in an attempt to influence the judiciary.

The board determined respondent violated duties owed to the public and the legal system by making false, misleading, and inflammatory statements about two judges. She did so as part of a pattern of conduct intended to influence the judges' future rulings in pending litigation. Considering the ABA's *Standards for Imposing Lawyer Sanctions* (“ABA Standards”), the board determined the baseline sanction is suspension.

In aggravation, the board found a dishonest or selfish motive, a pattern of misconduct, multiple offenses, refusal to acknowledge the wrongful nature of the ****15** conduct, and substantial experience in the practice of law. In mitigation, the board found respondent has no prior disciplinary record.

After further considering respondent's misconduct in light of this Court's prior jurisprudence, the board adopted the committee's recommendation respondent be suspended from the practice of law for one year and one day, required to attend Ethics School, and assessed with the costs and expenses of this proceeding.

Respondent filed an objection to the disciplinary board's recommendation. Accordingly, the case was docketed for oral argument pursuant to Louisiana Supreme Court Rule XIX, § 11(G)(1)(b).

DISCUSSION

[1] [2] Bar disciplinary matters come within the exclusive original jurisdiction of this Court.  La. Const. art. V, § 5(B). Consequently, we act as triers of fact and conduct an independent review of the record to determine whether the alleged misconduct has been proven by clear and convincing evidence. La. Sup.Ct. R. XIX, § 11(G); *In re: Banks*, 09–1212, p. 10 (La.10/2/09), 18 So.3d 57, 63. While we are not bound in any way by the findings and recommendations of the hearing committee and disciplinary board, we have held the manifest error standard is applicable to the committee's factual findings. *Banks*, 09–1212 at p. 10, 18 So.3d at 63; *see also In re: Caulfield*, 96–1401 (La.11/25/96), 683 So.2d 714.

At the outset, we note the ODC's formal charges in this case are somewhat confusing. Rather than separating out the allegations and rule violations into multiple counts, the ODC chose to combine all the factual allegations into a single count spanning eighteen pages. In an effort to clarify the matter, we have divided the allegations into three broad categories: (1) improper *ex parte* communications; (2) dissemination of false and misleading information; ***1069** and (3) conduct prejudicial to the administration of justice. We will address each category in turn.

****16** *Improper Ex Parte Communication*

The ODC's allegations in this area relate to respondent's use of the internet and social media to disseminate information about the manner in which Judge Gambrell and Judge Amacker handled the child custody and visitation cases at issue, in an apparent attempt to marshal public opinion against these judges and attention from this Court. According to the ODC, this conduct violated Rules 3.5(a) and (b)Rules 3.5(a) and (b) and Rule 8.4(a) of the Rules of Professional ConductRule 8.4(a) of the Rules of Professional Conduct.

Rule 3.5Rule 3.5 provides:

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

Rule 8.4(a) Rule 8.4(a) provides:

It is professional misconduct for a lawyer to:

Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

The ODC alleges respondent violated these rules by using “the internet and social media to elicit outrage in the general public and to encourage others to make direct contact with judges in an effort to influence their handling of pending cases.” Respondent, however, takes the position her comments were only intended to encourage the public to remind the judges to do justice in this case by listening to the evidence and applying the law. Nonetheless, the hearing committee made a finding of fact that respondent’s clear intent was to influence the judges’ future rulings in this case through *ex parte* communication directed specifically at the judges. In support, the committee cited the following examples of respondent’s actions:

- ****17** Please sign the petition, circulate it to all of your friends and families and call Judge Amacker and Judge Gambrell during the hours of 8:30 to 5:00 starting Monday, August 15 to ask why they won’t follow the law and protect these children. Let them know you’re watching and expect them to do their job and most of all, make sure these precious little girls are safe!
- Call the Louisiana Supreme Court and tell them you want the law to protect these girls? [phone number] [A]sk about the writ pending that was filed by attorney Nanine McCool on Friday, August 12, 2011.
- Let’s turn this around and be [H’s] hero. Please sign the Care2 petition and continue to call Judge Gambrell to ask her why she is unwilling to afford [H] and [Z] simple justice.
- You can sign the petition and lend your voice to this cause *here*. Or, you can contact directly. Contact information is: [provided contact information for the judges and their staff].

- Sign our petition telling the judges that there can be no justice for [H] and [Z], or any child, if the law and evidence is ignored. Tell them they must look at the evidence before they make a decision that will affect the rest of [H] and [Z’s] lives. Ask yourself, what if these were your daughters? ... Horrified? Call the judges and let them know.

We agree the examples clearly and convincingly establish respondent solicited the public to contact the presiding judges and this Court. Although respondent asserts “the admonitions in the petitions did nothing other than ensure that both parties ***1070** would receive the same treatment—a hearing based on the law and evidence,” the evidence shows she used the internet and social media to solicit and encourage others to make direct, *ex parte* contact with Judge Gambrell, Judge Amacker, and this Court in an effort to influence their and our decisions in sealed, pending domestic litigations.

Moreover, when the petition was printed and faxed to the Marion County Court and Judge Amacker’s office, it became *ex parte* communication between the ****18** judiciary and all signatories just as if it were a signed letter. And the first signatory on both printed petitions was respondent: “1. Nanine McCool Lacombe, LA.”

Although not directly responsible for its delivery, respondent, by signing the petition, “lent her voice to the cause” along with the rest of the signatories, making the petition her own and, in turn, communicating directly to the judges and this Court, in its entirety:

LA Supreme Court; Judge Dawn Amacker; Judge Deborah Gambrell

We, the undersigned, insist that you ensure that the two little girls who are the subject of the case [], pending in the 22nd JDC, St. Tammany Parish Louisiana, and the case [], pending in the Chancery Court of Marion County Mississippi, are afforded all legal protections, including a full evidentiary hearing, to ensure that they are protected from abuse.

To the Louisiana Supreme Court, we, the undersigned, ask that you issue emergency writs, ordering the courts below to exercise emergency jurisdiction over the two small girls until, based on all the evidence available, it is established by clear and convincing evidence, that the little girls subject to these proceedings are being protected from

further abuse, including ordering the Hon. Dawn Amacker, Judge, Division L, 22nd JDC, Parish of St. Tammany, to lift the unlawful stay of the adoption proceedings and to set an evidentiary hearing at all due speed, allowing the girls' stepfather to show why it is in the girls' best interest that he be allowed to adopt them.

To Judge Amacker, we, the undersigned, insist that you withdraw the unlawful stay of the adoption proceedings currently pending in your court, and, in accordance with La.Ch.C. art. 1253, a hearing be set with all due speed to allow the girls' stepfather to show why it is in the girls' best interest that they be adopted by him, thereby terminating all parental rights of the girls' biological father.

To Judge Deborah Gambrell, we, the undersigned, ask that you renounce jurisdiction in this matter to the Louisiana court because the children have lived exclusively in Louisiana for the past three years. Their schools, teachers, physicians, therapists, little sister and brother and the vast majority of significant contacts are now in Louisiana. There is also an adoption proceeding pending in Louisiana over which Louisiana has ****19** jurisdiction and in the interest of judicial economy, and the best interest of the girls, Louisiana is the more appropriate forum to oversee ensure [sic] the “best interest” of the girls are protected. If you refuse to relinquish jurisdiction to Louisiana, we insist that you remove the Guardian Ad Litem currently assigned to the case, and replace him with one that has the proper training and experience in investigating allegations of child sexual abuse in custody proceedings. We further insist that, in keeping [with]  S.G. v. D.C., 13 So.3d 269 (Miss.2009), you specifically define the Guardian Ad Litem's role in the suit; require the new Guardian Ad Litem [to] prepare a written report; require that ***1071** the report be shared with all parties prior to a hearing; that all proceedings be conducted on the record, with advance notice and opportunity to be heard, and that an evidentiary hearing be conducted to review the allegations of child sexual abuse, and that no visitation be allowed until you have seen all of the evidence.

Thank you for your consideration and for protecting HB and ZB!

This petition is not just a communication from the electorate to its elected judges to “look at the evidence,” “protect children,” and “apply the law,” it is a directive asking and insisting the judges and this Court:

- issue emergency writs
- order[] lower courts below exercise emergency jurisdiction
- order[] [Judge] Amacker to lift the unlawful stay
- set ... a hearing at all due speed
- withdraw the unlawful stay
- terminat[e] all parental rights of the girls' biological father
- renounce jurisdiction
- remove the Guardian Ad Litem
- replace [the Guardian Ad Litem]
- define the Guardian Ad Litem's role in the suit
- require the new Guardian Ad Litem prepare a written report
- **20** • conduct all proceedings ... on the record
- conduct an evidentiary hearing ... to review the allegations of child sexual abuse
- disallow visitation ... until [the judge] ha[s] seen all of the evidence

By its very language, the petition implores the judges to review/see “ALL” the evidence irrespective of the rules of evidence and the judges' discretionary gatekeeping function conferred therein and likewise sets forth in explicit detail the specific manner in which the petitioners want the judges and this Court to “apply” and “follow” the law—essentially a quest for mob justice or rather “trial by internet.”

Respondent claims her postings are not *ex parte* communication because

first and foremost we encourage people to draw their own conclusions. We gave them the information, we gave them the evidence and we said form your own opinion, and then if you feel strongly about it share your opinion, your independent opinion of that with the judge.... But I don't

consider it an ex parte communication unless I told all those people this is what you need to tell them, and I didn't.

However, the postings belie her depiction and speak for themselves:

- Insist that Judge Amacker and Judge Gambrell do their jobs!
- Call Judge Amacker and Judge Gambrell ... to ask why they won't follow the law and protect these children.
- Let them know you're watching and expect them to do their job and most of all, make sure these precious little girls are safe!
- Call the Louisiana Supreme Court and tell them you want the law to protect these girls....
- Continue to call Judge Gambrell to ask her why she is unwilling to afford [H] and [Z] simple justice.
- Tell[] the judges that there can be no justice for [H] and [Z], or any child, if the law and evidence is ignored.
- Tell **21 them they must look at the evidence before they make a decision that will affect the rest of [H] and [Z's] lives.
- Ask Judge Amacker why she won't listen

Just as in the petition, respondent gives explicit directives to the public on how to *1072 voice “concern” and “horror” to the presiding judges.

As to this Court, respondent repeatedly admitted she sought to bring this case to our attention through the elicited phone calls because this Court is a “policy court”:

Q. And while the writ was pending at the Supreme Court you encouraged people to call them also?

A. Yes. To let them know that they were concerned because it's a Policy Court.

Q. Do you still think that's appropriate conduct today for an attorney to encourage people to contact a Court and ask them and voice their opinions about pending cases?

A. To—yes. I do.

Q. Okay. And do you think it's perfectly okay, even today, for you to encourage that and to solicit that?

A. Yes. They're elected officials. They are responsible—they are responsive and responsible to the people they serve. And if they don't know that people aren't concerned—The Supreme Court is a Policy Court. It responds to things that they believe are important social trends. So, yes, I do believe it's important that the Supreme Court be aware that this is an important issue for people in the community. And the number that was provided is the Clerk of Court's number.

We also note the petition was drafted and posted on more than one internet site when the matter was pending before this Court on writs and just days before Judge Gambrell held her first hearing in the custody matter in Mississippi on August 16, 2011. The pleas to “call Judge Amacker and Judge Gambrell during the hours of 8:30 to 5:00 starting Monday, August 15 to ask why they won't follow the law and protect these children” and “call the Louisiana Supreme Court ... and **22 ask about the writ pending that was filed by [respondent]” were made, therefore, for the sole purpose of improperly influencing the courts' future rulings to gain a tactical advantage in the pending underlying litigation. In her sworn statement, respondent even explained:

I guess I see judges as public officials. If I understand this correctly they're elected both in Mississippi and Louisiana. They answer to the public. The public has a right to tell them how they feel. And I guess—oh boy, I'm getting on a soap box now, when the judicial—when it comes to the judiciary they have such incredible immunity that they somehow feel like they don't have to answer to the public. And I feel strongly that particularly when it comes to family law that hearing from people about what's going on is a part of what will make them better judges.

As the record reveals, one of the signatories, Heather Lyons, not only emailed Judge Gambell on August 14, 2011—just

two days before the August 16, 2011 hearing—she also apparently called Judge Gambell at home, “[a]ccusing [her] of being a person who supports child predators or whatever.” Judge Amacker testified her office received “hundreds” of calls regarding the petitions, while Judge Gambell testified she even mentioned on the record in the August 16, 2011 hearing “that numerous people were calling and that they should not do that.” Both viewed the petition as an attempt to threaten, intimidate, and/or harass them into handling the case in the manner the petitioners wanted, and they both felt threatened. Specifically, Judge Gambell explained:

Q. Judge, did you receive any calls or view anything in the petition or these comments that we've looked at already that ever gave you any *1073 cause for concern for your personal safety?

A. Yes, sir. The kind of work that we do in this court places you in a situation where somebody is going to win most of time and somebody's going to lose.... So that concerned me that all these people are being told to call me. You could easily Google map me; find out where I am and it really—I was really concerned because I had just gotten into the case and before I could even do what I needed to do, I was being harassed by phone calls and **23 then this Twitter and all this other stuff. It did not make sense to me, but I was concerned about my safety.

When asked a similar question regarding whether she had personally received any telephone calls, Judge Amacker responded:

Let me see if I can break that down just to be accurate. I—no. We have things put in place at our offices that no one ever gets to me as the Judge without it first being vetted through usually my secretary and my staff attorney. So if there's ex-parte communications that come in, and we get a lot in Family Court. You get a lot of angry people and people calling in and it happens. Those never get to the Judge.

So I can't tell you who called, what they said, these types of things of who called in. I can say that hundreds of members of the public and attorneys have stopped by or called to let us know this was on the internet out of concern; out of concern for us. They just wanted to let my staff know or me know. Stop me on the street, in the hallway, whatever, out of concern and horror—the horrified was the public and the attorneys that saw this. And still are.

Reviewing all the evidence, we conclude the telephone calls, the email, and the faxed petitions constitute prohibited *ex parte* communication induced and/or encouraged by respondent. Coupled with her social media postings, we further conclude respondent's online activity amounted to a viral campaign to influence and intimidate the judiciary, including this Court, in pending, sealed domestic litigations by means prohibited by law and through the actions of others. Accordingly, we find the evidence clearly and convincingly shows respondent's conduct in this regard violated Rules 3.5(a) and (b) Rules 3.5(a) and (b) and Rule 8.4(a) of the Rules of Professional Conduct Rule 8.4(a) of the Rules of Professional Conduct.

Dissemination of False and Misleading Information

The ODC alleges respondent “disseminated false, misleading and/or inflammatory information through the internet and social media about Judge Deborah Gambrell and Judge Dawn Amacker in pending cases wherein Respondent was counsel of record and/or had a personal interest.” It further **24 alleges respondent “also made false and misleading statements in multiple motions to recuse Judge Amacker.” The ODC concludes these actions violate Rule 8.4(c) Rule 8.4(c).

Rule 8.4(c) Rule 8.4(c) provides:

It is professional misconduct for a lawyer to:

- (c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

In finding respondent violated this rule, the hearing committee made several specific factual findings:

- (1) Respondent stated Judge Gambrell ignored “overwhelming evidence” of abuse and “refuses to even look at the evidence, and has now ordered the girls be sent to unsupervised *1074 visitation with their father.” The committee found respondent's statement was a “gross mischaracterization” of the facts.
- (2) Respondent stated Judge Amacker “in Louisiana also refused to protect the girls, even though she has the power and authority to protect them ...” The committee found this statement was false and inflammatory, as Judge Amacker did not refuse to protect the children, but

instead stayed the Louisiana proceedings on the ground related proceedings were already pending in Mississippi.

- (3) Respondent posted audio recordings of the minor children purportedly talking about abuse and stated that on August 16, 2011, Judge Gambrell “once again refused to admit all of Raven’s evidence, including these recordings, and ordered that [H] and [Z] have visits with their father in the house where they both report having been molested by their father in the past.” The committee found this statement was clearly false, as the tapes were not offered into evidence on August 16, 2011; therefore, Judge Gambrell could not have “refused to admit” them.
- (4) Respondent stated, “Judge Dawn Amacker in the 22nd Judicial District Court for the Parish of St. Tammany in Louisiana is also refusing to hear any evidence or to protect [H] and [Z], even though the law requires her to have a hearing and to take evidence.” The committee found this statement was false, because Judge Amacker had stayed the Louisiana proceedings in light of the Mississippi proceeding.
- (5) Respondent stated the Louisiana court (Judge Amacker presiding) “has voluntarily and expressly admitted its extreme bias and conflict in recusing itself in two other cases, which grounds are equally applicable in the case at ****25** bar.” The committee found this statement was false, as Judge Amacker’s judgment stated, “[t]he Court hereby voluntarily recuses itself due to the possibility that the judge may be called as a witness in the proceedings referenced by counsel, and out of an abundance of caution and to avoid the appearance of impropriety.”

In her brief, respondent takes the position she did not make any knowingly false statements. While respondent acknowledges she may have made some factual mistakes, such as with regard to the admission of the audio tapes, she claims this does not amount to making an intentionally false statement. She further contends her characterization of the judges’ actions in this case was not false, but simply based on her subjective analysis of their actions.

However, we find the record evidence supports the ODC’s charges in this regard. Respondent’s online posting and twitter feeds are littered with misrepresentations and outright false statements. Although she claims they were not made intentionally, respondent even concedes to the misrepresentations. Moreover, even after learning of the

“mistakes” through her own review of the underlying records, respondent made no attempt to remedy them, but merely took the position they were her client’s subject view of the proceedings, raising the level of her continuous posting and twitter conduct from a simple mischaracterization into a knowing and arguably intentional dissemination of false information. This is particularly true regarding the judges’ “refusal” to “hear,” “view,” or “admit” evidence, namely the audio recordings, which were never offered into evidence at any proceeding before either Judge Gambrell or Judge Amacker.

1075** Regarding the recusal notices, the signed orders of recusal contain no express admissions of “extreme bias.” Respondent attempts to excuse her statements as merely her subjective interpretation of Judge Amacker’s action in recusing herself, arguing the recusal itself is an expression of bias. Moreover, she styles her motion to recuse a pleading, casting Judge Amacker as the adverse party, *26** and argues that by not outright denying the allegations therein, Judge Amacker essentially admitted to the extreme bias. Rather than an answer, however, Judge Amacker’s recusal is an order of the court, and as well established, those matters not expressly granted in a judgment or order of a court are considered denied.  *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 07–2371, p. 12 (La.7/1/08), 998 So.2d 16, 26 (relief sought presumed denied when judgment silent as to claim or demand). Accordingly, we find the evidence clearly and convincingly shows respondent’s repeated false statements concerning Judge Amacker’s “expressly admitted extreme bias” were not mere misrepresentations, but false statements knowingly and intentionally made. Accordingly, we find the evidence clearly and convincingly shows a violation of Rule 8.4(c) of the Rules of Professional ConductRule 8.4(c) of the Rules of Professional Conduct.

Conduct Prejudicial to the Administration of Justice

Lastly, the ODC alleges respondent’s overall conduct—utilizing the internet and social media both in an attempt to influence the judges and to expedite achievement of her goals in the case—was prejudicial to the administration of justice and violated Rule 8.4(d)Rule 8.4(d).

Rule 8.4(d)Rule 8.4(d) provides:

It is professional misconduct for a lawyer to:

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(d) Engage in conduct that is prejudicial to the administration of justice.

In determining respondent violated this rule, the hearing committee found:

Respondent used the internet and social media in an effort to influence Judge Gambrell's and Judge Amacker's future rulings in pending litigation. Respondent's conduct threatened the independence and integrity of the court and was clearly prejudicial to the administration of justice.

Respondent also used her Twitter account to publish multiple tweets linking the audio recordings of the minor children discussing alleged sexual abuse; to publish false, ****27** misleading and inflammatory information about Judge Gambrell and Judge Amacker, and to promote the online petition, all of which was designed to intimidate and influence the judges' future rulings in the underlying proceedings.

Respondent knowingly if not intentionally embarked on a campaign using internet, social media and *ex parte* communication specifically designed to intimidate and to influence the judges' future rulings in pending litigation. Her online campaign to influence judges in pending litigation threatened the independence and integrity of the judiciary. Respondent's conduct also caused the judges concern for their personal safety.

In her brief, respondent asserts there is no evidence any of her statements were intended to be intimidating or threatening to the judges. Rather, she claims her statements were within the scope of the First Amendment and were intended to "encourage the public, to extoll their elected judges to do justice, listen to the evidence, apply the law, and protect children."

[3] [4] We disagree and take strong exception to respondent's artful attempt to use the First Amendment as a shield against her clearly and convincingly proven ethical misconduct. As the United ***1076** States Supreme Court noted in  *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991):

It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to "free speech" an attorney has is extremely circumscribed. An attorney may not, by speech or other conduct, resist a ruling of

the trial court beyond the point necessary to preserve a claim for appeal.  *Sacher v. United States*, 343 U.S. 1, 8, 72 S.Ct. 451, 454, 96 L.Ed. 717 (1952) (criminal trial);  *Fisher v. Pace*, 336 U.S. 155, 69 S.Ct. 425, 93 L.Ed. 569 (1949) (civil trial). Even outside the courtroom, a majority of the Court in two separate opinions in the case of  *In re Sawyer*, 360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473 (1959), observed that lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be. There, the Court had before it an order affirming the suspension of an attorney from practice because of her attack on the fairness and impartiality of a judge. The plurality opinion, which found the discipline improper, concluded that the comments had not in fact impugned the judge's integrity. Justice Stewart, who provided the fifth vote for ****28** reversal of the sanction, said in his separate opinion that he could not join any possible "intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct."  *Id.*, at 646, 79 S.Ct., at 1388. He said that "[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech."  *Id.*, at 646–647, 79 S.Ct., at 1388–1389. The four dissenting Justices who would have sustained the discipline said:

"Of course, a lawyer is a person and he too has a constitutional freedom of utterance and may exercise it to castigate courts and their administration of justice. But a lawyer actively participating in a trial, particularly an emotionally charged criminal prosecution, is not merely a person and not even merely a lawyer."

....

"He is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense."  *Id.*, at 666, 668, 79 S.Ct., at 1398, 1399 (Frankfurter, J., dissenting, joined by Clark, Harlan, and Whittaker, JJ.).

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Likewise, in *Sheppard v. Maxwell*, where the defendant's conviction was overturned because extensive prejudicial pretrial publicity had denied the defendant a fair trial, we held that a new trial was a remedy for such publicity, but

“we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. *Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.*”

384 U.S., at 363, 86 S.Ct., at 1522 (emphasis added).

.....

****29** We think that the quoted statements from our opinions in *In re Sawyer*, 360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473 (1959), and *Sheppard v. Maxwell*, *supra*, rather plainly indicate that the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press in *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), and the cases which preceded it. Lawyers representing clients in pending cases are key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct. As noted by Justice Brennan in his concurring opinion in *Nebraska Press*, which was joined by Justices Stewart and Marshall, “[a]s officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice.” *Id.*, at 601, n. 27, 96 S.Ct., at 2823, n. 27. Because lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative. See, e.g., *In re Hinds*, 90 N.J. 604, 627, 449 A.2d 483, 496 (1982) (statements by attorneys of

record relating to the case “are likely to be considered knowledgeable, reliable and true” because of attorneys' unique access to information); *In re Rachmiel*, 90 N.J. 646, 656, 449 A.2d 505, 511 (N.J.1982) (attorneys' role as advocates gives them “extraordinary power to undermine or destroy the efficacy of the criminal justice system”). We agree with the majority of the States that the “substantial likelihood of material prejudice” standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials.

Gentile, 501 U.S. at 1071–73, 111 S.Ct. at 2743–44.

Applying this reasoning herein, respondent, as an officer of the court, is held to a higher standard than a non-lawyer member of the public. As we stated in the matter of *In re: Thomas*, 10–0593, p. 11 (La.6/25/10), 38 So.3d 248, 255:

An attorney is trained at law, has taken an oath, assumes a position of public trust and holds himself out to the public as being fit and capable of handling its funds and problems. The attorney has assumed a position of responsibility to the law itself and any disregard for the law is more serious than a breach by a layman or non-lawyer. He is an officer of the Court.

By holding the privilege of a law license, respondent, along with all members of the bar, is expected to act accordingly. This is particularly so when a lawyer is actively participating in a trial, particularly an emotionally charged child custody proceeding. Respondent in this instance “is not merely a person and not even merely a lawyer. [She] is an intimate and trusted and essential part of the machinery of justice, an ‘officer of the court’ in the most compelling sense.” See *Gentile*, *supra*. And as such, her “[o]bedience to ethical precepts require[d] abstention from what in other circumstances might be constitutionally protected speech,” to preserve the integrity and independence of the judicial system. *Id.*

The appropriate method for challenging a judge's decisions and evidentiary rulings, as respondent even conceded, is through the writ and appeal process, not by starting a social media blitz to influence the judges' and this Court's rulings in pending matters and then claiming immunity from discipline through the First Amendment.

***1078** Rather than protected speech, the evidence clearly and convincingly shows respondent's online and social media campaign was nothing more than an orchestrated effort to inflame the public sensibility for the sole purpose of influencing this Court and the judges presiding over the pending litigation. As such it most assuredly threatened the independence and integrity of the courts in the underlying sealed domestic matters. Moreover, the testimony irrefutably establishes both presiding judges perceived the campaign as a threat to their personal security and as an attempt to intimidate and harass them into ruling as the petitioners wanted.

We also find the ultimate result of the viral blitz was the recusal of both judges from the underlying domestic cases as well as other cases involving ****31** respondent as counsel. As Judge Gambrell testified, to which Judge Amacker would agree:

A Judge is a human being also and it is very difficult for me to feel that I am exercising my integrity and being independent when I'm being constantly barraged by allegations that are just completely false. It is very difficult for a Judge to make decisions without knowing that all of this intimidation and harassment is out there.

It is insulting to me as an—well, I practiced law for 30 years. I'm a mother of six daughters. It would have been better for [respondent] just to drive across the state line and come sit in the court and actually see what was being done. As an advocate for the children or whatever as opposed to making these malicious attacks to the point—I think it was designed to run me from the case. Intimidate me to the point that I felt that there was no way to be fair or impartial.

That's basically what it did. I tried—I've never been one to run away from doing what I've been called to do, but this was just more than I could bear. I have a family like everybody else and it just would not stop. My—I wanted to stop it at the Show Cause hearing so that I could just look at everybody and say look, this is not how we do this. Give me a chance to look at this and let everybody have access to the court system. But everybody just went on their own

tears and it took away my ability to really do anything with the case.

Though not as blatantly offensive as the blitzing itself, this result nevertheless prejudiced the administration of justice by causing undue delays in numerous time sensitive matters, some of which these judges had presided over for a long period of time. Therefore, we find respondent's overall conduct in this regard was prejudicial to the administration of justice in violation of Rule 8.4(d)Rule 8.4(d).

Accordingly, having found the ODC has proven by clear and convincing evidence respondent's conduct violated Rule 3.5(a) and (b)Rule 3.5(a) and (b) and Rule 8.4(a), (c), and (d)Rule 8.4(a), (c), and (d), we must determine the appropriate sanctions.

Sanctions

[5] [6] [7] In determining a sanction, we are mindful disciplinary proceedings are not primarily to punish the lawyer, but rather are designed to maintain high standards ****32** of conduct, protect the public, preserve the integrity of the profession, and deter future misconduct.  *Louisiana State Bar Ass'n v. Reis*, 513 So.2d 1173, 1177–78 (La.1987). The discipline to be imposed depends upon the facts of each case and the seriousness of the offenses involved considered in light of any aggravating and mitigating circumstances. *Louisiana State Bar Ass'n v. Whittington*, 459 So.2d 520, 524 (La.1984).

Louisiana Supreme Court Rule XIX, § 10(C) states, in imposing a sanction after ***1079** a finding of lawyer misconduct, this Court shall consider four factors:

- (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession;
- (2) whether the lawyer acted intentionally, knowingly, negligently;
- (3) the amount of actual or potential injury caused by the lawyer's misconduct; and
- (4) the existence of any aggravating or mitigating factors.

As required, we turn now to a consideration of each factor.

Violated Duties

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As the hearing committee and disciplinary board both found, there is no question respondent's misconduct violated a duty to the legal system, as well as the public. More importantly, we find her misconduct also violated a duty to the children in the underlying domestic litigation. In child custody and abuse cases, our courts are extremely cognizant of the need to protect the identity and privacy of the children and their best interest is always at the forefront of any litigation involving their welfare. *State ex rel. S.M.W.*, 00-3277, p. 21 (La.2/21/01), 781 So.2d 1223, 1238 ("primary concern of the courts and the State remains to secure the best interest for the child"); La. Civ.Code art. 131 (custody awarded "in accordance with the best interest of the child"); *Kieffer v. Heriard*, 221 La. 151, 160, 58 So.2d 836, 839 (1952) ("well established that the paramount consideration ... is the welfare and best interest of the child"). This is why such cases are often sealed as the litigations herein were, one of which was sealed at the request of respondent. With that being said, we take umbrage with respondent's online and social media activity that not only released the names of these children, but linked their audio conversations with their mother detailing their abuse allegations and posted their faces on the world wide web for anyone to see. We find very telling in this regard the following discussion respondent had with ODC counsel in her sworn statement:

Q. And so part of the concern is in now in Louisiana in a knowingly sealed matter because you are the one who asked it be sealed, I assume it was granted and was sealed, that now in the public arena you're discussing and complaining about those very proceedings which are sealed.

A. Well, I guess my understanding of sealing records is that you would be sealing the sensitive evidence or information in the record, not the fact that the record exists itself. So we never and I would not allow the drawings that were submitted as part of that record to be made part of the social —

Q. Okay.

A. —you know,—

Q. So the drawings and none of the excerpts from the journal, none of that was ever—

A. No.

Q. —linked or attached or images uploaded and connected with any of the social media sites?

A. No, absolutely not.

Q. Okay.

A. They've very compelling images but I believe they belong to H. So I wouldn't—didn't want to do that to her.

We agree, but would also extend respondent's reasoning and concerns to the children's audio recordings, their photos, and their names, some of which are still ****34** accessible even today. In her misguided attempt to protect the children, respondent intentionally facilitated their exposure, breaching what we would consider one of the greatest duties owed by an attorney in a domestic litigation involving ***1080** minor children and allegations of sexual abuse.

Intentional, Knowing, Negligent Action

The ABA Standards define the terms intent, knowledge, and negligence. Intent is defined as "the conscious objective or purpose to accomplish a particular result." Knowledge is "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." Whereas negligence is "the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation."

Both the hearing committee and disciplinary board found the evidence proved respondent acted knowingly if not intentionally. As to the internet and social media campaign, respondent repeatedly admitted her purpose was to increase the chance of this Court granting her writ, to "influence the judges to apply the law and look at the evidence ... through whatever means available," and "to get local and national media attention on this particular case." In her sworn statement, respondent explained her reasons for employing her social media blitz:

Q. ... you've afforded yourself the appeal route although we discussed at least in the one instance where that was not, didn't give the results that y'all were still looking for.

A. Correct.

Q. But you understand that's how our system is set up, and you go to district court and if the ruling is wrong and or you disagree with it factually or legally and you have grounds to then you appeal and you can go up to the circuit court and

to the Louisiana Supreme Court. What I don't understand is or what I'm trying to understand is **35 why the two pronged attack. I mean you know you have access to appeal Judge Amacker—

A. Uh-huh.

Q. —since that's the case you're involved in, okay, and if she's wrong to get her ruling overturned, right?

A. Right.

Q. And y'all availed yourself of that?

A. Correct.

Q. Why also then used the online slash social media attack to effect her rulings at the district court level?

A. Yeah, well, you know, my initial thing that I wanted to say was why not because we're talking about little kids here and used every available resource to try and protect them. So as a general response to your question that would be my answer as to why I would use any available and appropriate tactic to help these kids. Whether or not I thought—I mean at the moment the—I think the social pressure that, you know, we thought—because the appeal process is a long process, in the meantime the kids are being exposed, you know, and they're not being protected. So I think maybe the better answer to your question is that our concern was that even if we were successful on the appeal or the writ it was going to take a while and in fact it did. I think it took up two months, two maybe two and a half months. And even if we had been successful that would have been two and a half months where these children were being exposed to this trauma and we were just trying to do anything we could to protect them.

Q. Did you ever think that this—the kind of social media approach that there was something wrong with it or that it jeopardized you?

A. I wanted to be careful that I didn't do anything inappropriate. I understand *1081 that I'm a lawyer and that I have to protect, you know, that my—I'm very, very, very serious about my own ethics and my own integrity. So—but, you know, I served in the military, I have a very strong sense of what it means to be a U.S. citizens and I absolutely believe in being active and pro-active and just standing up and taking a voice. I'm standing up against what I do believe is wrong in an appropriate manner and I didn't see anything wrong with reaching out to other citizens and

saying I have a problem with this, do you agree with me, and if you do come join me. I think that's **36 just, you know, inherently American. So, no, I guess the short answer is no, did I proceed with caution, yes, I did. I had—I had to have a sit down with myself about whether or not how involved I wanted to be in drafting the petition. But after considering it, you know, Raven needed my help. She didn't, you know, she was too close to it emotionally to be coherent so I helped her shape her ideas. I helped her be more coherent in what she wanted to say. And I have no—I can't regret doing that.

We agree this evidence demonstrates both a level of intent and knowledge. As previously discussed, we likewise find the evidence demonstrates respondent acted knowingly, if not outright intentionally, in the dissemination of false information on social media/internet and in her motions to recuse as well as in her request for public action in calling the presiding judges to express concern and outrage.

Regarding the actual faxing of the petition to the Marion County Court and Judge Amacker's office, we find respondent's participation was knowingly made, *i.e.*, with “conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.” Without question, once respondent knowingly and intentionally signed the petition, it was published and released to anyone with access to the internet. Her act in signing an online petition directly related to a pending litigation in which she was enrolled as counsel thus rises to the level of knowledge, because although she did not fax the petition, she, given her internet and social media suavity, clearly was aware the petition she signed could and might very well be printed and sent to the judges and courts to whom the petition was addressed. Though “uncomfortable” upon learning of the fax shortly after it was sent, respondent could not admit she was surprised. And when asked if she said anything that either directed or encouraged her client to fax the petition, she conceded:

I can't remember anything I said that was directly encourage [sic] her but I don't know that I did anything to discourage her, you know, honestly. You know, there is a lot of frustration with this case....

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****37** Thus, we find this evidence does demonstrate knowledge on respondent's part.

Actual or Potential Harm

Furthermore, we find the evidence shows respondent's conduct caused actual and potential harm to the independence and integrity of the judicial system and also caused the judges concern for their personal well-being. We also find her exposure of the children on the world wide web extremely harmful.

Aggravating and Mitigating Factors

[8] After reviewing the record, we adopt the hearing committee's and disciplinary board's findings on the aggravating and mitigating factors in this case. In aggravation, we find respondent: (1) acted dishonestly and selfishly, (2) engaged in a pattern of misconduct involving multiple offenses, (3) had substantial experience in ***1082** the practice of law having been admitted to the practice of law since October 2000, and, most importantly, (4) absolutely refuses to acknowledge the wrongful nature of her conduct or show any remorse for her actions. It is this utter lack of remorse that astonished this Court when she appeared before us for oral argument. Her defiant attitude as to the rules of our profession vis-à-vis her First Amendment rights was clearly evident in her response to questions posed by several members of the Court. Completely unapologetic for her misconduct, respondent made it abundantly clear she would continue to use social media and blogs to effect her agenda to bring about the changes she sought in the underlying cases. Respondent will not admit to any wrong doing whatsoever.

There can be no greater professional calling than to stand as an attorney at the bar of justice and assert as well as defend the rights of citizens. With that being said, we have long recognized the utmost importance of our rules of professional conduct to maintain and preserve the dignity and integrity of our time-honored profession. Any lawyer privileged to stand at the bar and pursue this noble ****38** endeavor has taken an oath to abide by those rules. This Court will not tolerate respondent's defiant attitude and unapologetic actions, which make a mockery of our rules and traditions.

[9] In imposing sanctions we also look at any mitigating factors. The only mitigating factor in this case is respondent's absence of a prior disciplinary record.

While there is no Louisiana case directly on point with the manner in which respondent facilitated her misconduct, *i.e.*, through social media and the internet, we do find the serious nature of her actions requires serious sanction. In these cases, we look to the ABA Standards for guidance in determining the baseline sanction. Under the standards relevant herein, disbarment is generally appropriate when a lawyer:

- (1) makes an ex parte communication with a judge or juror with intent to affect the outcome of the proceeding, and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceedings; or
- (2) engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

ABA Standards 6.31(b) and 5.11(b), respectively. Suspension is generally appropriate when a lawyer:

engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.

ABA Standard 6.32. Accordingly, the applicable baseline sanction under the ABA Standards ranges from suspension to disbarment.

Although the manner in which respondent violated the applicable rules of professional conduct is novel, the misconduct—*ex parte* communication, dissemination of false and misleading information, and conduct prejudicial to the ****39** administration of justice—is hardly so. As both the hearing committee and disciplinary board properly noted, our prior jurisprudence provides us guidance in dealing with professional misconduct involving lawyers who engage in improper communications with and about judges and in conduct dishonest and prejudicial to the administration of justice.

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For example, in the matter of  ***1083** *In re: White*, 08–1390, p. 14 (La.12/02/08), 996 So.2d 266, 274, this Court held “disbarment is the applicable baseline standard for respondent’s conduct in engaging in *ex parte* communications with the trial judge presiding over his client’s pending domestic litigation.” This Court disbarred attorney White for, among other things, his *ex parte* communication with the presiding judge, Ronald Bodenheimer, about seafood pricing information.

In the matter of  *In re: Lee*, 07–2061, p. 10 (La.02/16/08), 977 So.2d 852, 858, this Court stated “the language of Rule 3.5(b) clearly and broadly prohibits all *ex parte* communication with a judge during the course of a proceeding.” The attorney therein was suspended for six months, with all but 45 days deferred, subject to the condition he attend Ethics School and obtain five additional hours of continuing legal education in professionalism, for his misconduct which included extremely vile and insulting remarks to the trial court and an *ex parte* communication with the judge during the course of a proceeding. This Court noted his behavior presented a common theme of “lack of respect for the dignity, impartiality, and authority of the district court.”  *Lee*, 07–2061 at p. 10, 977 So.2d at 858.

And in  *Louisiana State Bar Ass’n v. Harrington*, 585 So.2d 514 (La.1990), this Court found a lawyer need not represent a party in a case to be subject to the Rule 3.5(b) proscription against *ex parte* communication and suspended an attorney for 18 months for making false statements, engaging in conduct that unduly embarrassed, delayed or burdened a third person, and engaging in improper *ex parte* communication with a judge. Considering the attorney’s conduct “caused ****40** no harm to his clients and his inexperience and remorse,” this Court reduced the suspension to nine months on rehearing.  *Harrington*, 585 So.2d at 524.

We likewise suspended an attorney for six months, with all but 30 days deferred, for making false statements about judges in a hypothetical attached to an appellate brief in which the attorney described a judge’s ruling as having “violated not only controlling legal authority but the very principals [sic] (honesty and fundamental fairness) upon which our judicial system is based.”  *In re: Simon*, 04–2947, p. 4 (La.6/29/05), 913 So.2d 816, 819. In the matter of  *In re: Larvadain*, 95–2090 (La.12/8/95), 664 So.2d 395, 395–96, this Court

suspended a lawyer for three months, fully deferred, and placed him on unsupervised probation for one year with special conditions, for having accused the judge of being a racist while cursing him, threatening him, and attempting to intimidate him.

Notably, we also suspended an attorney for one year for accusing a judge of being “dishonest, corrupt and engaging in fraud and misconduct,” and for causing his unfounded accusations to be published in the local newspaper.

 *Louisiana State Bar Ass’n v. Karst*, 428 So.2d 406, 408 (1983).

As these cases demonstrate, the discipline for similar misconduct corresponds with the ABA recommended baseline sanction ranging from suspension to disbarment. Respondent’s misconduct is further distinguishable because of her use of the internet and social media to facilitate her misconduct. As a result, the petition and associated offensive postings had and still have the potential to reach a large number of people world-wide and remain present and accessible on the world wide web even today. Coupled with her complete lack of remorse and admitted refusal to simply allow our system of review to work without seeking outside interference, respondent’s misconduct reflects a horrifying lack of respect for the dignity, impartiality, and authority of our courts and our judicial process as a whole. As noted by the United State Supreme Court:

***1084 **41** The vigorous advocacy we demand of the legal profession is accepted because it takes place under the neutral, dispassionate control of the judicial system. Though cost and delays undermine it in all too many cases, the American judicial trial remains one of the purest, most rational forums for the lawful determination of disputes. A profession which takes just pride in these traditions may consider them disserved if lawyers use their skills and insight to make untested allegations in the press instead of in the courtroom. But constraints of professional responsibility and societal disapproval will act as sufficient safeguards in most cases.

 *Gentile*, 501 U.S. at 1058, 111 S.Ct. at 2736. Respondent’s social media campaign conducted outside the sealed realm of the underlying judicial proceedings constitutes, in our view, an intolerable disservice to these traditions and our judicial system, which the constraints of our rules of professional conduct seek to safeguard against. Accordingly, we find

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her ethical misconduct warrants the highest of sanction—disbarment.

DECREE

Upon review of the findings and recommendations of the hearing committee and the disciplinary board, and considering the record, briefs, and oral arguments, it is ordered that Joyce Nanine McCool, Louisiana Bar Number 27026, be and hereby is disbarred. Her name shall be stricken from the roll of attorneys and her license to practice law in the State of Louisiana shall be revoked. All costs and expenses in the matter are assessed against respondent in accordance with Louisiana Supreme Court Rule XIX, § 10.1, with legal interest to commence thirty days from the date of finality of this Court's judgment until paid.

WEIMER, Justice, concurs in part and dissents in part and assigns reasons.

GUIDRY, Justice, concurs in part and dissents in part.

CRICHTON, Justice, additionally concurs and assigns reasons.

CANNELLA, Justice, concurring in part and dissenting in part.

WEIMER, J., concurring in part, dissenting in part.

I agree with the majority that the respondent has engaged in professional misconduct. However, I find some aspects of respondent's conduct amounted to constitutionally protected speech, for which respondent cannot be sanctioned. Furthermore, I find the majority's sanction of disbarment to be disproportional to respondent's misconduct.

The majority finds that the respondent's online and social media campaign was an orchestrated effort to inflame the public sensibility and to direct public criticism toward the judges presiding over child custody litigation in both Louisiana and Mississippi. I do not doubt this was the respondent's motivation. I also have no doubt that the respondent was wrong on several points for which she sought to have the public become incensed. Contrary to respondent's internet postings, the Mississippi judge did not ignore audio recordings of the children. Rather, the recordings were never offered into evidence in the Mississippi proceeding. Similarly,

and contrary to respondent's postings, the Louisiana judge did not ignore evidence because proceedings in Louisiana were appropriately stayed in deference to the proceedings pending in Mississippi. After the Louisiana judge realized she would likely be a witness in the respondent's disciplinary proceedings, the judge recused herself “to avoid the appearance of impropriety” in two unrelated cases in which respondent ***1085** was counsel of record. However, the respondent followed this up by filing motions in two other unrelated cases in which the respondent misrepresented the judge had recused herself because of the judge's “extreme bias” against the respondent.

Making misrepresentations in court pleadings is sanctionable. The misrepresentations within the respondent's online and social media campaign and the fact that they were made by a lawyer representing the mother's custody interests are also sanctionable. See  *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1038, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991) (upholding the ability of a state supreme court to sanction an attorney who “knew or reasonably should have known his remarks created a substantial likelihood of material prejudice” to a judicial proceeding). The misrepresentations in respondent's statements justify a sanction under Rule 3.5Rule 3.5¹ for the substantial likelihood it would prejudicially disrupt the child custody proceedings, “since lawyers' statements are likely to be received as especially authoritative.”  *Id.* at 1074, 111 S.Ct. 2720. Also, to the extent respondent maintained internet resources, such as websites and social media, directing petitions to be sent to the Louisiana and Mississippi judges, I construe respondent's actions as sanctionable ex parte communications in violation of Rule 3.5Rule 3.5.² This court's majority goes further, however, and sanctions the very acts of criticizing judges and inspiring public criticism toward judges. In so doing, the majority impermissibly sanctions the respondent for engaging in constitutionally protected speech.

As the Court in *Gentile* explained, “[t]here is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment.”  *Id.* at 1034–35, 111 S.Ct. 2720. Furthermore, “limits upon public comment about pending cases are ‘likely to fall not only at a crucial time but upon the most important topics of discussion.’ ”  *Id.* at 1035, 111 S.Ct. 2720, quoting  *Bridges v. California*, 314 U.S. 252, 268, 62 S.Ct. 190, 86 L.Ed. 192 (1941).

Indeed, because of the adversarial nature of our system of justice, criticism of judges is an expected part of the judicial system. Criticism of judges takes place regularly by parties who perceive they have been aggrieved by judges' decisions. The appeals process actually requires parties—and the lawyers who represent them—to identify and criticize the aspects of judicial decisions with which they disagree. Had the respondent not peppered her criticism with misrepresentations, engaged in ex parte communications, engaged in conduct designed to gain an unfair advantage in on-going litigation, and broken a court-ordered seal imposed to protect confidentiality, the respondent's online criticisms of the judges' handling of the child custody matter would likely have ***1086** been fully protected speech.³ As the Supreme Court explained in  *Bridges*, 314 U.S. at 270–71, 62 S.Ct. 190:

The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

Here, the respondent perceived there to be mistreatment of her client's children and looked to the judicial system to address that mistreatment. In light of her evaluation of the situation, respondent's initial efforts to invoke judicial action were both expected and appropriate. However, as an officer of the court, a lawyer must abide by the principle that cases should be decided by careful deliberation and application of the facts to the law, not by public clamor. Therefore, after the litigation was complete, the respondent would have been entitled to disseminate appropriate criticism—on the internet if she preferred—that the courts ignored the rule of law, if her representations had been true. But they were not.

Respondent cannot even lay claim to holding a reasonable belief in the veracity of some of her most significant criticisms. As noted earlier, there was simply no evidence that the Mississippi court had ignored tape recordings, which allegedly revealed child abuse, when those recordings had never been submitted for the court's consideration. I emphasize this example, because I believe it underscores that the respondent is passionate in her belief there is a need for society to prevent child abuse. Passionate belief is usually preferable to apathy and, regarding the need for society to prevent child abuse, only an unreasonable person would argue

in favor of apathy. In every given case as to whether abuse has actually occurred and must be stopped, society has chosen the courts to be the ultimate arbiters. Because respondent, in her privileged role as a lawyer, is an officer of the court, both society and the government serving it have a justified expectation that officers of the courts will temper their public criticisms with truthful statements. See  *Gentile*, 501 U.S. at 1031, 111 S.Ct. 2720 (explaining that lawyers “are key participants” in the justice system, “and the State may demand some adherence to that system's precepts in regulating their speech and conduct.”).

Respondent certainly did not champion the rule of law in her handling of information relating to her client's children. Respondent sought and obtained the sealing of the record in a case dealing with the children. However, respondent later released information in violation of the seal that she had obtained from the judicial system.

Therefore, I concur with the majority inasmuch as I find discipline is warranted for respondent's misrepresentations, ex parte communications during on-going litigation, and breaking of a court-ordered seal. I dissent, however, from the majority's inclusion of respondent's acts of online criticism (apart from the impermissible content just noted) as sanctionable conduct.⁴

***1087** I further dissent as to the sanction. The Office of Disciplinary Counsel (ODC) recognizes that “[t]here is no Louisiana Jurisprudence addressing misconduct similar to Respondent's” and relies on the jurisprudence of two other states⁵ to support the recommended sanction of one year and one day suspension. While it is true that the novelty in Louisiana of the issues in this case presents certain challenges, this court is not without guidance and that guidance does not point to the disbarment the majority now imposes.

Specifically, the ABA Standards for Imposing Lawyer Sanctions address violations of a lawyer's duties to the legal system. Respondent's violations of her duties to the legal system are the crux of this case, even under the majority's analysis. However, under the rubric of “Improper Communications with Individuals in the Legal Systems,” ABA Standard 6.32 provides a baseline sanction of a suspension for an ex parte “communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential

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interference with the outcome of the legal proceeding.” Under the same rubric of improper communications, disbarment is reserved for an ex parte communication which “causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding.” ABA Standard 6.31(b). However, in its prosecution of this case, the ODC did not charge respondent with violating Rule 3.6⁶ or even allege that respondent’s *1088 actions created a danger of imminent and substantial harm. Thus, the baseline sanction is suspension because of the potential for harm rather than a showing of actual harm. See ABA Standard 6.32; compare ABA Standard 6.31(b).

In contrast to these standards establishing a baseline of suspension, the majority’s sanction analysis relies on  *In re White*, 08–1390 (La.12/02/08), 996 So.2d 266, 274, in which this court determined a lawyer’s ex parte communications fell within a baseline sanction of disbarment. The majority presently describes our analysis in *In re White* as turning on the fact that the ex parte communication was “about seafood pricing information.” *In re McCool*, No. 15–0284, op. at 1083 (La.06/30/15). While it is true that seafood prices were one topic of the lawyer’s ex parte communications in *In re White*, the majority presently fails to mention that the seafood pricing information supplied by the lawyer was stipulated to be “relatively useless” to the judge and, therefore, our finding in *In re White* that the baseline sanction for certain ex parte communications was disbarment actually rested on the lawyer engaging in other communications.  *In re White*, 08–1390 at 7, 996 So.2d at 270. To benefit his employer in a pending domestic dispute case, the lawyer engaged in ex parte communications to arrange for providing lavish gifts to a judge and his family. *Id.* at 7–8,  996 So.2d at 270–71. Specifically, the lawyer stipulated to the following ex parte communications with Judge Bodenheimer, which were found to have been made with the intent to benefit the lawyer’s client, restaurateur Al Copeland:

14. During the course of the Copeland/Hunter domestic relations proceedings, Bodenheimer requested and respondent provided complimentary appetizers and refreshments at one of Copeland’s restaurants to Bodenheimer’s daughter for a birthday. Although it was (and is) a regular and common practice of Copeland’s restaurants to provide complimentary food and beverages to various members of the public,

respondent acknowledges that he should have declined Judge Bodenheimer’s request.

15. Additionally, on another occasion, respondent provided promotional gift cards for complimentary food and refreshments at a Copeland’s restaurant to members of Bodenheimer’s staff during the time that the Copeland/Hunter proceedings were then pending. Although it was (and is) a regular and common practice of Copeland’s restaurants to provide complimentary food and beverages to various members of the public, respondent acknowledges that he should have declined to furnish these promotional gift cards.

 *In re White*, 08–1390 at 7–8, 11–12, 996 So.2d at 270, 272–73.

Here, and unlike *In re White*, there has been no allegation that the respondent engaged in ex parte communications as part of a *quid pro quo* exchange to curry favor with a judge during a pending case. Aside from *In re White*, which plainly deals with misconduct of a more egregious nature than the misconduct here, the majority’s sanction analysis relies on cases in which this court suspended lawyers who engaged in ex parte communications. *In re McCool*, No. 15–0284, op. at 1082–83 (citing  *In re Lee*, 07–2061, p. 11 (La.02/26/08), 977 So.2d 852, 858 (suspension of 6 months, all but 45 days deferred);  *In re Simon*, 04–2947 (La.06/29/05), 913 So.2d 816, 819 (suspension of 6 months, all but 30 days deferred);  *In re Larvadain*, 95–2090 (La.12/08/95), 664 So.2d 395 (suspension of 3 months, fully deferred);  *Louisiana State Bar Ass’n v. Harrington*, 585 So.2d 514 (La.1990) (suspension of 18 months); and  *Louisiana State Bar Ass’n v. Karst*, 428 So.2d 406 (La.1983) (suspension of 1 year)). To disbar the respondent here, *1089 considering the suspensions cited by the majority, reveals that disbarment is not only disproportionate to the misconduct, but is impermissibly punitive. See  *Louisiana State Bar Ass’n v. Reis*, 513 So.2d 1173, 1177–78 (La.1987) (noting the primary purposes of disciplinary proceedings are to maintain the high standards and integrity of the legal profession, protect the public, and to deter misconduct, rather than punish the lawyer).

The suspension of one year and one day recommended by the hearing committee, disciplinary board, and ODC is consistent with the baseline of suspension under the ABA Standards.

I would impose the recommended suspension, with one alteration. Because the misconduct here is novel in that this court has never directly addressed an attorney's use of social media and the internet and the ODC points to only two other states that have addressed misconduct involving improper internet postings, I would defer all but six months of the suspension subject to the condition that the suspension would be fully imposed if respondent were to commit misconduct during the period of active or deferred suspension. See *In re Raspanti*, 08–0954, p. 23 (La.3/17/09), 8 So.3d 526, 540 (finding as a significant mitigating factor that “we are issuing a sanction for a matter for which no one has been sanctioned previously.”).⁷ The recommended suspension is also supported by the mitigating factor that respondent has no disciplinary history in over 14 years as a member of the bar.

Thus, I respectfully concur in part and dissent in part, with the opinion of the majority.

GUIDRY, Justice, concurs in part and dissents in part.

I concur that respondent should be sanctioned, but I dissent as to majority's imposition of disbarment and I would impose a suspension of three years.

CRICHTON, J., additionally concurs and assigns reasons:

I wholeheartedly agree with the majority opinion in this matter. I write separately, however, to touch upon what I believe to be an outrageous disregard for the sacred profession we, as well as respondent, have chosen. The majority aptly notes that holding a law license is a great privilege. As United States Supreme Court Justice Benjamin Cardozo, then Judge on the Court of Appeals of New York, also stated almost a century ago: “Membership in the bar is a privilege burdened

with conditions.” *In re Rouss*, 221 N.Y. 81, 116 N.E. 782, 783 (1917). Those conditions are numerous, and do not come without great sacrifice. Respondent is an “ ‘officer of the court’ in the most compelling sense,”¹ as the majority so correctly finds, and consequently, she is held to a higher standard than a non-lawyer member of the public. She cannot confuse a First Amendment claim of the right to free speech with a serious and intentional violation *1090 of the Rules of Professional Conduct, which are rules that apply both to her and to every lawyer. Not only did her conduct cause major disruptions in the course of litigation, it also unnecessarily put members of the judiciary at risk.

But perhaps respondent's most astounding and egregious action is her complete and utter lack of remorse, and defiance in the face of her impending sanction. At oral argument of this matter, respondent admitted she did “not have any remorse for [my] conduct” and that she would “continue to speak out and advocate for change.” It is unfortunate that respondent does not seem to understand that being a zealous advocate does not equate to such repugnant disrespect for the system we are charged to honor and serve. It is for these reasons I agree with the majority's decision to impose the most serious of sanctions: disbarment.

CANNELLA, J., * concurring in part and dissenting in part. I dissent in part as to the sanction and would impose a three year suspension, but I concur in all other respects.

All Citations

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Footnotes

* Retired Judge James L. Cannella, assigned as Justice ad hoc, sitting for Hughes, J., recused.

¹ Respondent, a Mandeville attorney, is 52 years of age and was admitted to the practice of law in Louisiana in 2000.

² The children's names have been redacted from the record of this matter and only their initials are used to protect and maintain their privacy. All phone numbers and addresses for social media and internet sites have been redacted as well to further ensure their privacy.

- 3 To date, no law enforcement agency or court has found any merit to the serious allegations made against Raven's former husband.
- 4 In denying Raven's writ application, the court of appeal, with a panel composed of Judges Guidry, Pettigrew, and Welch, stated: "[o]n the showing made, we find no error."
- 5 Pursuant to a September 2, 2008 Agreed Judgment in the Mississippi case, the parties agreed and were ordered not to disclose any audio or video recordings of the minor children to anyone except counsel of record and the court, and not to make said recordings available to anyone except the appropriate investigatory agencies at their request. Respondent argues the Agreed Judgment does not bind her because she is not a party to the Mississippi proceeding, or counsel in the proceeding, or even an attorney licensed to practice law in Mississippi.
- 1 Rule 3.5 of the Louisiana Rules of Professional ConductRule 3.5 of the Louisiana Rules of Professional Conduct provides:

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.
- 2 The Rules of Professional Conduct prohibit a lawyer from utilizing others to do what a lawyer is prohibited from doing. See Rule 8.4(a)Rule 8.4(a).
- 3 Although the respondent's brief relies heavily on First Amendment protections of speech, during oral argument, the respondent's repeated comments about the possibility of losing her license to practice law tacitly recognize that a lawyer's speech is subject to regulation.
- 4 The majority finds that the respondent's "overall conduct" constitutes misconduct by "clear and convincing evidence." *In re McCool*, No. 15–0284, op. at 1075, 1078 (La.06/30/15). Thus, the majority sweeps both protected and un-protected speech into the category of sanctionable conduct.

I certainly share the majority's concern that unfounded criticism can impede the judicial process. As one commentator also has noted, "with increasing frequency ... attacks on the judiciary ... are purely ideologically driven. This type of 'criticism' ... undermines the rule of law by suggesting that judges are free to ignore the relevant facts or the applicable law to reach the outcome sought by a special interest group." Steven M. Puiszis, *The Need to Protect Judicial Independence*, 55 No. 4 DRI For Def. 1 (Apr.2013). Caustic though it may be, such speech even by a lawyer is protected by the First Amendment, as long as the speech does not, as it does here, contain misrepresentations or as the Supreme Court has explained, present a "substantial likelihood of material prejudice" to a case. 🚩 *Gentile*, 501 U.S. at 1037, 111 S.Ct. 2720.

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- 5 The ODC cited unpublished disciplinary cases. It cited the public reprimand ordered in *The Florida Bar v. Conway*, SC08–326 (Fla.10/29/08), 2008 WL 4748577, and administered by the Florida Bar in *The Florida Bar v. Sean William Conway*, TFB File No. 2007–51,308(17B), available at [https://www.floridabar.org/DIVADM/ME/MPDisAct.nsf/daToc!OpenForm&AutoFramed&MFL=Sean William Conway&ICN=200751308&DAD=Public Reprimand](https://www.floridabar.org/DIVADM/ME/MPDisAct.nsf/daToc!OpenForm&AutoFramed&MFL=Sean%20William%20Conway&ICN=200751308&DAD=Public%20Reprimand) (last visited 6/4/15).

In *Conway*, the lawyer maintained a website entitled “Judge Aleman’s New (illegal) ‘One–Week to prepare’ policy,” and referred to the judge throughout the website as an “EVIL UNFAIR WITCH.” *Conway*, TFB File No. 2007–51,308(17B). The reprimand stated: “although attorneys play an important role in exposing valid problems within the judicial system, statements impugning the integrity of a judge, when made with reckless disregard as to their truth or falsity, erode public confidence in the judicial system without assisting to publicize problems that legitimately deserve attention.”

The ODC also cited *In re: Kristine Ann Peshek*, M.R.23794 (Ill.5/18/10), available at <http://www.illinoiscourts.gov/SupremeCourt/Announce/2010/05181.pdf>, and accepting the petition for discipline available at <http://www.iardc.org/09CH0089CM.html> (last visited 6/4/15). According to the petition in *Peschek*, the attorney referred to a judge as “Judge Clueless” and referred to another judge as “a total a*****.”

- 6 Rule 3.6(a) of the Rules of Professional Conduct Rule 3.6(a) of the Rules of Professional Conduct prohibits a lawyer from “mak[ing] an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”
- 7 Noting the novelty of internet blogging, one commentator suggests the rules governing the legal profession currently fail to equate blogging with an ex parte communication. See Rachel C. Lee, Symposium: *Media, Justice, and the Law: Note: Ex Parte Blogging: The Legal Ethics of Supreme Court Advocacy in the Internet Era*, 61 Stan. L.Rev. 1535 (April 2009). Here, respondent’s conduct, such as her online petition, went beyond the type of commentary typically associated with blogging and, as earlier noted, I have no difficulty finding that the respondent has engaged in communications which violate the Rules of Professional Conduct. However, the commentary just cited underscores that this is a developing area of the law, a reality which weighs against imposing disbarment under the facts presented.
- 1  *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991) (internal citations omitted).
- * Retired Judge James L. Cannella, assigned as Justice ad hoc, sitting for Hughes, J., recused.

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508 B.R. 572

United States Bankruptcy Court, E.D. New York.

IN RE: Sunil PARIKH, Debtor.

John Desiderio, Plaintiff,

v.

Sunil Parikh, Defendant.

Case No. 807–72869–reg

|

Adv. Proc. No. 808–8062–reg

|

Signed April 17, 2014

Synopsis

Background: Judgment creditor filed motion for award of sanctions against Chapter 7 debtor, debtor's attorney, law firm for which attorney worked, and debtor's spouse, not only pursuant to Bankruptcy Rule 9011, but on various other theories.

Holdings: The Bankruptcy Court, [Robert E. Grossman, J.](#), held that:

[1] numerous inconsistencies between information disclosed in Chapter 7 petition and schedules and that disclosed in recently-filed Chapter 13 petition and schedules was sufficient to warrant imposition of Rule 9011 sanctions against debtor's attorney, for lack of reasonable pre-filing investigation;

[2] publication of decision finding that debtor's counsel had failed to conduct reasonable investigation prior to filing bankruptcy petition was sufficient Rule 9011 sanction;

[3] judgment creditor was not entitled to award of sanctions against debtor's attorney under statute authorizing bankruptcy court to issue “necessary or appropriate” orders, on an “unreasonable and vexatious multiplication” theory, or in exercise of court's inherent authority

[4] court would not exercise its discretion to shift costs;

[5] court would not impose monetary sanctions against debtor personally;

[6] debtor's spouse could not be sanctioned in exercise of bankruptcy court's inherent authority, absent evidence that she had violated specific order of bankruptcy court; and

[7] court would not exercise its discretion to impose contempt sanction for debtor's delay in appearing for Rule 2004 examination and in producing responsive documents.

Motion granted in part.

West Headnotes (44)

[1] Bankruptcy 📌 Frivolity or bad faith; sanctions

In deciding whether to exercise its discretion to impose Rule 9011 sanctions, bankruptcy court should be guided by purpose of such sanctions, which is to deter repetition of such conduct or comparable conduct by others similarly situated. [Fed. R. Bankr. P. 9011\(c\)\(2\)](#).

[12 Cases that cite this headnote](#)**[2] Bankruptcy** 📌 Frivolity or bad faith; sanctions

“Safe harbor” provision of Bankruptcy Rule 9011, which generally requires movant to give party an opportunity to cure his or her offending conduct before movant seeks Rule 9011 sanctions, does not apply when the offending conduct is the filing of bankruptcy petition. [Fed. R. Bankr. P. 9011\(c\)\(1\)\(A\)](#).

[4 Cases that cite this headnote](#)**[3] Bankruptcy** 📌 Frivolity or bad faith; sanctions

Awarding Rule 9011 sanctions on “improper purpose” theory requires a finding of subjective bad faith. [Fed. R. Bankr. P. 9011\(b\)\(1\)](#).

[2 Cases that cite this headnote](#)**[4] Bankruptcy** 📌 Frivolity or bad faith; sanctions

Award of Rule 9011 sanctions, on theory that attorney has failed to make reasonable inquiry into whether the claims asserted are “warranted in law,” utilizes an objective bad faith standard, that requires finding of frivolousness. [Fed. R. Bankr. P. 9011\(b\)\(2\)](#).

[1 Case that cites this headnote](#)**[5] Bankruptcy** 📌 Frivolity or bad faith; sanctions

While bankruptcy court may infer subjective bad faith from a frivolous filing, or one that is entirely without merit, frivolity is not necessary prerequisite to award of Rule 9011 sanctions on “improper purpose” theory. [Fed. R. Bankr. P. 9011\(b\)\(1\)](#).

[1 Case that cites this headnote](#)**[6] Bankruptcy** 📌 Frivolity or bad faith; sanctions

Rule 9011 sanctions may be, but need not be, imposed when court filings are used for improper purpose, or when claims are not supported by existing law, lack evidentiary support, or are otherwise frivolous. [Fed. R. Bankr. P. 9011\(b\)](#).

[2 Cases that cite this headnote](#)**[7] Bankruptcy** 📌 Frivolity or bad faith; sanctions

Subjective bad faith may be found, of kind sufficient to support award of Rule 9011 sanctions on “improper purpose” theory, when paper is submitted to harass a litigant or unnecessarily delay the proceedings; however, delay or frustration to creditors must be unnecessary, and delay and frustration alone are insufficient for sanctions. [Fed. R. Bankr. P. 9011\(b\)\(1\)](#).

[1 Case that cites this headnote](#)

[8] **Bankruptcy** Frivolity or bad faith; sanctions

Award of Rule 9011 sanctions, on “improper purpose” theory, based on debtor's use of bankruptcy petition to delay and frustrate creditors is inappropriate where delay or frustration to creditors occurs because debtor needs breathing room to legitimately pursue discharge or reorganization. [Fed. R. Bankr. P. 9011\(b\)\(1\)](#).

[1 Case that cites this headnote](#)

[9] **Bankruptcy** Frivolity or bad faith; sanctions

Determining whether attorney's pre-filing investigation was reasonable, for purposes of Bankruptcy Rule 9011, requires a case-by-case, fact intensive analysis dependent on all the circumstances. [Fed. R. Bankr. P. 9011\(b\)\(3\)](#).

[10] **Bankruptcy** Frivolity or bad faith; sanctions

Bankruptcy Rule 9011 places on attorneys a duty to make at least some affirmative investigation into facts represented in documents submitted to court. [Fed. R. Bankr. P. 9011\(b\)\(3\)](#).

[5 Cases that cite this headnote](#)

[11] **Bankruptcy** Frivolity or bad faith; sanctions

While attorney's pre-filing investigation into the facts represented in documents filed with court need not be to the point of certainty in order to be reasonable and to foreclose award of Rule 9011 sanctions for lack of reasonable pre-filing investigation, attorney must explore readily available avenues of factual inquiry. [Fed. R. Bankr. P. 9011\(b\)\(3\)](#).

[2 Cases that cite this headnote](#)

[12] **Bankruptcy** Frivolity or bad faith; sanctions

While attorney may generally rely on objectively reasonable client representations for facts included in papers filed with court, attorney, to avoid liability for Rule 9011 sanctions for lack of reasonable pre-filing investigation, must independently verify publicly available facts to determine if client's representations are objectively reasonable. [Fed. R. Bankr. P. 9011\(b\)\(3\)](#).

[6 Cases that cite this headnote](#)

[13] **Bankruptcy** Frivolity or bad faith; sanctions

Generally, Bankruptcy Rule 9011, and [Rule 11 of the Federal Rules of Civil Procedure](#) on which it is based, impose no continuing duty to amend a paper bearing attorney's signature. [Fed. R. Bankr. P. 9011](#); [Fed. R. Civ. P. 11](#).

[14] **Bankruptcy** Frivolity or bad faith; sanctions

While judgment creditor's failure to comply with "safe harbor" provision prior to seeking Rule 9011 sanctions foreclosed award of sanctions for any documents that Chapter 7 debtor's attorney had filed with court other than bankruptcy petition and schedules, "safe harbor" provision did not apply to petition and schedules, because petition, unlike papers, claims, defenses, contentions, allegations, or denials, caused immediate collateral effects and could not be withdrawn without court's consent. [Fed. R. Bankr. P. 9011\(c\)\(1\)\(A\)](#).

4 Cases that cite this headnote

[15] **Bankruptcy** 📌 Frivolity or bad faith; sanctions

Chapter 7 debtor's attorney could not raise attorney-client privilege as defense to liability for Rule 9011 sanctions, on theory that the privilege prevented him from disclosing client communications that were the basis of allegedly inaccurate information included in bankruptcy petition and schedules, given that sanctions were requested for attorney's alleged failure to adequately investigate publicly available information included in filings, without regard to what information attorney's client may have communicated in confidence. [Fed. R. Bankr. P. 9011\(b\)\(3\)](#).

[16] **Bankruptcy** 📌 Frivolity or bad faith; sanctions

Judgment creditor's failure to seek Rule 9011 sanctions against Chapter 7 debtor's attorney in more timely manner, instead of first filing adversary proceeding to deny debtor a discharge and only later moving to dismiss case as abusive and requesting sanctions based on that abuse, was not fatal to award of sanctions. [Fed. R. Bankr. P. 9011](#).

[17] **Bankruptcy** 📌 Frivolity or bad faith; sanctions

Denial of judgment creditor's motion for summary judgment on "bad faith" filing claims did not necessarily mean that Chapter 7 debtor's attorney had not filed petition for improper purpose or without reasonable pre-filing investigation, and did not foreclose award of Rule 9011 sanctions, especially where denial of summary judgment was based in large part on disputes over facts that debtor eventually conceded. [11 U.S.C.A. § 707](#); [Fed. R. Bankr. P. 9011\(b\)\(1,3\)](#).

[18] **Bankruptcy** 📌 Frivolity or bad faith; sanctions

That debtor may have filed for Chapter 7 relief for sole purpose of further delaying payment of judgment debt that he could afford to pay, prior to fraudulently transferring assets and using home equity line of credit to deplete equity in his home, did not warrant award of Rule 9011 sanctions against debtor's counsel for filing bankruptcy petition for improper purpose, where, at time petition was filed, counsel at most had reason to believe that debtor was involved in fraudulent transfer, and there was no reason for court to attribute any of debtor's bad faith conduct to counsel. [Fed. R. Bankr. P. 9011\(b\)\(1\)](#).

[19] **Bankruptcy** 📌 Frivolity or bad faith; sanctions

Numerous inconsistencies between information disclosed in Chapter 7 petition and schedules and that disclosed in recently-filed Chapter 13 petition and schedules, coupled with counsel's failure to amend Chapter 7 petition and schedules even after inaccuracy of some of disclosures became evident, was sufficient to warrant imposition of Rule 9011 sanctions against debtor's attorney based on his failure to conduct reasonable pre-filing investigation, despite alleged emergency nature of filing, when debtor was allegedly facing imminent arrest based on state court's contempt finding; notwithstanding this alleged emergency, petition and schedules were not filed until nearly two months after arrest warrant was issued, and were not in nature of bare-bones petition but together comprised 50 pages of documents. [Fed. R. Bankr. P. 9011\(b\)\(3\)](#).

[20] **Bankruptcy** 🔑 Requisites in general

Court and the Chapter 7 trustee rely heavily on debtors and debtors' counsel to provide truthful and accurate information in petition and schedules.

[21] **Bankruptcy** 🔑 Frivolity or bad faith; sanctions

“Safe harbor” provision of Bankruptcy Rule 9011 also applied to request for award of sanctions under section of Chapter 7 dealing with abusive filings, so that where judgment creditor's failure to comply with “safe harbor” provision precluded award of Rule 9011 sanctions against Chapter 7 debtor's attorney other than for filing of bankruptcy petition itself, to which filing the “safe harbor” provision did not apply, section of Chapter 7 dealing with abusive filings did not broaden range of conduct for which sanctions could be imposed. 11 U.S.C.A. § 707(b)(4); Fed. R. Bankr. P. 9011(c)(1)(A).

6 Cases that cite this headnote

[22] **Bankruptcy** 🔑 Frivolity or bad faith; sanctions

Possible Rule 9011 sanctions include award of attorney fees, but can range from reprimand to disbarment. Fed. R. Bankr. P. 9011.

[23] **Bankruptcy** 🔑 Frivolity or bad faith; sanctions

Generally, court should award the minimum Rule 9011 sanction necessary to deter future sanctionable conduct. Fed. R. Bankr. P. 9011.

6 Cases that cite this headnote

[24] **Bankruptcy** 🔑 Frivolity or bad faith; sanctions

In selecting appropriate Rule 9011 sanction, court may consider reasonableness of costs and expenses incurred by party seeking sanctions, prejudice suffered by party seeking sanctions, relative culpability of client and counsel, degree to which party seeking sanctions caused the expenses for which recovery is sought, whether the sanctionable conduct was in nature of conscious disregard of duty, and general reputation of individual to be sanctioned. Fed. R. Bankr. P. 9011.

1 Case that cites this headnote

[25] **Bankruptcy** 🔑 Frivolity or bad faith; sanctions

Publication of decision finding that counsel to Chapter 7 debtor had failed to conduct reasonable investigation prior to filing bankruptcy petition, in violation of obligation imposed by Bankruptcy Rule 9011, was sufficient sanction for counsel's negligence in failing to discover that representations made by debtor-client, which formed basis of information disclosed in bankruptcy petition and schedules, were contradicted by petition and schedules from debtor's recently-filed Chapter 13 case; counsel was respected bankruptcy practitioner, whose Rule 9011 violation was result of carelessness rather than any conscious disregard of duties, and could easily be addressed by change in counsel's office procedures related to intake and preparation of bankruptcy petitions. Fed. R. Bankr. P. 9011.

[1 Case that cites this headnote](#)

[26] Bankruptcy 📌 Frivolity or bad faith; sanctions

Law firm that employed attorney who violated Rule 9011, by failing to conduct reasonable investigation as to accuracy of disclosures in Chapter 7 petition and schedules, was jointly and severally liable for sanctions, in absence of any extraordinary circumstances that would exclude firm from liability. [Fed. R. Bankr. P. 9011\(c\)\(1\)\(A\)](#).

[1 Case that cites this headnote](#)

[27] Bankruptcy 📌 Carrying out provisions of Code

Bankruptcy 📌 Frivolity or bad faith; sanctions

Bankruptcy statute authorizing court to issue “necessary or appropriate” orders may provide basis to impose sanctions, but only against bad faith conduct, and only when tied to a specific provision of the Bankruptcy Code, rather than to further the purposes of the Bankruptcy Code generally. [11 U.S.C.A. § 105\(a\)](#).

[6 Cases that cite this headnote](#)

[28] Bankruptcy 📌 Frivolity or bad faith; sanctions

Bankruptcy court may sanction attorneys on an “unreasonable and vexatious multiplication” theory for bad faith conduct that is not necessarily entirely without merit or tied to a specific Bankruptcy Code provision, but which unnecessarily delays proceedings. [28 U.S.C.A. § 1927](#).

[4 Cases that cite this headnote](#)

[29] Bankruptcy 📌 Frivolity or bad faith; sanctions

Purpose of federal statute authorizing award of sanctions on an “unreasonable and vexatious multiplication” theory is to deter unnecessary delays in litigation. [28 U.S.C.A. § 1927](#).

[30] Bankruptcy 📌 Frivolity or bad faith; sanctions

Federal statute authorizing award of sanctions on an “unreasonable and vexatious multiplication” theory is construed narrowly and with great caution, so as not to stifle enthusiasm or chill the creativity that is very lifeblood of the law. [28 U.S.C.A. § 1927](#).

[31] Bankruptcy 📌 Frivolity or bad faith; sanctions

Imposition of sanctions on an “unreasonable and vexatious multiplication” theory is discretionary, and courts may decline to award sanctions in interests of justice, such as when the party seeking sanctions is primarily responsible for multiplication of proceedings. [28 U.S.C.A. § 1927](#).

[32] Bankruptcy 📌 Frivolity or bad faith; sanctions

Bankruptcy court has inherent authority to sanction parties appearing before it for acting in bad faith, vexatiously, wantonly, or for oppressive reasons.

[6 Cases that cite this headnote](#)

[33] Bankruptcy [Frivolity or bad faith; sanctions](#)

Imposition of sanctions in exercise of bankruptcy court's inherent authority is appropriate only if there is clear evidence that the conduct at issue is (1) entirely without color, and (2) motivated by improper purpose(s).

[9 Cases that cite this headnote](#)

[34] Bankruptcy [Frivolity or bad faith; sanctions](#)

Conduct is “entirely without color,” so as to permit award of sanctions in exercise of bankruptcy court's inherent authority, when it lacks any legal or factual basis; it is colorable when it has some legal and factual support, considered in light of reasonable beliefs of attorney.

[3 Cases that cite this headnote](#)

[35] Bankruptcy [Frivolity or bad faith; sanctions](#)

Imposition of sanctions by bankruptcy court, whether under statute authorizing it to issue “necessary or appropriate” orders, on an “unreasonable and vexatious multiplication” theory, or in exercise of court's inherent authority, all require clear and specific finding of bad faith. [11 U.S.C.A. § 105\(a\)](#); [28 U.S.C.A. § 1927](#).

[1 Case that cites this headnote](#)

[36] Bankruptcy [Frivolity or bad faith; sanctions](#)

Judgment creditor was not entitled to award of sanctions against Chapter 7 debtor's attorney, whether under statute authorizing bankruptcy court to issue “necessary or appropriate” orders, on an “unreasonable and vexatious multiplication” theory, or in exercise of court's inherent authority, for attorney's carelessness in failing to discover that representations made by debtor-client, which formed basis of information disclosed in bankruptcy petition and schedules, were contradicted by petition and schedules from debtor's recently-filed Chapter 13 case; attorney's conduct did not rise to level of bad faith, and any unreasonable multiplication of proceedings was caused, not by debtor's attorney, but by judgment creditor's overly litigious approach in zealously seeking to recover sanctions and attorney fees from debtor and debtor's attorney. [11 U.S.C.A. § 105\(a\)](#); [28 U.S.C.A. § 1927](#).

[2 Cases that cite this headnote](#)

[37] Bankruptcy [Grounds and Circumstances](#)

Federal statute setting forth examples of types of costs that may be shifted to an opposing party does not create basis for shifting costs, but merely enumerates and limits the costs that may be taxed when court does shift costs. [28 U.S.C.A. § 1920](#).

[1 Case that cites this headnote](#)

[38] Bankruptcy [Prevailing party](#)

Cost-shifting under Bankruptcy Rule is discretionary, and prevailing party is not necessarily entitled to cost-shifting in bankruptcy in absence of some more specific cost-shifting statute relevant to proceeding which requires court to shift costs. [Fed. R. Bankr. P. 7054](#).

[1 Case that cites this headnote](#)

[39] **Bankruptcy** 📌 Frivolity or bad faith; sanctions

Bankruptcy court would not exercise its discretion to shift costs to attorney whose carelessness in failing to conduct reasonable investigation of information included in Chapter 7 petition and schedules had allegedly resulted in bad faith filing on debtor's part, where attorney's conduct was merely careless, and where legal fees and costs incurred by party seeking sanctions were largely attributable to his own litigiousness. [Fed. R. Bankr. P. 7054](#).

[40] **Bankruptcy** 📌 Frivolity or bad faith; sanctions

Bankruptcy 📌 Date of determination

Even assuming that misconduct of Chapter 7 debtor, debtor's spouse, and attorney and law firm that represented debtor had resulted in delay of Chapter 7 proceedings, during which amount of New York homestead exemption available to debtor increased by \$100,000, this increase in homestead exemption did not cause any monetary damage to judgment creditor, whose rights in event of sale of debtor's real property by trustee would be determined based upon homestead exemption in effect on petition date, and creditor was not entitled to money judgment against debtor in amount of this \$100,000 increase. [11 U.S.C.A. § 522\(b\)\(3\)](#).

[41] **Bankruptcy** 📌 Frivolity or bad faith; sanctions

Bankruptcy court would not impose monetary sanctions against Chapter 7 debtor personally in amount equal to legal fees and expenses incurred by judgment creditor in bankruptcy proceeding, based on debtor's alleged bad faith in filing petition, where judgment creditor was not oversecured creditor of kind generally entitled to postpetition fees, and where, due to court's entry of order denying debtor a Chapter 7 discharge, judgment creditor would be free to pursue debtor in non-bankruptcy forum for any and all damages to which he believed he was entitled, whether based on prepetition contract with debtor or otherwise. [11 U.S.C.A. § 506\(b\)](#).

[1 Case that cites this headnote](#)

[42] **Bankruptcy** 📌 Frivolity or bad faith; sanctions

Non-party may be sanctioned pursuant to bankruptcy court's inherent power only if he or she (1) violates a specific court order, or (2) acts in bad faith, has a substantial interest in litigation, and plays a substantial role in litigation.

[43] **Bankruptcy** 📌 Frivolity or bad faith; sanctions

Non-party's status as Chapter 7 debtor's spouse, who funded his bankruptcy filing, did not give her a "substantial interest" in case, nor was her conduct in providing testimony both in person and by affidavit "substantial participation" in case, such that spouse could not be sanctioned in exercise of bankruptcy court's inherent authority, absent evidence that she had violated specific order of bankruptcy court.

[1 Case that cites this headnote](#)

[44] **Bankruptcy** 📌 Compelling attendance

Bankruptcy 📌 Production of documents

Bankruptcy court would not exercise its discretion to impose, as contempt sanction for debtor's delay in appearing for Rule 2004 examination and in producing responsive documents, the \$100 daily fine previously directed by another judge in attempt to compel debtor's attendance and document production to denial-of-discharge complainant, where debtor was not solely responsible for delay in conducting Rule 2004 examination, and some delay was attributable to complainant, whose attorney was unavailable on dates that debtor offered to appear, and where complainant was not prejudiced by nonproduction of documents, as this did not prevent complainant from prevailing on complaint to deny debtor a discharge.

Attorneys and Law Firms

*578 John S. Desiderio, D&F Associates LLP, Garden City Park, NY, for Plaintiff.

Marc A. Pergament, Weinberg Gross & Pergament LLP, Garden City, NY, for Defendant.

Chapter 7

DECISION

(Re: MOTION FOR SANCTIONS [DKT # 191] and MOTION TO BE RELIEVED AS COUNSEL [DKT # 197])

Hon. Robert E. Grossman, U.S.B.J.

Before the Court is the motion ("Motion") by the Plaintiff, John Desiderio Sr. ("Desiderio"), seeking sanctions against the Defendant/Debtor, Sunil Parikh (the "Debtor"), the Debtor's wife, Meena Parikh ("Meena"), the Debtor's counsel, Marc Pergament, Esq. ("Pergament"), and his law firm Weinberg Gross & Pergament LLP ("WGP"), for their alleged bad faith bankruptcy filing and conduct in this adversary proceeding and Debtor's Chapter 7 bankruptcy case. [Adversary Proceeding Docket ("AP Dkt") # 191]. In seeking sanctions Desiderio relies upon this Court's inherent power, 11 U.S.C. §§ 105(a), 707(b)(4)(C), 707(b)(4)(D), 28 U.S.C. § 1927, and/or Federal Rule of Bankruptcy Procedure 9011 ("Sanctions"). Desiderio also seeks to have costs awarded to him in this adversary proceeding pursuant to 28 U.S.C. § 1920 ("Costs"). He further requests entry of a money judgment against the Debtor and Meena pursuant to an Order of this Court, dated November 4, 2008 [Bankruptcy Case Docket ("BK Dkt") # 72], granting daily monetary sanctions for failure to comply with subpoenas under Federal Rule of Bankruptcy Procedure 2004 ("Judgment on Prior Sanctions").

This Court previously denied the Motion by Order, dated March 13, 2012. [AP Dkt # 199]. Desiderio appealed [AP Dkt # 200], and upon review by the District Court for the Eastern District of New York, this Court's denial was vacated and this matter remanded for (1) "further findings regarding whether the actions of the Debtor, [Meena], Pergament, and/or WGP were sanctionable," and (2) further findings regarding the entry of a Judgment on Prior Sanctions. [AP Dkt # 209, Civil Action No. 12-cv-02148].

Upon reconsideration of the Motion, this Court finds that to the extent the Motion seeks a finding that Pergament's conduct was sanctionable, it should be granted, in part, pursuant to Rule 9011 as to Pergament and WGP. Rule 9011(b) requires an attorney to conduct an inquiry "reasonable under the circumstances" prior to filing a bankruptcy petition and schedules. Here, Pergament signed the Debtor's Chapter 7 petition [BK Dkt # 1] which contained incomplete or incorrect information. These inaccuracies and omissions should have been apparent to the Debtor's counsel based on the existence of a readily-available prior Chapter 13 petition [Case No. 8-06-71203-sb Docket ("Ch. 13 Dkt") # 1, 14, 15] which should have caused counsel to

conduct a further inquiry into the facts. Had counsel conducted this inquiry it would have revealed facts very different from the facts presented in the Chapter 7 petition, as filed. As a result the Court finds that the Debtor's counsel's conduct in this case is sanctionable under [Rule 9011](#).

Pergament's attempt to avoid a finding that his conduct was sanctionable by assertion of the attorney-client privilege fails, as does his defense that this was a “bare bones” petition filed in an emergency filing. First, were counsel able to use the attorney-client privilege as a defense to [Rule 9011](#) or other sanctions, the Court's *579 ability to sanction counsel would be entirely circumvented. Second, the Chapter 7 petition filed in this case was not a “bare bones” petition. A bare bones petition would have been a three-page document consisting of the petition only (Official Form 1). What Pergament filed was a 40–page document including all, or almost all, of the schedules and statements required of a Chapter 7 debtor. The problem is, the information included in those filings was incomplete and/or inaccurate, and if Pergament had conducted a reasonable inquiry, he would have known that. The emergency nature of a bankruptcy filing does not excuse compliance with [Rule 9011\(b\)](#). See *In re Moffett*, 10–71920, 2012 WL 693362 (Bankr.C.D.Ill. Mar. 2, 2012); *In re Alessandro*, 10–12511 AJG, 2010 WL 3522255 (Bankr.S.D.N.Y. Sept. 7, 2010).

This Court's ruling is about the fine line lawyers must navigate between zealous advocacy on behalf of their clients and conduct that is sanctionable. The Court is mindful and strongly believes that zealous advocacy is the bedrock of our legal system. Any restraint or limits placed on a lawyer in the performance of his duties must be applied with the utmost care. However, the Court is also duty bound to ensure the integrity of this Court and hold attorneys who practice before it accountable for conduct that goes beyond zealous advocacy into the realm of sanctionable conduct.

Counsel for debtors in bankruptcy have to be particularly mindful of their duty to conduct an inquiry into the facts presented in a bankruptcy petition and schedules that is reasonable under the circumstances. First, the filing of a bankruptcy petition affords immediate and significant benefits to a debtor. The Court and parties in interest rely heavily on the information disclosed in the petition and schedules. Second, bankruptcy is not a typical adversarial proceeding where abuses by one party are likely to be exposed by another party. Chief Justice Burger famously described the adversarial system of justice as a tripod, one leg representing the court and the other two legs representing the adversaries. Justice William H. Erickson, *The History of the Tripod of Justice*, 64 Mil. L.Rev. 79, 100 (1974) (citing Chief Justice Warren E. Burger, Second Plenary Session American Bar Association Annual Meeting, July 16, 1971). Each leg must be equally strong to maintain justice. *Id.* In enacting the Bankruptcy Code, Congress recognized that creditors lack incentive to participate as actively against a debtor in bankruptcy as they would in normal litigation involving a plaintiff and a defendant because “[i]n contrast to general civil litigation, where cases affect only two or a few parties at most, bankruptcy cases may affect hundreds of scattered and ill-represented creditors.” H.R.Rep. No. 595, 95th Cong., 1st Sess. 88 (1977), U.S.Code Cong. & Admin.News 1978, 5787, 6050. In addition, creditors in non-bankruptcy litigation engage in a race to the bottom against a defendant, where the most aggressive, fast-acting creditor recovers the most. However, once a debtor enters bankruptcy, similarly situated creditors recover the same amount from the debtor, often less than the full amount owed to them, regardless of their participation. In bankruptcy, the debtor's “leg” is relatively strong—debtors are afforded an immediate automatic stay and are highly incentivized to zealously participate in their case—while the creditor's leg is relatively weak. Thus, in bankruptcy, the line between zealousness and abuse must be firmly observed to maintain the balance of the bankruptcy process. Courts use sanctions to draw this line and ensure that it is observed. See *580 *United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL–CIO*, 948 F.2d 1338, 1343 (2d Cir.1991).

Desiderio has asked this Court to redress the sanctionable conduct in this case by the imposition of monetary sanctions payable to him. However, the Court finds that publication of this Decision is an appropriate sanction in this case – sufficient to deter future sanctionable conduct.

The remainder of the relief sought by Desiderio in the Motion is denied for the reasons as set forth herein. Finally, Pergament's motion to be relieved as counsel to the Debtor and Meena will be granted.

PROCEDURAL HISTORY AND RELEVANT FACTS¹

Prior to filing the instant Chapter 7 petition, the Debtor had filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code (“Chapter 13 Petition”) on May 30, 2006 (“Chapter 13 Petition Date”) with the assistance of bankruptcy counsel. Among the personal property disclosed in the Chapter 13 Petition was a Citibank checking account (account number ending in X9420) held jointly by the Debtor and Meena, with a balance of \$146.67. [Ch. 13 Dkt # 1]. The Debtor also scheduled first and second mortgage liens on his residence in favor of Wells Fargo and Citibank, respectively, totaling approximately \$200,000, plus a third mortgage to Meera Management LLC (“Meera Mortgage”) in the amount of \$300,000. Schedule J listed the monthly payment on the Debtor’s first mortgage as \$823.73, and on the second mortgage, \$550. In the Chapter 13 case, the Debtor also listed Peter Devani and Meena as co-debtors of the Debtor, \$2,500 monthly income from Meena, and interests in two businesses (Health Heaven and Kuliwala Food Corp.).

The Chapter 13 Petition was dismissed by Order, dated November 2, 2006 [Ch. 13 Dkt # 16], on motion of the United States Trustee [Ch. 13 Dkt # 9] for the Debtor’s failure to produce documents.

Desiderio was a creditor in the Chapter 13 case as he is in the instant Chapter 7 case. Prior to the Chapter 13 Petition Date, on July 19, 2004, Desiderio commenced an action in the Supreme Court of Nassau County against the Debtor and Peter Devani (“Devani”) to enforce personal guarantees related to a commercial transaction among the parties (Index # 009557/04) (“Guaranty Action”). The state court entered judgment in favor of Desiderio, but collection efforts were stayed upon the filing of the Chapter 13 Petition. After the Bankruptcy Court granted the Chapter 13 Trustee’s motion to dismiss, but before entering an order dismissing the case Desiderio moved for an amended judgment in the Guaranty Action. On November 1, 2006, the state court entered an amended judgment in favor of Desiderio in the amount of \$98,328.28 against the Debtor and Devani, and an additional \$44,784.28 against Debtor, [AP Dkt # 22–53], for a total of \$143,112.56.²

In the Guaranty Action, the Debtor was found in contempt on March 16, 2006 for failing to comply with subpoenas and was afforded an opportunity to purge his contempt. [AP Dkt # 22–51]. The Debtor was further sanctioned on June 14, 2006 for failing to comply with subpoenas, and *581 was again afforded an opportunity to comply. *Id.* The Debtor was fined a total of \$100.00 for these two contempt findings. Desiderio moved for a warrant of commitment after the Chapter 13 Petition was dismissed, and on January 24, 2007, the state court held that the Debtor had refused to purge his contempt and entered a Final Order of Contempt and Warrant of Commitment. [AP Dkt # 22–52]. The court entered judgment on the Final Order of Contempt and Warrant of Commitment on April 3, 2007, and directed the Nassau County sheriff’s office to arrest the Debtor. [AP Dkt # 22–51].

On March 16, 2007, Meera Management LLC brought an action against the Debtor, Meena, and Desiderio, a judgment lien creditor, to foreclose on the Meera Mortgage—a third mortgage against the Debtor’s residence. (Index # 00217/07) (“Foreclosure Action”). Desiderio moved for summary judgment denying the foreclosure on the ground that the mortgage was a fraudulent conveyance. [AP Dkt # 22–20]. The state court agreed, and on June 13, 2007 entered a short form decision and order finding that the Meera Mortgage was a fraudulent conveyance to a related entity done with the intention of depleting the available equity in the Debtor and Meena’s real property (“June 13 Order”). [AP Dkt # 22–20]. The court specifically held that Debtor and Meena “continue to engage in a planned, calculated scheme to defraud and delay Desiderio from the collection of his judgment.” [AP Dkt # 22–20 at *4]. The June 13 Order directed Desiderio to submit a proposed judgment, by notice of settlement, vacating the Meera Mortgage. Also in the June 13 Order, the state court awarded Desiderio \$7,575.00 in attorney’s fees jointly and severally against Meera Management, LLC, the Debtor, and Meena, and directed the County Clerk to enter judgment for said amount. The state court subsequently, on June 20, 2007, entered a judgment granting Desiderio \$7,575.00 in attorney’s fees, plus 9% interest from the date of June 13, 2007, which amounted to \$7,590.15 (“June 20 Judgment”) [AP Dkt # 22–23]. On July 31, 2007, the state court entered a judgment directing the Nassau County Clerk to vacate the Meera Mortgage. [AP Dkt # 22–24].

On July 30, 2007 (the “Chapter 7 Petition Date”), the Debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code (“Chapter 7 Petition”) with the assistance of WGP. Pergament signed the petition. The schedules as originally

filed did not disclose the Citibank bank account that was previously disclosed in the Chapter 13 Petition. Schedule J listed the Debtor's first and second mortgage payments as \$1,700 and \$880, respectively (a total \$1,200 increase from the Chapter 13 Petition). Schedule D listed Desiderio as a secured creditor holding judgment lien(s) in the amount of \$150,702.72, which appears to be the total amount of the judgment(s) obtained by Desiderio as of the Chapter 7 Petition Date.³ However, the Chapter 7 Petition, as originally filed, failed to list Devani as a co-debtor on any judgment, failed to list Meena as a co-debtor with respect to the June 20th Judgment, and failed to list the Debtor's interest in Kuliwala Food Corp. ***582** The Chapter 7 Petition also failed to list, in response to Question 19 of the Statement of Financial Affairs, any accountant that kept the Debtor's books and records within the two years prior to the Chapter 7 Petition Date. On Schedule I, the Chapter 7 Petition listed the Debtor's current income as \$800 per month, and Meena's income as \$2,326.82. In response to Question 1 of the Statement of Financial Affairs, the Chapter 7 Petition reflected the Debtor's income from 2005 as \$52,638.00.

The petition and schedules did not report a \$45,000 withdrawal from the Debtor and Meena's VRESA (home equity line of credit) account, a portion of Desiderio's claim for attorney's fees that remained unsecured because it had been awarded but not yet reduced to judgment, or the Debtor's ownership in 2001 of Davenil Consulting. The Debtor listed on Schedule F, *inter alia*, a debt for \$700.00 to American Express, \$2,500.00 to Bank of America, a debt to Shah & Pandya, for \$4,000, and a debt to Solomon Lowenbraun for \$5,562.56. The Debtor's Statement of Current Monthly Income and Means Test Calculation [BK Dkt # 2] listed his marital status as legally separated or living apart. Despite this, on September 17, 2007, the Debtor filed an Amended Statement of Current Monthly Income and Means Test Calculation [BK Dkt # 12] to include Meena's income and indicated that they were not separated or living apart.

Eighteen months after the initial filing, on January 27, 2009, Pergament filed amended schedules, including Schedule J, to reduce the monthly first mortgage payment from \$1,700 to \$823.73 (the same amount originally reflected in the Chapter 13 Petition). [BK Dkt # 79]. Pergament also listed Desiderio as an unsecured creditor on Schedule F for legal fees, although he noted that they were contingent, disputed, and unliquidated. At that time, the Debtor also filed an amended Statement of Financial Affairs to report that the accountants, Shah & Pandya, CPA, P.C. provided services to the Debtor from 1995 to the Chapter 7 Petition Date. The Debtor also filed an amended Schedule H to list Pever Devani as a co-debtor on the Debtor's obligations to Desiderio. At no time in the Chapter 7 case did the Debtor disclose the Citibank account as being open within one year of the bankruptcy filing as required by the Statement of Financial Affairs.

Desiderio filed a proof of claim in the Chapter 7 case in the total amount of \$281,311.45 which is based upon the pre-petition state court judgment(s), plus additional counsel fees in the amount of \$128,635.83. [Claim 1–1].

Desiderio filed an adversary proceeding in the Chapter 7 case on March 27, 2008 seeking to dismiss the petition as a bad faith filing pursuant to 11 U.S.C. § 707(a), or alternatively, to deny the Debtor's discharge pursuant to §§ 727(a)(2)(A), 727(a)(3), 727(a)(4)(A), 727(a)(4)(B), 727(a)(4)(D), 727(a)(5), and/or 727(a)(6)(A).⁴ [AP Dkt # 1]. Desiderio alleged, *inter alia*, that the Debtor had omitted information from his Chapter 7 Petition, that the Debtor filed the petition solely to frustrate Desiderio's collection efforts, and that the Debtor fraudulently conveyed assets to various parties to shield them from Desiderio.

Both parties filed various motions in the adversary proceeding, including Desiderio's Motion for Summary Judgment [AP Dkt # 22], which was denied on April 2, 2009 [AP Dkt # 41]. Desiderio sought leave from the District Court to appeal the ***583** interlocutory order denying his motion for summary judgment. [AP Dkt # 43]. The District Court denied that request on July 31, 2009 [AP Dkt # 61].

As a result of discovery misconduct by both parties, the Bankruptcy Court sanctioned the Debtor by prohibiting him from producing documents at trial that were not produced to Desiderio. The Court also sanctioned Desiderio by prohibiting him from producing documents at trial, namely records relating to his attorney's fees. [AP Dkt # 42].

The Court held a trial on the merits over several days from November 2009 through June 2010. On May 24, 2011, the Court issued its Decision After Trial [AP Dkt # 189] ("D.A.T."), which held that Desiderio sustained his burden of proof to dismiss the

case for cause under § 707(a) and to deny discharge under § 727(a)(4)(A) and (a)(2)(A). However, the Court declined dismissal of the case and instead denied the discharge.

On June 28, 2011, Desiderio filed the present Motion for sanctions against Pergament, WGP, Debtor, and Meena pursuant to Rule 9011, § 707(b)(4)(C) and (D), 11 U.S.C. § 105, 28 U.S.C. § 1920, 28 U.S.C. § 1927, and the Court's inherent powers. On March 5, 2012, the Court held a hearing on the Motion and denied it for the reasons given on the record. Desiderio appealed, and on March 29, 2013, the District Court remanded the matter for further findings. After giving the parties an opportunity to submit further papers on the issues presented, this matter was marked submitted on June 3, 2013.

JURISDICTION

The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 1334 and 157(a). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (E), (H), (I), (J) and (O). The following constitutes the Court's findings of fact and conclusions of law pursuant to Fed. R. Bankr.P. 7052.

DISCUSSION

I. Motion for Sanctions

A. Sanctions against Pergament and WGP

Desiderio seeks sanctions against Pergament and WGP, in the total amount of \$239,252.69, in the form of attorneys' fees and costs incurred by Desiderio in this bankruptcy case, pursuant to Rule 9011, 11 U.S.C. § 707(b)(4)(C) and (D), 28 U.S.C. § 1927, 11 U.S.C. § 105, 28 U.S.C. § 1920, and the Court's inherent power. The Court will address the separate theories in order.

i. Rule 9011 and 11 U.S.C. § 707(b)(4)

According to Rule 9011(b) the signature by an attorney or unrepresented party on any paper filed with the court constitutes a certification “that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

1. it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
2. the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
3. the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- *584 4. the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Fed. R. Bankr.P. 9011(b).

If a court makes a finding that Rule 9011(b) has been violated, Rule 9011(c) permits the court, within its discretion, to impose sanctions upon the offending attorney or party. See *Perez v. Posse Comitatus*, 373 F.3d 321, 325 (2d Cir.2004) (“Even if the district court concludes that the assertion of a given claim violates Rule 11, however, the decision whether or not to impose

sanctions is a matter for the court's discretion.”). “Absent exceptional circumstances” an attorney's law firm will be held jointly and severally liable for [Rule 9011\(b\)](#) violations by its attorneys or employees. [Fed. R. Bankr.P. 9011\(c\)\(1\)\(A\)](#).

[1] In determining whether to exercise discretion to impose [Rule 9011](#) sanctions, the Court should be guided by the purposes of [Rule 9011](#) sanctions, which is to “deter repetition of such conduct or comparable conduct by others similarly situated.” [Fed. R. Bankr.P. 9011\(c\)\(2\)](#); *Star Mark Mgmt., Inc. v. Koon Chun Hing Kee Soy & Sauce Factory, Ltd.*, 07–CV–3208 KAM SMG, 2010 WL 4878955 at *2 (E.D.N.Y. Nov. 23, 2010) (“[I]n exercising its broad discretion to impose Rule 11 sanctions in an appropriate amount, this court must also contemplate the limited permissible purposes for Rule 11 sanctions.”) (quoting Advisory Committee Note (1993) (“The court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct....”)).

Although the primary purpose of [Rule 9011](#) is deterrence, compensation is considered a secondary purpose. *See Fed. R. Bankr.P. 9011(c)(1)(A)* (“If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.”). *But see* Advisory Committee Note (1993) (“Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty.”).

[2] If sanctions pursuant to [Rule 9011](#) are sought by motion of a party, the movant must comply with a safe-harbor provision contained in [Rule 9011\(c\)\(1\)\(A\)](#) which requires that the offending party be given notice and an opportunity to cure the offending conduct. Specifically, the safe harbor provision requires that:

...The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected ...

[Fed. R. Bankr.P. 9011\(c\)\(1\)\(A\)](#). However, the safe harbor provision does not apply where the offending conduct is the filing of a bankruptcy petition in violation of [Rule 9011\(b\)](#). *Id.*

[3] [4] [5] [6] Assuming the movant has complied with the safe harbor provisions of [Rule 9011\(c\)](#), awarding sanctions pursuant to the “improper purpose” prong of [Rule 9011\(b\)\(1\)](#) requires a finding of subjective bad faith. This differs from sanctions under [Rule 9011\(b\)\(2\)](#), where an attorney fails make a reasonable inquiry into whether claims asserted are “warranted in law,” which uses an objective bad faith standard that requires frivolousness. Although the Court may infer subjective bad faith from *585 a frivolous filing, or one that is entirely without merit, frivolity is not a necessary finding under the “improper purpose” prong of [Rule 9011\(b\)](#). Sanctions may be—but need not be—imposed when court filings are used for an “improper purpose,” or when claims are not supported by existing law, lack evidentiary support, or are otherwise frivolous. *Ipscon Collections LLC v. Costco Wholesale Corp.*, 698 F.3d 58, 63 (2d Cir.2012); *see also Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir.1985), *cert. denied*, 484 U.S. 918, 108 S.Ct. 269, 98 L.Ed.2d 226 (1987) (sanctions can be imposed for filings made for an “improper purpose” even where the attorney conducted a reasonable investigation).

[7] [8] Subjective bad faith can occur when a paper is submitted to harass a litigant or unnecessarily delay the proceedings. However, the delay or frustration to creditors must be unnecessary; delay and frustration alone are insufficient for sanctions under [Rule 9011\(b\)\(1\)](#). *See Matter of Cohoes Indus. Terminal, Inc.*, 931 F.2d 222, 228 (2d Cir.1991) (“Indeed, because a major purpose behind our bankruptcy laws is to afford a debtor some breathing room from creditors, it is almost inevitable that creditors will, in some sense, be ‘frustrated’ when their debtor files a bankruptcy petition.”) (internal citations omitted). Another major purpose behind our bankruptcy laws is to afford a debtor a fresh start through discharge or reorganization. Thus, sanctions pursuant to [Rule 9011\(b\)\(1\)](#)’s “improper purpose” clause are inappropriate where delay or frustration to creditors occurs because a debtor needs breathing room to legitimately pursue discharge or reorganization. *Cf. In re Intercorp Int'l, Ltd.*, 309 B.R. 686, 697 (Bankr.S.D.N.Y.2004) (sanctioning attorney under the improper purpose prong who filed petition to stay foreclosure sale where there was “no reasonable likelihood that the debtor intended to reorganize and no reasonable probability that it would eventually emerge from bankruptcy proceedings”) (quoting *Cohoes*, 931 F.2d at 227).

[9] [10] [11] Determining whether an investigation was reasonable pursuant to [Rule 9011\(b\)\(3\)](#) requires a case-by-case, fact intensive analysis dependent on all the circumstances. [Cooter & Gell v. Hartmarx Corp.](#), 496 U.S. 384, 404, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). At a minimum, [Rule 9011\(b\)\(3\)](#) places on attorneys a duty to make at least some affirmative investigation into the facts represented in documents submitted to the court. [In re Obasi](#), 10–10494 SHL, 2011 WL 6336153 at *5 (Bankr.S.D.N.Y. Dec. 19, 2011). While “the investigation performed by a signatory need not be to the point of certainty to be reasonable,” a “signer must explore readily available avenues of factual inquiry.” [In re Obasi](#) at *5. (internal citations omitted).

[12] Although an attorney may generally rely on objectively reasonable client representations, [Hedges v. Yonkers Racing Corp.](#) 48 F.3d 1320, 1329 (2d Cir.1995) (internal citations omitted), the attorney must independently verify publicly available facts to determine if the client representations are objectively reasonable. [Televideo Sys., Inc. v. Mayer](#), 139 F.R.D. 42, 47 (S.D.N.Y.1991); [In re Withrow](#), 391 B.R. 217, 228 (Bankr.D.Mass.2008), *aff’d*, 405 B.R. 505 (1st Cir. BAP 2009); [In re Seare](#), 493 B.R. 158, 209–11 (Bankr.D.Nev.2013) (quoting *ABA Attorney Liability* 697 at 704). If independent verification reveals inconsistencies or other problems, an attorney must “probe further—by asking questions, obtaining additional documents, or by some other means.” [Seare](#), 493 B.R. at 211; [In re Dean](#), 401 B.R. 917, 920 (Bankr.D.Idaho 2008) (“Simply put, having previously identified that a problem may *586 exist with the Gladman lien, Beeman could not reasonably rely upon his clients' statements”).

“[H]ow much time the attorney had for the investigation” is a relevant factor in the [Rule 9011](#) analysis, [Televideo Sys., Inc.](#), 139 F.R.D. at 47, however, the emergency nature of a filing does not excuse an attorney from this obligation to independently verify publicly available information and probe further if the attorney is unable to do so. [In re Alessandro](#), 10–12511 AJG, 2010 WL 3522255 at *3 (Bankr.S.D.N.Y. Sept. 7, 2010); [In re Mofett](#), 10–71920, 2012 WL 693362 at *1 (Bankr.C.D.Ill. Mar. 2, 2012). For instance, in [Seare](#), debtor's counsel was sanctioned for failing to review a judgment obtained by a hospital, where a review would have revealed that the judgment was for fraud, not medical bills, and thus nondischargeable. [Seare](#), 493 B.R. at 211. The court rejected counsel's argument “that he did not have an independent duty to investigate the nature of the Judgment.” *Id.* at 176.

[13] Generally, [Rule 11](#) and [Rule 9011](#) impose no continuing duty to amend a paper bearing the attorney's signature. [Oliveri v. Thompson](#), 803 F.2d 1265, 1274 (2d Cir.1986)(rejecting movant's claim that [Rule 11](#) imposes a continuing obligation and holding that “the signer's conduct is to be judged as of the time the pleading or other paper is signed.”).

[Section 707\(b\)\(4\)](#), added to the Bankruptcy Code by the 2005 Amendments, makes it explicit that [Rule 9011](#) applies to debtors' counsel in the context of the filing of the petition and schedules in bankruptcy cases. In addition to, but essentially reflective of, [Rule 9011](#) sanctions, [§ 707\(b\)\(4\)\(C\)](#) provides that “[t]he signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has—(i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and (ii) determined that the petition, pleading, or written motion—(I) is well grounded in fact; and (II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).” 11 U.S.C. [§ 707\(b\)\(4\)\(C\)](#). [Section 707\(b\)\(4\)\(D\)](#) makes it clear that the debtor's counsel's signature on the bankruptcy petition also includes a certification that the attorney “has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.” 11 U.S.C. [§ 707\(b\)\(4\)\(D\)](#).

[Section 707\(b\)\(4\)\(A\) and \(B\)](#) contain certain remedies. [Section 707\(b\)\(4\)\(A\)](#) provides that a debtor's attorney may be required to reimburse the trustee for “all reasonable costs in prosecuting a motion filed under [section 707\(b\)](#), including reasonable attorneys' fees” if the court grants a motion by the trustee to dismiss or convert the case under [§ 707\(b\)](#), and finds that the conduct of the debtor's attorney in filing the petition violated [Rule 9011](#). [Section 707\(b\)\(4\)\(B\)](#) provides that “[i]f the court finds that the attorney for the debtor violated [rule 9011 of the Federal Rules of Bankruptcy Procedure](#), the court, on its own initiative or on the motion of a party in interest, in accordance with such procedures, may order—(i) the assessment of an appropriate civil penalty against the attorney for the debtor; and (ii) the payment of such civil penalty to the trustee, the United States trustee (or the bankruptcy administrator, if any).” 11 U.S.C. [§ 707\(b\)\(4\)\(B\)](#). Neither [§ 707\(b\)\(4\)\(A\)](#) nor [§ 707\(b\)\(4\)\(B\)](#) contemplate that damages in the form of attorneys' fees should be payable to a creditors' counsel directly.

a. Arguments of the Parties

Desiderio argues that his motion for sanctions was not subject to the safe harbor *587 provision of Rule 9011 because the motion is based upon information omitted from the Chapter 7 Petition—and the filing of the petition is not subject to the safe harbor provisions. On the merits, Desiderio alleges that Pergament violated Rule 9011 by failing to conduct a reasonable investigation and accurately disclose: the Debtor's bank accounts, monthly mortgage payments; co-debtors; income from his spouse; that his income in 2005 was combined with Meena; the Debtor's job title as described in the petition; the Debtor's monthly income as \$866 instead of \$800; the Meera Mortgage; Debtor's interest in Kuliwala, Health Heaven, and Davenil Consulting; the June 20th Judgment; the \$45,000 VRESA transfer; that a portion of Desiderio's claim for attorney's fees remained unsecured and should have been listed on Schedule F; whether Debtor and Meena were separated; documentation of the amount of Debtor's debts to credit card companies, Shah & Pandya, or Solomon Lowenbraun; and the Debtor's accountants. Desiderio also alleges that Pergament violated Rule 9011(b)(1) by filing the petition for an “improper purpose” because it was patently obvious that the bankruptcy filing was made solely to frustrate Desiderio's collection efforts, and the Debtor had the ability to repay Desiderio. Desiderio further argues that Pergament's year and a half delay in amending the petition and schedules once he had actual knowledge of the correct information violates Rule 9011 because that Rule imposes a continuing duty to correct incorrect information. Finally, Desiderio seeks to hold Pergament and WGP jointly and severally liable for these alleged violations.

Pergament responds that Desiderio is procedurally barred from seeking sanctions under Rule 9011 because he failed to comply with Rule 9011's safe harbor provision, and that Desiderio's own overly litigious conduct during the case waives, estops, or precludes him from seeking sanctions. [AP Dkt # 214]. First, Pergament argues that Desiderio waived his right to seek Rule 9011 sanctions by filing an adversary proceeding to deny the Debtor's discharge instead of moving more expeditiously to dismiss this bankruptcy case. According to Pergament, the Bankruptcy Code contemplates that bad faith petitions should be met with a timely motion to dismiss instead of an adversary proceeding because such motions minimize hindsight and encourages prompt resolution of issues. Second, Pergament argues that *Cohoes*, 931 F.2d 222 (2d Cir.1991), which held that a party's failure to expeditiously move to dismiss the petition estopped him from alleging that the petition violated Rule 9011's requirement to reasonably investigate whether the petition was warranted by law, requires this Court to deny sanctions. Similarly, Pergament asserts that the Court's denial of Desiderio's Motion for Summary Judgment on his “bad faith filing” claims precludes a finding that the petition was frivolously filed. Last, Pergament asserts that the Court has already ruled on Desiderio's request for sanctions in the Decision After Trial and that Desiderio cannot have a “second bite at the apple.”

Substantively, Pergament asserts that he cannot be sanctioned under Rule 9011 for filing the petition with an “improper purpose” unless the filing is frivolous, and that the filing was not frivolous. Pergament asserts that he cannot be sanctioned under Rule 9011 for failing to conduct a reasonable investigation because he is entitled to rely on his client's representations and that any ambiguity as to whether his acts are objectively reasonable should be resolved in his favor. He argues that Desiderio has merely “raised questions” as to whether Pergament and WGP should have *588 accepted the Debtor's representations, and that without more, the dispute should be resolved in Pergament and WGP's favor. He also asserts that the information omitted from or incorrectly reflected in the bankruptcy petition, was not independently verifiable by him, and that the emergency nature of the filing, based on Debtor's fears of imminent arrest, justifies the level of investigation conducted by his office. Pergament notes that sanctions under Rule 9011 should be invoked sparingly because a “request for sanctions under Rule 11 is not a tactical device,” *In re Taub*, 439 B.R. 276, 281 (Bankr.E.D.N.Y.2010) (quoting *Nakash v. U.S. Dep't of Justice*, 708 F.Supp. 1354, 1370 (S.D.N.Y.1988)), and that conduct must be egregious to warrant sanctions. Pergament also argues that the attorney-client privilege precludes him from providing an explanation for his conduct with regard to information that was not verifiable by independent means.

b. Safe harbor provisions

[14] The Court finds that Desiderio did not comply with the safe-harbor provision of Rule 9011(c). This alone precludes the imposition of Rule 9011 sanctions with regard to all papers filed by Pergament in this case—*other than* the bankruptcy petition

and schedules. *In re Taub* at 282. The safe harbor provision does not apply to the filing of the petition because “petitions, unlike papers, claims, defenses, contentions, allegations, or denials, cause immediate collateral effects and, moreover, a petition cannot be withdrawn without the court’s consent.” *Levey v. Kesser Cleaners Corp.*, 06CV02530(DLI), 2007 WL 2177048 at *3 (E.D.N.Y. July 27, 2007). In *Levey*, the court concluded that this rationale applied even where the petition had already been withdrawn and the collateral implications were no longer in effect. Thus, this Court may analyze Pergament’s role in connection with the filing of the bankruptcy petition and schedules under Rule 9011, despite Desiderio’s failure to satisfy the safe harbor provision, even though Debtor’s discharge has been denied and the exigencies of the situation have waned.

c. Attorney client privilege

[15] The Court finds that Pergament was not entitled to rely on his client’s representations, so his attempt to invoke attorney-client privilege, given the unique facts and circumstances of this case, is fundamentally flawed. He argues that the attorney-client privilege prevents him from responding to the allegations against him. Although the attorney-client privilege bars an attorney from disclosing the contents of privileged communications, it cannot give Pergament an absolute defense to the imposition of sanction under the facts in this case. To hold otherwise, would allow counsel to circumvent the reach of Rule 11 or other sanctions in connection with factual misrepresentations made in court filings. In any event, the Court in this Decision is imposing sanctions on Pergament for failing to adequately investigate publicly available information regardless of information his client communicated in confidence. Under the particular facts of this case, Pergament had a duty to externally verify the information provided to him by his client because sufficient red flags existed that should have prompted a further investigation which would have revealed information to him that should have been included in the Chapter 7 Petition.⁵ *589 The attorney-client privilege cannot shield Pergament from the basic independent verification he was expected to do.

d. Delay in filing motion to dismiss

[16] The Court finds that Desiderio’s decision to file an adversary proceeding instead of a more expeditious motion to dismiss does not preclude sanctions related to filing the Chapter 7 Petition. Several courts have held that sanctions may be imposed under Rule 9011 even after the dismissal of a bankruptcy case. *In re Berger Indus., Inc.*, 298 B.R. 37, 40 (Bankr.E.D.N.Y.2003) (motions for sanctions pursuant to Rule 9011 with regard to the filing of a bankruptcy petition was timely, even though bankruptcy case had closed, because “[i]t is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation, and in the case of motions at the time the motion is decided or shortly thereafter.”) (quoting Advisory Committee Note (1983); *In re Mem’l Estates, Inc.*, 116 B.R. 108, 112 (N.D.Ill.1990)); *Matter of Jones*, 117 B.R. 415, 419 (Bankr.N.D.Ind.1990) (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 398, 110 S.Ct. 2447, 2457, 110 L.Ed.2d 359 (1990) (“[A] litigant who violates Rule 11 merits sanctions even after a dismissal.”)). Thus, Desiderio’s failure to seek sanctions against Pergament in a more timely manner is not fatal to the relief he seeks.

e. Previous denial of Desiderio’s motion for summary judgment

[17] The Court finds that the previous denial of Desiderio’s motion for summary judgment does not preclude the imposition of sanctions here. Relevant to his argument in this regard, Pergament relies on *Cohoes*, 931 F.2d 222. First, *Cohoes* analyzed sanctions under Rule 9011(b)(2), which requires attorneys to ensure that their claims are warranted in law. *Id.* at 227. In the Second Circuit, an attorney may only violate Rule 9011(b)(2) if the claims asserted are frivolous. *Id.* Non-frivolousness is determinative of Rule 9011(b)(2), but is not determinative of Rule 9011(b)(1) which prohibits filings for an improper purpose, or Rule 9011(b)(3), which requires a reasonable investigation into whether facts asserted have evidentiary support. Thus, the denial of summary judgment does not preclude sanctions for violation of Rule 9011(b)(1) or (b)(3).

Second, the denial of summary judgment in this case was based in large part on disputes over facts that the Debtor eventually conceded, either by amending the petition or stipulating to them prior to trial. Neither the Debtor nor Debtor’s counsel can delay amending the petition or admitting to material facts until after summary judgment is denied, and then use the denial of summary judgment as a defense to sanctions.

Third, *Cohoes* emphasized that the party seeking sanctions in that case gained some advantage from the pendency of the bankruptcy case. *Id.* at 239. Here, there is no evidence that Desiderio ever gained an advantage from the pendency of this Chapter 7 case. Thus, *Cohoes* does not prohibit the Court from imposing sanctions under the circumstances of this case simply because the Debtor survived a motion for summary judgment on Desiderio's § 707 bad faith filing claims.

f. Failure to address sanctions in the Decision After Trial

Pergament writes that the Decision after Trial “denied” Desiderio's motion for *590 sanctions, and that Desiderio's failure to appeal the Decision after Trial prevents him from seeking sanctions now. [AP Dkt # 214 at 2, 18]. However, on the final day of that trial, this Court made it clear that it was only ruling on the issues presented by the adversary proceeding complaint, and that sanctions would be addressed in the main bankruptcy case, which at the time was being handled by Judge Eisenberg. [Trial Transcript 82:13–15, AP Dkt # 170]. In any event, Desiderio ultimately filed the Sanctions Motion before this Court, appealed this Court's ruling denying those sanctions, and this matter is squarely back before this Court on remand pursuant to a final Order of the United States District Court for the Eastern District of New York vacating this Court's denial. This Court can hardly find, at this stage in the proceedings, that Desiderio is precluded from pursuing these sanctions.

g. Analysis of Rule 9011(b)(1)

[18] On the merits of the allegations, the Court finds that Pergament's conduct is not sanctionable pursuant to Rule 9011(b)(1), which prohibits filings made for an improper purpose. In its prior Decision in this case, the Court found that the Debtor's sole purpose in filing the petition was to avoid paying Desiderio, even though he appeared to have the ability to do so. *D.A.T.* at 31. The Court determined that the Debtor had the ability to pay because: he fraudulently conveyed equity in his home via the Meera Mortgage (as found by the state court); there was a \$45,000 withdrawal from the Debtor and Meena's home equity line designed to further deplete the equity in his home; the Debtor had transferred assets to Meena to shield his business assets from collection; the Debtor had paid extensive attorney fees litigating with Desiderio; and Desiderio's judgments appeared to be the only significant debt owed by the Debtor. *Id.* The Court has no reason to attribute any of this bad faith conduct to Pergament. Based on the objectively verifiable facts supporting this Court's bad faith finding against the Debtor, the most Pergament should have known, at the time of filing, was that Debtor was involved in a fraudulent conveyance (the Meera Mortgage) and that most of his debts were owed to Desiderio. This Court is not prepared to find that Pergament filed this bankruptcy petition with an improper purpose sufficient to sanction him under Rule 9011(b)(1) under these facts.

h. Analysis of Rule 9011(b)(3)

[19] However, this Court finds that Pergament's conduct in this case did violate Rule 9011(b)(3) which provides that counsel's signature on a bankruptcy petition is a certification that “after an inquiry reasonable under the circumstances,—the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery ...” The Chapter 13 Petition was readily available to Pergament at the time of the preparation and filing of the Chapter 7 Petition. At a minimum, Pergament should have reviewed the Chapter 13 Petition and schedules and known that there were several discrepancies between the information presented in the Chapter 7 Petition and the Chapter 13 Petition.

First, the Schedule H to the Chapter 13 Petition reflected that Peter Devani was a co-debtor of the Debtor's. Not only that, Desiderio had filed a proof of claim (# 1) in the Chapter 13 case which attaches a copy of a judgment against the Debtor clearly showing that Mr. Devani was jointly and severally liable with the Debtor. The Court can think of no reason to exclude Mr. Devani from Schedule H to the *591 Chapter 7 Petition other than counsel's failure to conduct an “inquiry reasonable under the circumstances,” prior to his certification in Schedule H, that there existed no co-debtors other than Meena.⁶

Second, the Chapter 13 Petition, specifically, Schedule J, reflected monthly payments on the Debtor's first mortgage of \$823.73. Despite this, Schedule J to the Chapter 7 Petition reflects a monthly first mortgage payment of \$1,700. In light of this discrepancy, it would have been reasonable for Pergament to obtain from the Debtor a copy of his most recent first mortgage statement. As

we now know, if he had done so, it would have shown that the monthly payment on the Debtor's first mortgage was in fact still \$823.73 the month prior to the Chapter 7 Petition Date. As with the failure to list Peter Devani as a co-debtor, the Court finds that Pergament failed to conduct an inquiry reasonable under the circumstances prior to his certification that the monthly mortgage payment listed in Schedule J to the Chapter 7 Petition was correct.

In fact, although this Court is not prepared to hold that [Rule 9011\(b\)](#) imposes a continuing duty to amend a faulty petition and schedules, the record in this case reflects that Pergament knew or should have known of the inaccuracy of the monthly first mortgage payment as early as January 28, 2008, when he, on behalf of the Debtor, produced mortgage statements to Desiderio in [Rule 2004](#) discovery that reflected monthly first mortgage payments of \$823.73 for May through July 2007 (Adv. Doc # 191–14 at 5).⁷ Despite having this information in January of 2008, Pergament did not amend the petition and schedules to reflect the correct monthly first mortgage payment until one year later, on January 27, 2009.

[20] The Court and the chapter 7 trustee rely heavily on debtors and debtors counsel to provide truthful and accurate information in the petition and schedules. Specifically, the information provided in a debtor's schedule I (income) and schedule J (expenses), as well as the “means test” (Official Form 22A) is critical to an analysis of a debtor's good faith in filing the petition as well as whether the debtor should be required to repay a certain portion of his debts in a Chapter 13. If debtors and debtors' counsel are not held accountable for inaccuracies in the petition and schedules, the system simply will not work.

Third, Pergament signed the Chapter 7 Petition which reflected in Schedule B that the Debtor did not hold any cash, nor did he have any checking or savings accounts as of the Chapter 7 Petition Date. In addition, the response to Question 11 of the Statement of Financial Affairs indicated that the Debtor did not have any financial accounts that were closed within the one year prior to the Chapter 7 Petition Date. Pergament failed to reflect the Citibank bank account in the Chapter 7 Petition despite the fact that the account was disclosed in the Chapter 13 case. Specifically, *592 the original Chapter 13 Petition, filed on May 30, 2006, reflected the Citibank account. Pergament was thus on notice that this bank account existed prior to the Chapter 7 Petition Date, and he failed to reflect it in the Chapter 7 Petition. Pergament apparently relied on his client's representations that the account was closed more than one year prior to the Chapter 7 Petition Date. The Court finds, however, that the fact that this bank account was reflected in the Chapter 13 schedules was sufficient to put Pergament on notice of its existence and it would have been a reasonable investigation under the circumstances for Pergament to require of his client an account closing statement. Absent that, Pergament should have erred on the side of disclosing the bank account.

As with the inaccuracies with respect to the Debtor's monthly first mortgage payment, the Court will note that the record reflects that Pergament did in fact know about the Citibank account—and that it was in fact open as of the Chapter 7 Petition Date—as early as September 29, 2008 when Pergament's office signed an amended response to Desiderio's [Rule 2004](#) discovery request. [AP Dkt # 153]. In response to Question 6, which requested the Debtor's bank statements from January 2001 to July 30, 2007, the Debtor produced documents with Bates Stamp numbers 000275 through 000657. In Desiderio's motion for sanctions [AP Dkt # 191–17], Desiderio attached copies of a Citibank bank statement, for Acct. # xxx9420 (the same as was disclosed in the Chapter 13), held jointly by the Debtor and Meena, showing a \$646.67 balance as of November 6, 2006. The bottom of that bank statement shows a bates stamp # of 000553—which is within the range of the bates numbers of the documents that Pergament produced to Desiderio in September of 2008. This clearly shows that Pergament knew, or should have known, the account was open and held a balance, as early as September of 2008, and yet he amended neither the Debtor's Schedule B, nor Question 11 of the Statement of Financial Affairs. The Debtor, in opposition to Desiderio's motion for summary judgment in late 2008, argued that Desiderio was fully aware of the Citibank account because it was Desiderio who had the account restrained in November 2006. However, this is no defense to a failure to disclose an interest in a bank account, and Pergament should have known that.

Further, in the joint pretrial memorandum, dated October 28, 2009, signed by Pergament, he admits that “[t]he partial statements of account that were eventually produced by Debtor indicate that he had a checking account with Citibank which was open and had a positive balance at least until November 6, 2006.” [AP Dkt # 69, at 10]. Yet, the schedules were *never* amended to reflect the existence of the Citibank account.⁸

***593** Fourth, the Court finds that the Chapter 7 Petition did not accurately reflect the status of the Meera Mortgage as of the Chapter 7 Petition Date. Pergament was fully aware of the state court Foreclosure Action and the findings made therein. Therefore, he knew or should have known that as of the Chapter 7 Petition Date the state court had not yet entered an order vacating the Meera Mortgage and as a result, as of the Chapter 7 Petition Date, the Meera Mortgage was a valid lien on the Debtor's residence. Admittedly, it was a mortgage that was subject to vacatur, but this does not justify the manner in which Pergament reflected the Meera Mortgage in the Chapter 7 Petition. To list the litigation in response to Question 4 of the Statement of Financial Affairs and simply note that the action was “to be discontinued” was the kind of partial and inaccurate disclosure that is inexcusable.

Fifth, the Court finds that Pergament's failure to include the Debtor's ownership interests in Kuliwala Food Corp. in Schedule B of the Chapter 7 Petition was the result of Pergament's failure to conduct a reasonable inquiry under the circumstances. Amended Schedule B to the Chapter 13 Petition, filed on October 16, 2006, shows that the Debtor reported having a 70% ownership interest in Kuliwala at least as of the Chapter 13 Petition Date. Despite this, the Chapter 7 Petition as originally filed does not contain *any* reference to Kuliwala. Given the prior disclosure of this corporate interest, it would have been reasonable under the circumstances, for Pergament to conduct a search of corporate filings to objectively verify the information given to him by his client. As it turns out, in September of 2007, Pergament filed an amended Schedule B to list, among other things, a 100% interest in Kuliwala, as “nominee.”

Sixth, the Debtor testified at trial that prior to filing the Chapter 7 Petition, he provided Pergament's office with a draft of his 2006 tax return prepared by his accountant, Shah & Pandya, C.P.A. [Trial Transcript, June 6, 2010 [AP Dkt # 169] at 166:20–167:5, Exh. 29]. This draft showed gross income by the Debtor of \$10,036, tax liability of \$1,418, listed the Debtor's job title as “manager,” and identified Shah & Pandya, C.P.A. as tax preparers. [AP Dkt # 191–24]. Pergament never denied that this draft was provided to him pre-petition. The fact that the Debtor's income and income tax liability reflected in that draft tax return was exactly the same as what was reported in the Chapter 7 Petition also suggests that his office had the draft tax return when it prepared the Chapter 7 Petition. Yet in response to Question 19 of the Statement Financial Affairs—which requires debtors to list bookkeepers and accountants who have “keep or supervised the keeping of books of account and records” of the debtor, who have “audited the books of account and records, or prepared a financial statement of the debtor,” or who possessed the books of account and records of the debtor—does not disclose Shah & Pandya, C.P.A. The Statement of Financial Affairs was not amended until January of 2009 to disclose the Debtor's accountants. The Court finds that Pergament had this information prior to filing the Chapter 7 Petition, and it should have been included with the original filings.

Finally, Pergament asserts that the “emergency” nature of the filing of the Chapter 7 Petition excuses the deficiencies ***594** in the petition as originally filed, and that the petition was amended “as information was obtained and provided to us.” [AP Dkt # 214 at 5]. He claims that because the Debtor “was facing an imminent arrest due to a state court finding of contempt ... we filed a bare bones bankruptcy petition to avoid having him arrested.” *Id.* First, the Court notes that the arrest warrant was issued on April 3, 2007. The Chapter 7 Petition was not filed until July 30, 2007. If there were truly an emergency here, the bankruptcy would have been filed shortly after the April 3rd arrest warrant. Even so, the emergency nature of a bankruptcy filing does not necessarily excuse compliance with Rule 9011(b). See *In re Alessandro*, 10–12511 AJG, 2010 WL 3522255 at *3 (Bankr.S.D.N.Y. Sept. 7, 2010); *In re Moffett*, 10–71920, 2012 WL 693362 at *1 (Bankr.C.D.Ill. Mar. 2, 2012). Second, the Chapter 7 Petition was not “bare bones.” Rather, most if not all of the required schedules were attached to the petition—they just were not accurate. If Pergament had checked the Chapter 13 Petition and conducted an independent verification of the information provided to him where inconsistencies existed, he would have known that the Chapter 7 Petition was not accurate. Finally, as previously explained, Pergament's contention that the petition was amended as information was provided to them, is just not true.

For all of the foregoing reasons, the Court finds that Pergament's conduct is sanctionable pursuant to Rule 9011(b)(3).⁹

i. Section 707(b)(4)

[21] Having found that Pergament's conduct violates [Rule 9011\(b\)\(3\)](#), the Court declines to engage in a separate analysis of his conduct under [§ 707\(b\)\(4\)](#). First, without deciding this issue, it is not entirely clear to the Court that Desiderio has standing to seek relief under [§ 707\(b\)\(4\)](#). See [11 U.S.C. § 707\(b\)\(6\)](#) (“Only the judge or United States trustee ... may file a motion under [section 707\(b\)](#) ...” if a debtor's current monthly income is below the median). Second, [§ 707\(b\)\(4\)](#) does not provide Desiderio with any direct claim against Pergament to collect his legal fees incurred in this bankruptcy case. See [11 U.S.C. § 707\(b\)\(4\)\(C\) and \(D\)](#).¹⁰

Third, even if he had standing and a separate claim for damages, this Court declines to award monetary sanctions for Pergament's conduct in this case.

Finally, this Court finds that the safe harbor provisions of [Rule 9011\(c\)](#) also apply to a motion for sanctions under [11 U.S.C. § 707\(b\)\(4\)](#). As a result, even if the statute did give him an individual remedy, any attempt by Desiderio to apply [§ 707\(b\)\(4\)](#) beyond the initial filing of the bankruptcy petition—which has already ^{*595} been addressed under [Rule 9011\(b\)\(3\)](#)—fails. Cf. *In re O'Brien*, 443 B.R. 117, 144 (Bankr.W.D.Mich.2011) (“If the Attorney has violated her obligations [under [§ 707\(b\)\(4\)\(C\) and \(D\)](#)], she may be held accountable in accordance with Bankruptcy [Rule 9011\(c\)](#)”). [Section 707\(b\)\(4\)\(C\) and \(D\)](#) should be read in conjunction with [§ 707\(b\)\(4\)\(A\) and \(B\)](#), which both refer specifically to [Rule 9011](#) and/or the “procedures described in [rule 9011](#) of the Federal Rules of Bankruptcy Procedure.” A finding that the safe harbor provisions do not apply to sanctions under [§ 707\(b\)\(4\)\(C\) and \(D\)](#) would eviscerate the safe harbor provision of [Rule 9011](#). As this Court previously stated, [§ 707\(b\)\(4\)](#) sanctions were intended to be an explicit extension of [Rule 9011](#) sanctions to debtor's counsel into the bankruptcy context. See *In re Withrow*, 07–41243–HJB, 2008 WL 2945423 at *2 (Bankr.D.Mass. July 25, 2008) (“[§ 707\(b\)\(4\)\(C\) and \(D\)](#) parallels [Rule 9011](#). It created no new standard. It simply codified and put an exclamation point on [Rule 9011](#) in the preparation of certain documents.”). The standards under both provisions are similar, and if [§ 707\(b\)\(4\)\(C\) and \(D\)](#) did not require compliance with the safe harbor provision of [Rule 9011](#), a moving party could do an end run around [Rule 9011](#) safe harbor provisions in the bankruptcy context by simply moving under [§ 707\(b\)\(4\)](#) instead. This would be an absurd result and minimize the safe harbor's “salutary effect of providing appropriate due process considerations to sanction litigation, reducing [Rule 11](#) volume and eliminating abuses proscribed by this Rule.” *Photocircuits Corp. v. Marathon Agents, Inc.*, 162 F.R.D. 449, 452 (E.D.N.Y.1995); See also *In re Pennie & Edmonds LLP*, 323 F.3d 86, 91 (2d Cir.2003).

j. Remedy

[22] [23] [24] The Court must exercise its discretion to determine the nature of the appropriate sanction. Possible sanctions include an award of attorney's fees, but they can also include a range of other actions, from reprimand to disbarment. *Matter of Omega Trust*, 120 B.R. 265, 270 (S.D.N.Y.1990). Generally, the Court should award the minimum sanction necessary to deter future sanctionable conduct. *Id.* at 271. The Court may also consider, *inter alia*, the reasonableness of costs and expenses incurred by the party seeking sanctions, prejudice suffered by the party seeking sanctions, the relative culpability of client and counsel, the degree to which the party seeking sanctions caused the expenses for which recovery is sought, whether the sanctionable conduct was a conscious disregard of duty, and the general reputation of the individual to be sanctioned. *Id.* at 271; *In re Witt*, 481 B.R. 468, 480 (Bankr.N.D.Ind.2012) (censure was appropriate sanction under [Rule 9011](#) where there was no “conscious disregard of [attorney's] obligations under [Rule 9011](#).”); *In re Martinez*, 393 B.R. 27, 41 (Bankr.D.Nev.2008) (public reprimand was sufficient to deter future violations of [Rule 9011](#) based on attorney's “general reputation” for “appear[ing] regularly before [the] court, and ... [being] courteous and civil in all matters.”).

[25] The Court does not find that Pergament engaged in a conscious disregard of his duties. Mainly, the Court believes that Pergament's conduct in this case was careless and easily addressed by a change in Pergament's office procedures related to intake and preparation of bankruptcy petitions. Pergament is a respected practitioner before this Court, and the Court is confident that in the future he will conduct sufficiently reasonable investigations under [Rule 9011](#). Based on a consideration of all of the above factors, the Court finds that publication of this Decision is a sufficient ^{*596} sanction against Pergament and WGP pursuant to [Rule 9011](#), and it is within this Court's discretion to decline the imposition of monetary sanctions for violation of those provisions.

[26] The Court finds that WGP is jointly and severally liable for Pergament's sanctions pursuant to [Rule 9011](#) because no extraordinary circumstances exist that would exclude the law firm from liability. See [Rule 9011\(c\)\(1\)\(A\)](#).

ii. Bad faith and sanctions pursuant to 11 U.S.C. § 105, the Court's inherent power and 28 U.S.C. § 1927

Desiderio argues that, even if the delay in amending the schedules did not violate [Rule 9011](#), it unreasonably and vexatiously multiplied the proceedings in violation of [28 U.S.C. § 1927](#), and could be subject to sanctions pursuant to [11 U.S.C. § 105](#) and this Court's inherent power because Pergament's conduct was in bad faith, vexatious, wanton, or oppressive. Desiderio also asserts that Pergament engaged in discovery misconduct and filed frivolous motions.

With regard to [§ 105](#), [§ 1927](#) and this Court's inherent power to sanction, Pergament responds that bad faith is required under each theory, and a finding of bad faith sufficient to dismiss the petition does not necessarily include a finding of bad faith on the part of the attorney sufficient to impose sanctions. *In re HBA E., Inc.*, 101 B.R. 411, 418 (Bankr.E.D.N.Y.1989).

[11 U.S.C. § 105](#) provides that:

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Id.

[27] [Section 105](#) may provide a basis to impose sanctions, but only against bad-faith conduct and only when it is tied to a specific provision of the Bankruptcy Code, “rather than to further the purposes of the Code generally ... and not merely [tied] to a general bankruptcy concept or objective.” *In re Smart World Technologies, LLC*, 423 F.3d 166, 184 (2d Cir.2005) (internal quotation marks and citations omitted).

[28] [29] [30] [31] A court may use [28 U.S.C. § 1927](#) to sanction attorneys for bad-faith conduct that is not necessarily “entirely without merit” or tied to a specific Code provision, but which unnecessarily delays the proceedings. [28 U.S.C. § 1927](#) provides that:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

“The purpose of the statute is to deter unnecessary delays in litigation.” *Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir.1986) (quoting H.R.Conf.Rep. No. 1234, 96th Cong., 2d Sess. 8, reprinted in 1980 U.S. Code Cong. & Ad. News, 2716, 2782); See *Hudson Motors P'ship v. Crest Leasing Enterprises, Inc.*, 845 F.Supp. 969, 978–79 (E.D.N.Y.1994) (describing non-exclusive list of examples of conduct that violates [§ 1927](#)). Courts within the Second Circuit construe [§ 1927](#) “narrowly and with great caution, so as not to stifle the enthusiasm or chill the creativity that is *597 the very lifeblood of the law.” *Mone v. Comis. of Internal Revenue*, 774 F.2d 570, 574 (2d Cir.1985)(internal citations omitted). The imposition of sanctions pursuant to [28 U.S.C. § 1927](#) is discretionary, and courts may decline to award sanctions even where conduct has unreasonably or vexatiously multiplied the proceedings in the interest of justice, such as when the party seeking sanctions is primarily responsible for the multiplication of the proceedings. *Oliveri*, 803 F.2d at 1279 (reversing award of sanctions where moving party caused the delay in proceedings).

[32] [33] [34] A bankruptcy court also “has inherent authority to sanction parties appearing before it for acting in bad faith, vexatiously, wantonly, or for oppressive reasons.” *In re 680 Fifth Ave. Associates*, 218 B.R. 305, 323 (Bankr.S.D.N.Y.1998). In the Second Circuit, inherent power sanctions are appropriate only if there is clear evidence that the conduct at issue is (1)

entirely without color and (2) motivated by improper purposes. *Wolters Kluwer Fin. Servs., Inc. v. Scivantage*, 564 F.3d 110, 114 (2d Cir.2009); *Sierra Club v. U.S. Army Corps of Eng'rs*, 776 F.2d 383, 390 (2d Cir.1985) (“The test is conjunctive and neither meritlessness alone nor improper purpose alone will suffice.”). Specifically, “[c]onduct is entirely without color when it lacks any legal or factual basis; it is colorable when it has some legal and factual support, considered in light of the reasonable beliefs of the attorney.” *Wolters Kluwer Fin. Servs.*, 564 F.3d at 114.

[35] Sanctions under § 105, § 1927, and the Court's inherent power all require bad faith, and the bad faith analysis under each is generally the same requiring clear and specific findings of bad faith. *Oliveri*, 803 F.2d at 1273 (“[W]e hold today that an award made under § 1927 must be supported by a finding of bad faith similar to that necessary to invoke the court's inherent power. Indeed, the only meaningful difference between an award made under § 1927 and one made pursuant to the court's inherent power is, as noted above, that awards under § 1927 are made only against attorneys or other persons authorized to practice before the courts while an award made under the court's inherent power may be made against an attorney, a party, or both.”) (internal citations omitted); *In re Negosh*, 06–CV–5617 (JS), 2007 WL 2445158 at *10 (E.D.N.Y.2007) (“In imposing sanctions pursuant to Section 105(a), courts have required a showing of bad faith similar to that required in imposing sanctions under the court's inherent power.”); *In re Smith*, BR 896–80189–478, 2011 WL 222146 at *3 (E.D.N.Y. Jan. 21, 2011) (sanctions were a “close call” but the court declined to sanction under 28 U.S.C. § 1927 where it could not “state with certainty that Appellants acted in bad faith”); *But see Wilder v. GL Bus Lines*, 258 F.3d 126, 130 (2d Cir.2001) (requiring bad faith, negligence or recklessness in performing responsibilities as an officer of the court) (citing *United States v. Seltzer*, 227 F.3d 36, 40 (2d Cir.2000)).

[36] The Court declines to sanction Pergament pursuant to either its inherent power, 28 U.S.C. § 1927, or § 105 because the record does not allow a specific, clear finding of bad faith. The circumstances of this case do not support inferring bad faith; Pergament made no affirmative misrepresentations to the Court and the petition as whole was not so utterly without merit that bad faith can be presumed. Nor is the Court prepared to find that Pergament's conduct rose to the level of negligence or recklessness.

Further, under 28 U.S.C. § 1927, even if the Court were to find that Pergament acted “unreasonably or vexatiously,” it cannot find that his conduct was the cause of the “multiplication” of these proceedings. *598 To the contrary, if anyone is to blame for the overly litigious nature of these proceedings, it is Desiderio. Desiderio's counsel has been more than a zealous advocate in this case and his conduct in seeking to collect sanctions and attorneys' fees from the Debtor, Meena and their counsel at every turn has bordered on the fanatical. As this Court previously found, the Debtor filed this case in bad faith, and his conduct in this case warranted a denial of discharge, which is the one of the most severe penalties to be imposed on a Chapter 7 debtor. To the extent Desiderio complains of Pergament's conduct during discovery, that misconduct was addressed by the prior monetary sanctions awarded against him, as well as the decision by Judge Eisenberg to limit the parties' use of certain evidence at trial.

To date, according to this Court's calculations, Desiderio has total pre-petition judgments against the Debtor for over \$152,675.62, including interest, all stemming from *actual damages* of \$76,143.97.¹¹ He also obtained a monetary award in the bankruptcy case jointly and severally against Debtor, Meena, Pergament and WGP in the amount of \$6,758.10. This means that Desiderio has at least obtained judgments against the Debtor, on account of legal fees, expenses and/or sanctions, in the amount of approximately \$83,289.75. He also seeks an additional \$128,635.83 in pre-petition legal fees that have not been reduced to judgment, which means that, not including what he seeks in this motion for sanctions, he has already sought \$211,925.58 in legal fees in connection with only \$76,143.97 in actual losses. (Attachment to Claim # 1–1). In this Motion, Desiderio seeks an additional \$253,953.69 in legal fees for his work in the bankruptcy case, which means that he seeks a total of \$465,579.27 in fees, almost ten times the amount of his actual damages. [AP Dkt # 191–26].

The Court is not suggesting that Desiderio was not entirely within his rights to seek and obtain monetary relief against the Debtor, Meena and Pergament, but it also will not grant Desiderio the relief he seeks against Pergament for unnecessary multiplication of these proceedings under 28 U.S.C. § 1927.

iii. Taxation of costs—28 U.S.C. § 1920

[37] Section 1920 sets forth examples of the types of costs that may be shifted to an opposing party if costs are in fact shifted, such as filing, transcription, expert witness and other fees associated with the litigation. 28 U.S.C. § 1920. Section 1920 does not, however, create a basis for shifting costs. It merely enumerates and limits the costs that may be taxed when a court *does* shift costs. See (“Section 1920 enumerates expenses that a federal court may tax as a cost under the discretionary authority found in Rule 54(d). It is phrased permissively because Rule 54(d) generally grants a federal court discretion to refuse to tax costs in favor of the prevailing party.”)

In proceedings governed by the Federal Rules of Civil Procedure, § 1920 is read in conjunction with Fed.R.Civ.P. 54(d)(1), which states that “costs—other than attorney’s fees—*should* be allowed to the prevailing party.” (emphasis added). However, the Bankruptcy Rules do not incorporate Fed.R.Civ.P. 54(d) into bankruptcy proceedings. Instead, Fed. R. Bankr.P. 7054(b), states that “[t]he court *may* allow costs to the prevailing party except when a statute of the United States *599 or these rules otherwise provides.” Fed. R. Bankr.P. 7054(b) (emphasis added)

[38] [39] Desiderio seeks relief under 28 U.S.C. § 1920, but did not cite to Rule 7054. Even if he did cite to it, cost-shifting under that Rule is discretionary. A prevailing party is not necessarily entitled to cost-shifting in bankruptcy. Several other statutes allow for the costs defined in 28 U.S.C. § 1920 to be shifted in bankruptcy proceedings, but none apply here. See 11 U.S.C. § 110(j)(1) and (4); § 303(i); § 362(k)(1); § 363(n); § 502(b); § 506(b); § 523(d); § 526(a)(3); § 707(b)(4)(A) and (b)(5)(A); Fed. R. Bankr.P. 7041, 7068 and 8014. Absent some more specific cost-shifting statute relevant to these proceeding which *require* the Court to shift costs, the Court will not do so. For all of same reasons described earlier in this Decision to support this Court’s denial of sanctions against Pergament under 28 U.S.C. § 1927, this Court declines to tax costs against Pergament or the Debtor in this case. Desiderio’s legal fees and expenses in this case are partly attributable to Desiderio’s legitimate concerns in this case, but largely attributable to his own litigiousness. If, in fact, Desiderio has a contractual basis to collect reasonable legal fees and expenses in connection with collection of his debt, he can do so outside of the context of these proceedings.

iv. Damages caused by the increase in New York’s homestead exemption

[40] Finally, Desiderio seeks \$100,000.00 in damages from WGP and Pergament resulting from the increase in the New York homestead exemption during the pendency of this case, from \$50,000 to \$150,000 in January of 2011. Desiderio argues that he would have been able to satisfy his pre-petition judgment lien(s) from substantial equity in the Debtor and Meena’s home if this case had not been delayed as a result of the misconduct in this case by the Debtor, Meena, Pergament and WGP. Desiderio does not cite any authority for the premise that he may recover damages caused by an increase in the Debtor’s available homestead exemption.

Desiderio’s request for damages due to the change in the New York homestead exemption during the pendency of this case is denied. First, were there to be a sale of the real property in this case by the Trustee and subsequent distribution to creditors from the non-exempt equity, it is the homestead exemption *on the date of filing* that would be relevant, not on any subsequent date. See 11 U.S.C. § 522(b)(3). Second, it is only within the bankruptcy context, specifically § 522(f) of the Bankruptcy Code, that the homestead exemption can be used to avoid the fixing of a judgment lien to the extent that it impairs the homestead exemption. Outside of bankruptcy, a judgment debtor cannot use the homestead exemption to come ahead of or avoid payment of a judgment lien, if there is a surplus above consensual liens, upon foreclosure by a mortgagee. See *First Federal Savings and Loan Assn. v. Brown*, 434 N.Y. S.2d 306 (N.Y.App.Div. 4th Dept.1980). Even if the Court were to attribute the substantial delays in administering this case to the Debtor, Meena, Pergament and /or WGP, it could not find that the change in the New York homestead exemption caused any monetary damage to Desiderio. Nor can this Court find any authority, and Desiderio has cited to none, to impose damages for such a change in the law during the pendency of a bankruptcy case.

B. Sanctions against the Debtor

[41] In the Motion, Desiderio seeks to impose monetary sanctions against the Debtor in an amount equal to all of Desiderio's *600 legal fees and expenses incurred in connection with this bankruptcy proceeding. Initially, Desiderio contends that he is entitled to such fees and expenses under the terms of the contract entered into by the Debtor and Desiderio pre-petition. Next, he cites to 11 U.S.C. § 105 and 28 U.S.C. § 1920, and argues that sanctions are appropriate because the Debtor filed the petition in bad faith, engaged in discovery misconduct, filed frivolous motions, and lied at his § 341 meeting. Pergament responds that the finding of bad faith sufficient to dismiss the Chapter 7 Petition does not automatically require sanctions.

First, Desiderio's claim for legal fees and expenses against the Debtor in this case under a pre-petition contract theory fails. Generally, only an *oversecured* creditor is entitled to a claim for legal fees and expenses incurred during the pendency of the bankruptcy case. See 11 U.S.C. § 506(b). Even then, the allowance by the bankruptcy court of post-petition legal fees and expenses of an oversecured creditor is only relevant as part of the *claims allowance* process. In this case, the Trustee has indicated that there will be no distribution to creditors, secured or unsecured, and therefore there is no point in allowing or disallowing claims in this case. This Court has already denied the discharge in this case and so the bankruptcy discharge will pose no bar to Desiderio pursuing the Debtor outside of bankruptcy for any legal fees and expenses that he may be entitled to under the contractual agreements between the parties.

Second, the Court declines to impose further monetary sanctions against the Debtor under the other theories asserted by Desiderio. Although the Court recognizes that it made specific findings of bad faith conduct by the Debtor in connection with the filing of the Chapter 7 Petition, it is clear in this case that the imposition of monetary sanctions against the Debtor at this stage of the proceedings will serve no purpose. First, the Debtor has already received the ultimate sanction for his conduct in connection with this bankruptcy case: the denial of discharge. At the conclusion of these proceedings – nearing seven years in duration – the Debtor will have received no relief in the form of a bankruptcy discharge. Although denial of discharge does not automatically preclude sanctions under Rule 9011(b)(1) for filing a petition for an improper purpose, in this case, additional sanctions would not add any deterrence value. Second, the record in this case reflects that the Debtor is no longer living in the United States, and perhaps is living in India. Any monetary sanctions issued by the Court at this point might be largely unenforceable and/or uncollectible. Nonetheless, as a result of denial of the discharge, Desiderio is free, upon this case closing, to pursue the Debtor in a non-bankruptcy forum for any and all damages to which he believes he is entitled. Finally, the Court will not impose costs against the Debtor pursuant to 28 U.S.C. § 1920 for the same reasons explained earlier in this Decision with respect to imposition of costs against Pergament.

C. Sanctions against Meena

[42] The Court finds that the only possible basis to impose sanctions upon Meena, a non-debtor and non-attorney, in this case would be pursuant to this Court's inherent power.¹² A non-party may only *601 be sanctioned pursuant to the Court's inherent power if they (1) violate a specific Court order or (2) act in bad faith, have a substantial interest in the litigation, and play a substantial role in the litigation. *Amerisource Corp. v. Rx USA Int'l Inc.*, 02–CV–2514 (JMA), 2010 WL 2730748 at *5–6 (E.D.N.Y. July 6, 2010) *aff'd sub nom. New York Credit & Fin. Mgmt. Grp. v. Parson Ctr. Pharmacy, Inc.*, 432 Fed.Appx. 25 (2d Cir.2011) (sanctioning majority shareholder and chief executive who managed litigation and represented the party-defendant “at every step”) (citing *Helmac Products Corp. v. Roth (Plastics) Corp.*, 150 F.R.D. 563, 564–68 (E.D.Mich.1993)); *Helmac*, 150 F.R.D. at 564–65 (sanctioning owner and principal of debtor who was “as much involved in the litigation as any party would be”). Courts have occasionally held that other non-parties are subject to sanctions under *Helmac*. See *In re Novak*, 932 F.2d 1397, 1408 (11th Cir.1991) (nonparty insurers have real stake in the litigation because they are financially liable for judgments against the insured); *Bartos v. Pennsylvania*, CIV. 1:08–CV–0366, 2010 WL 1816674 (M.D.Pa. May 5, 2010) (finding that witnesses substantially participated in employment discrimination action by engaging in egregious conduct like lying and forwarding disparaging reports about Plaintiff to employer and had a substantial interest because they were still employed by Defendant); *In re White*, 2:07CV342, 2013 WL 5295652 (E.D.Va. Sept. 13, 2013) (Neo-Nazi leader who sent packages containing racial epithets, swastikas, and threats to Plaintiffs in housing discrimination action and threatened and posted personal information

of Plaintiff's counsel and his wife to the internet substantially participated in the litigation to subject him to inherent power sanctions).

[43] With regard to Meena's alleged substantial interest in these proceedings, Desiderio argues that Meena is the Debtor's spouse, she funded his case, and assisted the Debtor "every step of the way." (Sanctions Motion at 23). With regard to her substantial participation in this case, Desiderio argues that Meena (1) was a "willful participant" in fraudulent conveyances by the Debtor, (2) made false statements under oath, (3) submitted an affidavit she knew to be false regarding the debtor's income, (4) "engaged in dilatory, evasive and contemptuous conduct intended to hinder, impair and impede Plaintiff," and (5) funded Debtor's bankruptcy case. (Sanctions Motion at 20–23).

Pergament asserts that Desiderio's allegations against Meena are irrelevant because they did not involve the violation of a Court order and because Meena did not act in bad faith.

The Court declines, under the facts of this case, to sanction Meena. Unlike the cases above, Desiderio points to no "substantial interest" by Meena other than her status as a spouse who funded her husband's case and assisted him. Desiderio does not point to a single case where a spouse, or any family member, was held to have a substantial interest in a proceeding sufficient to sanction. If the Court adopts Desiderio's argument that Meena has a "substantial interest" in this proceeding sufficient to subject her to non-party sanctions absent violation of a Court order, the Court would be expanding its jurisdiction over debtors' spouses well beyond the confines of existing law. This the Court declines to do.

Even if her conduct was sufficient to create a substantial interest in this case, Meena did not substantially participate in the proceeding. Meena testified, in person *602 and via affidavit, and was the subject of subpoenas. This alone is insufficient to establish sufficient participation. Her participation in the fraudulent conveyances outside of these proceedings does not implicate participation within the Court proceedings. In fact, even if this Court had jurisdiction to sanction Meena, it would not do so because it can point to no conduct by Meena within these proceedings that would subject her to sanctions.

Because Meena lacked substantial interest and did not substantially participate, the Court may only sanction her pursuant to its inherent powers if she violated a specific Court order. The only order Meena may arguably have violated was Judge Eisenberg's November 4, 2008 Order, and that Order delineated the specific sanctions that would apply if it was violated. Sanctions pursuant to that Order are addressed in this Decision, and this Court will not address Meena's alleged violation of that Order pursuant to its inherent powers.

D. Motion to Enter Judgment on Judge Eisenberg's November 4, 2008 Order

[44] On October 10, 2007, Desiderio filed a motion for permission to conduct [Rule 2004](#) examinations of the Debtor and Meena. [BK Dkt # 14]. Desiderio sought [Rule 2004](#) discovery "to investigate the truthfulness of the Debtor's claims with respect to his salary and ownership interests in Health Heaven, Inc., Dave's Health Foods, Kuliwala Food Corporation, and/or any other business interest which the Debtor failed to disclose in his petition and schedule." [BK Dkt # 14, ¶ 40]. He requested an examination of the Debtor and Meena regarding the circumstances surrounding: (a) their acquisition of Dave's Health Foods and/or any other business ownership interest; (b) their financial status; (c) the acquisition and disbursement of the \$300,000 mortgage obtained from Meera Management, LLC; and (d) such other matters bearing on the potential discovery of assets of the Debtor's estate. [BK Dkt # 14, ¶ 41].

Over the objection of the Debtor and Meena, Judge Rosenthal entered the [Rule 2004](#) order on November 29, 2007. [BK Dkt # 31]. Desiderio served [Rule 2004](#) discovery requests on November 30, 2007, and then a supplemental request on February 14, 2008.

In January, 2008, the Debtor and Meena produced partial responses and objections to the initial [Rule 2004](#) subpoenas, and on February 19, 2008, filed a motion for protective order arguing that the document requests were irrelevant, overbroad and overburdensome. [BK Dkt # 43]. Desiderio opposed the motion for protective order and moved to hold the Debtor and Meena in

contempt for failure to comply with the [Rule 2004](#) subpoenas. [BK Dkt # 47]. Shortly thereafter, on March 27, 2008, Desiderio filed a complaint against the Debtor seeking to dismiss the bankruptcy case as a bad faith filing, to deny the Debtor's discharge and/or determine the debt owed to Desiderio to be non-dischargeable. *See* [11 U.S.C. §§ 707, 727 and 523](#). The basis for the complaint—26 pages in total—was the Debtor's alleged failure to disclose a variety of business interests in this petition and schedules, as well as other material misstatement and/or omissions. The Court notes that this appears to be the same subject matter on which Desiderio sought [Rule 2004](#) discovery.

At a hearing held on May 29, 2008, Judge Eisenberg denied the Debtor and Meena's motion for protective order, and granted Desiderio's motion for sanctions against the Debtor and Meena for their failure to comply with the [Rule 2004](#) subpoenas. Judge Eisenberg found that the *603 filing of the adversary proceeding on March 27, 2008 did not necessarily preclude the Debtor's and Meena's obligations to comply with a previously issued [Rule 2004](#) order. Prior to entry of the Order memorializing this ruling, on June 26, 2008, the Debtor and Meena moved to reconsider the Court's decision. [BK Dkt. # 57]. At the same time, the Debtor filed a motion in the adversary proceeding to compel discovery that had commenced under the Federal Rules of Civil Procedure. [AP Dkt # 6]. The Debtor's motion to compel discovery in the adversary proceeding was denied by Order, dated July 28, 2008. [AP Dkt # 10].

On September 4, 2008, Desiderio moved to compel discovery in the adversary proceeding, [AP Dkt # 11], and on October 18, 2008, Judge Eisenberg entered an Order requiring the Debtor to respond to discovery requests in the adversary proceeding by October 24, 2008. [AP Dkt # 19].

On September 29, 2008, the Debtor and Meena provided Desiderio with supplemental document responses to the [Rule 2004](#) discovery.

On November 4, 2008, Judge Eisenberg denied the Debtor and Meena's motion for reconsideration and entered an Order granting Desiderio's March 10th contempt motion and sanctioning the Debtor and Meena \$100 per day *payable to Desiderio* “for every day as of the date of [the] Order until they produce the documents demanded pursuant to the [Rule 2004](#) Subpeona, Examination Order, and the Supplemental Document Request, and appear for examination ...”¹³ [BK Dkt. # 72]. Two weeks later, on November 18, 2008, Desiderio filed a motion for summary judgment in the adversary proceeding arguing that based on the facts as established by his voluminous exhibits, judgment should enter in his favor in the adversary proceeding as a matter of law. The motion for summary judgment was denied by Order, dated April 2, 2009.

On January 23, 2009, Desiderio filed a motion in the adversary proceeding to strike the Debtor's answer and enter default against the Debtor for his failure to comply with the [Rule 2004](#) subpoena(s). In that motion, Desiderio also sought to impose further sanctions against the Debtor for this alleged failure to comply, including apprehension and incarceration by the United States Marshal Service. [AP Dkt # 32]. On March 17, 2009, the Debtor filed a motion to dismiss the adversary proceeding for failure to comply with discovery under the Federal Rules of Civil Procedure. [AP Dkt # 36]. On April 2, 2009, Judge Eisenberg entered an Order prohibiting either party from producing at trial any document or record that was not previously produced to opposing counsel. [AP Dkt # 42]. Judge Eisenberg specifically deferred ruling on Desiderio's request for monetary and other sanctions for failing to comply with the [Rule 2004](#) subpoenas, and that portion of Desiderio's motion, [AP Dkt# 32], was pending at the time of the trial conducted by this Court from November 2009 through June 2010.

Although not articulated in this Court's Decision after Trial, it was this Court's belief that the entry of a judgment denying the Debtor's discharge sufficiently addressed and mooted Desiderio's request for civil contempt sanctions against the Debtor for failing to comply with *604 [Rule 2004](#) discovery requests. In addition and more significantly, prior to trial Judge Eisenberg had already issued an order prohibiting the use at trial of any document not previously exchanged in discovery. Regardless of whether the Debtor and Meena had produced each and every document requested in the [Rule 2004](#) subpoenas, they claim to have given Desiderio all of the documents in their possession and control that were responsive to the subpoenas. Moreover, the documents sought in the [Rule 2004](#) subpoenas were intended, among other things, to provide Desiderio with the very information he used to successfully prosecute his [§ 727](#) objection to discharge. This alone indicated to this Court that the [Rule 2004](#) examinations had

served their intended purpose. It is also this Court's belief that, although early on in the adversary proceeding Judge Eisenberg found it appropriate to continue to enforce the [Rule 2004](#) subpoenas, it is generally appropriate upon the filing of an adversary proceeding—on the same facts that are the subject of [Rule 2004](#) subpoenas—to abandon enforcement of the [Rule 2004](#) subpoena—which is generally very broad in scope—and defer to the discovery rules under the Federal Rules of Civil Procedure with all its procedural safeguards. *In re Enron Corp.*, 281 B.R. 836, 840 (Bankr.S.D.N.Y.2002) (“[O]nce an adversary proceeding or contested matter is commenced, discovery should be pursued under the Federal Rules of Civil Procedure and not by [Rule 2004](#)”); *See also In re Glitnir banki hf.*, 08–14757 SMB, 2011 WL 3652764 at *4 (Bankr.S.D.N.Y. Aug. 19, 2011) (explaining the ‘pending proceeding’ rule).

On June 28, 2011, following this Court's May 24, 2011 Decision after Trial granting the relief sought by Desiderio in the adversary proceeding and denying the Debtor's discharge, Desiderio renewed his request for a judgment memorializing the sanctions of \$100 per day against the Debtor and Meena pursuant to Judge Eisenberg's November 4, 2008 Order. [AP Dkt # 191]. In the motion, Desiderio requested that this Court enter judgment against the Debtor and Meena in the total amount of \$11,300 representing sanctions of \$100 per day from November 4, 2008 through February 26, 2009 (the date the Debtor and Meena appeared for [Rule 2004](#) depositions). This Court denied the motion, without reasons, by Order, dated March 13, 2012, frustrated by Desiderio's seemingly insatiable appetite for sanctions and contempt even after he successfully prosecuted litigation against the Debtor. Desiderio appealed.

Upon remand by the District Court and a directive to provide reasoning to support denial of the request, this Court directed Desiderio's counsel to file, and settle on the Debtor and his counsel, a proposed judgment, along with a detailed accounting of the proposed judgment amount. [AP Dkt # 211]. Desiderio submitted a proposed judgment seeking monetary sanctions of \$93,100.00 against the Debtor and Meena, jointly and severally, based on a calculation of \$100 a day from November 4, 2008 to May 24, 2011, the date on which this Court denied the Debtor's discharge. [AP Dkt # 211]. Desiderio contends that the Debtor and Meena did not appear for their [Rule 2004](#) examination until February 26, 2009, and that they never completed their responses to the document requests. Desiderio argues that the sanctions should continue to run until the Debtor and Meena produce the requested documents, but concedes that it is appropriate to terminate sanctions as of the date the discharge was denied. Desiderio also requests interest on the judgment from May 24, 2011. The \$93,100 monetary judgment sought by Desiderio ***605** far exceeds the amount originally sought in the motion.

The Debtor and Meena objected to the proposed judgment. [AP Dkt # 212]. First, they point out that they appeared on February 26, 2009 for their [Rule 2004](#) Examinations, and Desiderio does not seem to dispute this fact. Second, as to document production they argue that they were in “substantial compliance” with the [Rule 2004](#) discovery request when they produced documents to Desiderio on September 29, 2008. Finally, the Debtor and Meena argue that any alleged lack of response “did not prevent Desiderio from successfully prosecuting the adversary proceeding and obtaining a judgment denying Sunil's discharge” [Doc. # 212, ¶ 5], and therefore, the imposition of sanctions is not warranted.

As recognized by Judge Seybert on appeal, this Court has discretion in deciding whether and in what amount to award a monetary judgment to Desiderio based on Judge Eisenberg's November 4, 2008 Order. The imposition of civil contempt sanctions similar to the one imposed in the November 4, 2008 Order may serve the dual purposes of compelling future compliance with court orders, and compensating the aggrieved party. *Paramedica Electromedicina Comercial Ltda. v. GE Med. Sys. Info. Tech., Inc.*, 369 F.3d 645, 657 (2d Cir.2004) (citing *Manhattan Indus., Inc. v. Sweater Bee by Banff, Ltd.*, 885 F.2d 1,5 (2d Cir.1989)); accord *Chere Amie, Inc. v. Windstar Apparel Corp.*, 175 F.Supp.2d 562, 566 (S.D.N.Y.2001) (“The purpose of civil contempt sanctions is coercive and compensatory rather than punitive.”) (citing *Huber v. Marine Midland Bank*, 51 F.3d 5, 10 (2d Cir.1995)).

Any monetary award under the Order should consider the purpose of the sanction and should be narrowly tailored to achieve that purpose. The purpose of compensating the aggrieved party, in this instance, was achieved. In the November 4, 2008 Order, Judge Eisenberg sanctioned the Debtor, Meena and WGP, jointly and severally, \$6,758.10 which represents Desiderio's attorney's fees and costs incurred relative to the proceedings at that time. Pursuant to separate Order, dated November 4, 2008, Judge Eisenberg awarded an additional \$2,470 in attorney fees to Desiderio. According to Pergament, a total of \$9,228.10 has been paid to

Desiderio under the November 4, 2008 orders. In addition to these awards, Desiderio claims to be entitled to \$128,635.83 in pre-petition state court legal fees that were, according to the proof of claim filed in this case, awarded to Desiderio but not yet reduced to judgment when the bankruptcy was filed. Upon closing of this case, Desiderio is free to pursue collection of those amounts, in addition to any further legal fees expenses to which he believes he is entitled.

As for the coercive element to civil contempt sanctions, this Court finds that little to no purpose would be served in entering a monetary judgment against the Debtor and Meena at this stage in the proceedings. First, although the Debtor admits that he and Meena did not appear for [Rule 2004](#) depositions until February 26, 2009—nearly four months after the November 4th Order—the Court cannot find that such delay was entirely attributable to the Debtor and Meena. Desiderio has not directed this Court to any specific date after November 4, 2008, that his counsel was ready to in fact proceed with a deposition at which the Debtor and Meena failed to appear. The record reflects that Pergament did, in fact, suggest [Rule 2004](#) deposition dates in early November 2008 which apparently did not come to fruition. Then in January 2009 Pergament suggested February 17 and 19, 2009. Apparently Desiderio's counsel was not available those days and the agreed date was moved to *606 February 26, 2009, at which time the depositions proceeded. Entry of a judgment enforcing a \$100 per day sanction is a severe penalty. This Court cannot find that the delay in appearing for the [Rule 2004](#) deposition was solely attributable to the Debtor and Meena and as a result will not enter judgment for same.

Finally, to the extent Desiderio requested [Rule 2004](#) document discovery to investigate the Debtor's "right to a discharge" in this case, he has succeeded. [Fed. R. Bankr.P.2004\(a\)](#). To the extent Desiderio pursued [Rule 2004](#) discovery in relation to "any matter which may affect the administration of the debtor's estate," that purpose also has been served. On December 9, 2011, the chapter 7 trustee filed a "report of no distribution" indicating that he "made a diligent inquiry into the financial affairs of the debtor[] and the location of property belonging to the estate; and that there is no property available for distribution from the estate." This bankruptcy case is, except for this motion, ready to be closed without a discharge. If Desiderio wants to continue to seek information related to the Debtor's assets in efforts to collect on his various judgments, he can do so outside the jurisdiction of this Court. For these reasons, the Court declines to enter monetary judgment awarding daily civil contempt sanctions payable to Desiderio for the Debtor and Meena's alleged failure to comply with [Rule 2004](#) subpoenas.

II. Motion to relieve Pergament and WGP as Debtor's Counsel in the Adversary Proceeding

On August 19, 2011, Weinberg, Gross & Pergament LLP ("WGP") moved to be relieved as counsel for the Debtor–Defendant in the adversary proceeding. [Doc # 197].¹⁴ The Court has received no opposition to this motion. In support of the motion, Pergament filed an Affirmation stating that he has been unable to contact Sunil Parikh for at least sixty days and believes he may have left for India. Absent opposition from any party, the Court will enter an order granting this motion.

CONCLUSION

For the foregoing reasons, the Court grants Desiderio's Motion for Sanctions against Pergament pursuant to [Rule 9011\(b\)\(3\)](#) but declines to impose any monetary relief for such violation. The Court denies the remainder of the relief sought against Pergament, the Debtor and Meena. Further, the Court declines to enter any monetary award in connection with Judge Eisenberg's November 4, 2008 Order. Finally, the Court grants Pergament and WGP's motion to be relieved as counsel to the Debtor in the above-captioned adversary proceeding.

Orders consistent with this Decision will issue forthwith.

All Citations

508 B.R. 572

Footnotes

- 1 A fuller history of this adversary proceeding and the facts upon which it is based can be found in this Court's Decision after Trial, dated May 24, 2011, denying the Debtor's discharge.
- 2 No one has raised the issue of whether the entry of this judgment prior to the entry of the Order dismissing the Chapter 13 case constituted a violation of the automatic stay. [11 U.S.C. § 362\(c\)](#).
- 3 In the Decision After Trial [AP Dkt # 189] the Court noted that the judgments attached to Desiderio's Proof of Claim added up to only \$143,112.56, including interest. The June 20th Judgment was not attached to the Proof of Claim. However, the difference between the scheduled amount of \$150,702.72 and \$143,112.56 is \$7,590.16, the exact amount of the June 20th Judgment for attorney's fees. Thus, it appears that the Debtor scheduled all of the judgments memorializing debts owed to Desiderio at the time of the Chapter 7 Petition.
- 4 Desiderio also alleged causes of action pursuant to [11 U.S.C. §§ 523\(a\)\(2\)\(A\) and \(B\)](#), but withdrew these claims at the conclusion of trial.
- 5 The Court notes that it is not drawing a negative inference from Pergament's invocation of the attorney-client privilege. *Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208, 225–26 (2d Cir.1999) *abrogated on other grounds by Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 123 S.Ct. 1115, 155 L.Ed.2d 1 (2003). Rather, the Court finds that the record, as a whole, demonstrates that Pergament's actions were objectively unreasonable, regardless of evidence that could have been procured in the absence of attorney-client privilege.
- 6 The Court also notes that although Meena was listed in Schedule H, she was only listed as a co-debtor with respect to the first and second mortgage loans. Pergament knew or should have known that the June 20th Judgment against the Debtor also imposed joint and several liability upon Meena, and she should have been included in Schedule H to the original Chapter 7 Petition.
- 7 The monthly first mortgage statements were also attached as an exhibit to the motion for summary judgment filed by Desiderio in the adversary proceeding on November 18, 2008. [AP Dkt # 22–50]. Pergament received electronic notification of the motion upon filing, and was served with a copy of the motion, by regular mail on November 19, 2008. [AP Dkt # 36].
- 8 Desiderio also argues that Pergament knew of and failed to disclose one or more bank accounts at Chase bank. In the Chapter 13 case, in October of 2006, the Debtor filed an amended Schedule B which reflected that the Debtor held Chase checking and savings accounts (account numbers ending X3639–65) jointly with Meena, with a balance of \$22.44. Desiderio's sanctions motion attaches copies of a “Transaction History” for the Chase Account # xxx3901, showing a \$0 balance as of October 17, 2006. There is a handwritten note on the document, “Account Closed,” however, the transaction history shows that there was a \$4.54 balance in the account from July 21, 2006 until August 18, 2006 when a \$9.00 service fee created a \$4.46 overdraft in the account. Therefore the record suggests that the Chase account # xxx3901 was open within the one year prior to the Chapter 7 Petition Date and should have been reflected in the petition and/or schedules. However, it is not clear that the Chase account # xxx3901 was the same as that which was disclosed in the Chapter 13 Petition and schedules. In fact, the account numbers do not match. Therefore, the Court will not attribute knowledge of this open Chase account to Pergament as of the date of the Chapter 7 Petition such that his conduct for failing to include it in the Chapter 7 Petition would be sanctionable under [Rule 9011\(b\)\(3\)](#).
- 9 The Court declines to find that Pergament should be held accountable under [Rule 9011\(b\)](#) for the remainder of the inaccuracies in the Chapter 7 Petition. Pergament appears to have included the monetary award in the June 20th Judgment within the scheduled amount of Desiderio's claim. He included Meena's income, and an accurate estimate of Debtor's monthly second mortgage obligations in the Chapter 7 Petition. *See* AP Dkt # 139. The Court finds that the remainder of the inaccuracies of which Desiderio complains were not independently verifiable by Pergament and therefore he will not be sanctioned for failing to conduct an “inquiry reasonable under the circumstances.”
- 10 Moreover, [§ 707\(b\)\(4\)\(A\) and \(B\)](#) do not allow for attorney's fees to the moving party, they merely allow for reimbursement to the trustee, United States trustee, or bankruptcy administrator, if any. Because analysis under [§ 707\(b\)\(4\)\(C\) and \(D\)](#) are redundant under these facts based on Desiderio's failure to comply with the safe harbor provision of [Rule 9011](#), this Court declines to address whether [§ 707\(b\)\(4\)\(C\) and \(D\)](#) ever allow for the award of attorney's fees to the moving party.

- 11 Desiderio was able to offset this loss by obtaining a \$30,000 judgment in a legal malpractice suit against the attorney who represented him negotiating the promissory note and lease, so Desiderio's true damages are only \$46,143.97.
- 12 Only attorneys may be sanctioned pursuant to [28 U.S.C. § 1927](#), and only *parties* or attorneys may be sanctioned pursuant to [Rule 9011](#). [Section 105](#) sanctions may only be applied in order to further some other Code provision, in this case, [§ 707\(b\)\(4\)\(C\) and \(D\)](#), and those sections are directed only to debtors' attorneys. As discussed above, the Court will not shift costs under [28 U.S.C. § 1920](#).
- 13 The November 4, 2008 Sanctions Order also sanctioned the Debtor, Meena and WGP, jointly and severally, for certain attorney's fees and costs incurred by Desiderio, in the sum of \$6,758.10. It is this Court's understanding that the \$6,758.10 sanction was paid and the Desiderio is not seeking judgment for that portion of the sanctions awarded by Judge Eisenberg in the November 4, 2008 Sanctions Order.
- 14 In the motion, WGP does not seek to be relieved as the Debtor's counsel in the main bankruptcy case. Nor does it seek to be relieved as counsel to Meena.

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Only the Westlaw citation is currently available.
United States Bankruptcy Court,
C.D. Illinois.

In re George Paul SADORUS, Debtor.

No. 05-73411.

I

Dec. 8, 2005.

Attorneys and Law Firms

Raj Wadhvani, Encino, CA, for Debtor.

OPINION

LESSEN, Bankruptcy J.

***1** The issue before the Court is whether the attorney and law firm which represented the Debtor should be sanctioned for filing false schedules and advising the Debtor not to appear at the meeting of creditors in order to get the bankruptcy case dismissed.

The Debtor, George Sadorus, received a lump sum payment of \$16,000 from his children in 2004 as the repayment of a loan. By the end of 2004, Mr. Sadorus had \$12,000 left.

Despite the cash in the bank, Mr. Sadorus was having financial problems. He saw an ad for credit counseling on television and called the number given on the screen. He was told that his monthly payment on a debt consolidated plan would be \$767. Because his only income was a monthly social security check of \$747, it was apparent that credit counseling was not a viable option for him. The credit counseling firm referred the Debtor to The Price Law Group of Encino, California.

The Debtor never met with anyone from The Price Law Group in person. All communications with The Price Law Group were by telephone or email. The Price Law Group has around 20 attorneys. Most of the Debtor's communications were with three attorneys—Jason Bedell, Curt Hennecke, and Raj Wadhvani—and a non-attorney employed by The Price Law Group, Vicki Carrion. Mr. Wadhvani became the attorney of record for the Debtor after Mr. Hennecke left The Price Law Group.

The Debtor testified that he told The Price Law Group about the \$8,000 that he still had on hand in the spring of 2005. The Debtor did not want any of those funds going to his unsecured creditors and he was concerned about whether these funds would be exempt if he filed bankruptcy. He testified that Ms. Carrion told him that these funds were absolutely exempt.

Shortly before the bankruptcy case was filed, The Price Law Group called the Debtor to conduct a telephone consultation review. The Debtor was not home, so Mr. Bedell talked to the Debtor's wife, Joan Sadorus, who was not planning on joining her husband in the bankruptcy case. When Mr. Bedell asked about bank accounts, Mrs. Sadorus said there was \$500 in her bank account. In fact, there were two bank accounts—Mr. Sadorus' account with over \$6,000 and Mrs. Sadorus' account with \$500.

The Debtor filed a petition pursuant to Chapter 7 of the Bankruptcy Code on March 30, 2005. The case was assigned number 05-71597. Schedule B shows two checking accounts at the First Bank of Decatur with a total value of \$500. These funds were claimed as exempt in Schedule B. Mr. Wadhvani was the attorney who signed the petition on behalf of The Price Law Group. The Disclosure of Compensation shows that The Price Law Group received \$1,000 for its legal services.

As it turns out, the Debtor actually had over \$6,500 in his bank account when the petition was filed.

The first meeting of creditors was set for May 3, 2005. The Price Law Group retained Brian Finney, a lawyer in Decatur, Illinois, to cover the meeting of creditors. When the Debtor met with Mr. Finney before the creditors' meeting, Mr. Finney had the petition that was filed that showed \$500 in the bank account and the petition that was supposed to be filed which showed \$8,000 in the bank account. Mr. Finney told him that he did not think the \$8,000 would be exempt under Illinois law. This news alarmed the Debtor because the Debtor stated that he would not have filed bankruptcy if he had known that this money was not exempt.

***2** The news from Mr. Finney that the \$8,000 in the bank might not be exempt generated a call to The Price Law Group. The Debtor talked to Mr. Bedell and Mr. Wadhvani, who agreed with Mr. Finney's assessment that the money would not be exempt. The attorneys advised the Debtor not to appear at the meeting of creditors. According to Mr. Sadorus, the

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attorneys advised him not to go to the first meeting or the continued meeting and that the case would then be dismissed. Once the case was dismissed, they advised him to spend the money and then to re-file after the money was gone. The Debtor testified that Mr. Bedell told him to say that he was sick for the first meeting and that he forgot the second meeting.

The Debtor testified that Mr. Bedell, not Mr. Wadhvani, advised him not to appear at the creditors' meeting. Mr. Bedell denied telling the Debtor not to appear or to make up excuses. Mr. Bedell also denied any knowledge about the \$8,000 in the bank. The Court did not find Mr. Bedell to be a credible witness. The Price Law Group had at least one draft of the Debtor's bankruptcy petition that included the \$8,000 so it is clear that the Debtor told the law firm about the \$8,000. In addition, Mr. Wadhvani admitted that they advised the Debtor not to appear at the creditors' meeting. Thus, Mr. Bedell's testimony is inconsistent with the other testimony before the Court.

Mr. Wadhvani testified that they told the Debtor not to appear at the first meeting of creditors because they intended to amend the bankruptcy schedules to show that the bank account had \$8,000 in it rather than the \$500 that was listed in the original schedules. Mr. Wadhvani testified that he advised the Debtor to amend his schedules, but the Debtor did not want to amend his schedules and lose the asset. Mr. Wadhvani did not have anything in writing to document this advice, and the schedules were never amended. Mr. Wadhvani denied telling the Debtor not to appear at the continued meeting of creditors.

The first meeting of creditors was set for May 3, 2005. Mr. Finney appeared at the meeting and advised the Trustee that the Debtor was not there. The meeting of creditors was continued to May 17, 2005. When the Debtor failed to appear for the continued meeting, the Trustee filed a Motion to Dismiss on May 19, 2005, which the Court allowed on May 23, 2005. The case was closed on July 7, 2005.

On June 24, 2005, the instant case—No. 05-73411—was filed. The Debtor did not remember filing this case. The Price Law Group filed this case on behalf of the Debtor with Mr. Wadhvani once again as the attorney of record. The Price Law Group did not charge the Debtor for this filing.

The schedules in the new case were substantially the same as those in the first petition. There was no reference to the money

that the Debtor had in the bank (\$5,000 to \$8,000) when he filed his first petition or what happened to the money. The Debtor testified that he did not discuss with the Price attorneys whether the money was spent; Mr. Wadhvani testified that the Debtor told him that the money was used to pay bills.

*3 The evidence showed that the Debtor withdrew \$5,228.97 from his bank account on May 10, 2005. This lump sum withdrawal reduced the balance in the account to zero. The Debtor testified at the hearing that he did not remember making this withdrawal. In an affidavit submitted after the hearing, the Debtor stated that the money was withdrawn from the account because he thought he lost his checkbook. These funds were transferred to a new account at the bank. Thus, the funds never left the bank. The new account was not listed in the second bankruptcy filing.

Because the failure to attend a meeting of creditors is a failure to abide by a court order within the meaning of 11 U.S.C. § 109(g)(1), the Court set a hearing for August 4, 2005, for the Debtor to appear and show cause why the case should not be dismissed because it was filed within 180 days of a case that was dismissed for willful failure to abide by a court order. Two days before the show cause hearing, the meeting of creditors was held. The Trustee learned at the first meeting that the Debtor had \$5,000 in his bank account when the first case was dismissed. The Trustee also heard the Debtor's explanation for not appearing at the creditors' meeting in the first case. The issues raised at this hearing caused the Court to set an additional hearing "concerning the accuracy of the debtor's schedules, the basis for the debtor's failure to appear at the first meeting of creditors in the prior bankruptcy, and such other matters as are relevant to the inquiry of the Trustee and this Court." Mr. Wadhvani and the Debtor were ordered to appear personally.

The Debtor fired The Price Law Group on August 2, 2005, because they told him to go to Court and lie. The Debtor is now represented by Johnson, Waller, and Chiligris.

Mr. Bedell left The Price Law Group on August 5, 2005. Mr. Bedell is not licensed to practice in this Court, and he did not sign any documents in either of the Debtor's cases.

Mr. Wadhvani also left The Price Law Group in August, 2005, although he retains an *of counsel* affiliation with the firm for cases he was involved in prior to leaving. Mr. Wadhvani is admitted to practice in this Court. Mr. Wadhvani stated in his closing argument that The Price Law Group is

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no longer accepting new cases in the state of Illinois. This has proven to be a false representation. Makoto Shuttleworth of The Price Law Group has filed four cases in this District in October: *In re Gamauf*, No. 05-93817, *In re Henry*, No. 05-86186, *In re Gillespie*, No. 05-86353, and *In re Lareau*, No. 05-94395. In addition, Curt F. Hennecke of The Price Law Group has filed five cases in October: *In re Dampier*, No. 05-75617, *In re Denton*, No. 05-75618, *In re Watkins*, No. 05-93815, *In re Baine*, No. 05-93816, and *In re Wolf*, No. 05-85810.

The Court was not impressed with Mr. Wadhvani's testimony. The Court is always suspicious when attorneys do not have documents to support their testimony, and Mr. Wadhvani did not have any of the documents prepared by the Debtor in preparation for the filing of his cases and he did not have any documents to corroborate his advice to the Debtor to amend his schedules.

*4 The Bankruptcy Court has both the express and inherent authority to regulate the attorneys who practice before it.

The Bankruptcy Court is a unit of the District Court. 28 U.S.C. § 151. Rule 83.6 of the United States District Court for the Central District of Illinois provides that the court has the "power and responsibility to supervise the conduct of attorneys who are admitted to practice before it ..." Rule 83.6(A) provides that an attorney who is "guilty of conduct unbecoming a member of the bar of this court" is "subject to suspension, disbarment, or other appropriate disciplinary action by the court." Rule 83.6(D) adopts the Rules of Professional Conduct adopted by the Supreme Court of Illinois.

Moreover, 11 U.S.C. § 329(b) empowers the Bankruptcy Court to review a debtor's transactions with attorneys. Compensation which exceeds the reasonableness of an attorney's services must be disgorged. 11 U.S.C. § 329(b). An attorney's unethical conduct is a factor to be considered in determining the reasonableness of a legal fee paid by a debtor. *In re Soultisak*, 227 B.R. 77 (Bankr.E.D.Va.1998).

The Bankruptcy Court also has the inherent power to suspend or disbar attorneys:

Disbarment proceedings "are not for the purpose of punishment, but rather seek to determine the fitness of an official of the court to continue in that capacity and to protect the courts and the public from the official ministrations of person [sic] unfit to practice."

In re Derryberry, 72 B.R. 874, 881 (Bankr.N.D. Ohio 1987), citing *In re Echeles*, 430 F.2d 347, 349 (7th Cir.1970).

The level of service provided by The Price Law Group to the Debtor in these proceedings was far below the minimum standard expected of attorneys who practice in this Court. To begin with, the work done was sloppy. The evidence showed that there were at least two drafts of the Debtor's bankruptcy petition in the first case and the wrong one was filed. On a more serious note, The Price Law Group gave the Debtor bad legal advice. The Debtor's main concern in his decision to file bankruptcy was whether his cash in the bank was exempt. The Price Law Group incorrectly told the Debtor that the money was exempt. The fact that this advice came from a non-attorney employed by The Price Law Group is irrelevant; The Price Law Group should not have placed her in a position where she would be giving legal advice without the supervision of an attorney. Most seriously, the actions of The Price Law Group were unethical. The advice to skip the creditors' meetings (and lie about the reasons for missing them) and the advice to spend the money in the bank account before filing a new case clearly violated the spirit and intent of the Bankruptcy Code.

The filing of the second petition without accounting for the money in the bank or what happened to it also violated the Bankruptcy Code. The attorneys with The Price Law Group knew that the schedules in both cases were inaccurate and took no action to correct them. Finally, the second petition may have been filed without the knowledge or permission of the Debtor. He did not remember signing the second petition and he clearly did not want it filed when he had a substantial sum in his bank account.

*5 The consequences of the poor representation provided to the Debtor by The Price Law Group may be dire for the Debtor. The Trustee has filed an adversary complaint objecting to the Debtor's discharge based on the Debtor's concealment of the money in the bank account. The Trustee also seeks a money judgment against the Debtor. Thus, the Debtor could lose his discharge and his money.

The Price Law Group must bear the ultimate responsibility for this fiasco. At least three attorneys and one non-attorney with Price touched this file. It is not clear whether the problems in this case were caused by poor lawyering, the left hand not knowing what the right hand is doing, or the difficulties inherent in trying to represent an Illinois debtor in an Illinois bankruptcy court from an office in California. Whatever the

In re Sadorus, Not Reported in B.R. (2005)
2005 WL 3429467

cause of the problems, the services provided by The Price Law Group afforded absolutely no benefit to the Debtor. Therefore, the Court will order The Price Group to disgorge the entire \$1,000 fee it received in this case to Mr. Sadorus. In addition, the Trustee's fees and costs are assessed against The Price Law Group. The Trustee is directed to submit an application documenting his fees and costs.

As the primary attorney for Mr. Sadorus and the attorney who signed both bankruptcy petitions, Mr. Wadhvani must also bear some of the responsibility for the mishandling of these cases. The Court will suspend Mr. Wadhvani from the practice of bankruptcy law in the Central District of Illinois. The Court will lift the suspension upon a showing by Mr. Wadhvani that he has completed 10 hours of continuing legal education courses in bankruptcy, including at least two hours devoted to ethics.

This Opinion is to serve as Findings of Fact and Conclusions of Law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure.

See written Order.

IT IS SO ORDERED.

ORDER

For the reasons set forth in an Opinion entered this day,

IT IS HEREBY ORDERED that The Price Law Group disgorge the \$1,000 legal fees received in this case and remit the funds to the Debtor, George Sadorus.

IT IS FURTHER ORDERED that fees and costs of suit are assessed against The Price Law Group and the Trustee is directed to file an application for fees and costs.

IT IS FURTHER ORDERED that Mr. Raj Wadhvani is suspended from the practice of bankruptcy law in the Central District of Illinois, and that the suspension will be lifted upon a showing by Mr. Wadhvani that he has completed 10 hours of continuing legal education courses in bankruptcy with at least two hours devoted to ethics.

All Citations

Not Reported in B.R., 2005 WL 3429467

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2026 WL 265581

Only the Westlaw citation is currently available.
United States District Court, D. Kansas.

LEXOS MEDIA IP, LLC, Plaintiff,

v.

OVERSTOCK.COM, INC., Defendant.

Case No. 22-2324-JAR

I

Signed February 2, 2026

Editor's Note: This decision contains discussion of citation references that are incorrect or do not actually exist. These invalid citations appeared in the original court opinion and have been preserved as written since they are part of the official record. Any links to these invalid citations have been removed.

Attorneys and Law Firms

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MEMORANDUM AND ORDER

JULIE A. ROBINSON, UNITED STATES DISTRICT JUDGE

*1 Plaintiff Lexos Media IP, LLC (“Lexos”) brings this patent infringement action against Defendant Overstock.com, Inc. (“Overstock”), alleging it infringed three patents that relate to modifying the display of a cursor image on a website. This matter is before the Court on Lexos's Opposition to

Defendant's Motion to Exclude the Testimony of Samule [sic] Russ, Ph.D. (Doc. 194), and Response to Defendant's Motion for Summary Judgment (Doc. 193). The Court previously directed each attorney for Lexos listed on the signature blocks of Docs. 193 and 194 to show cause in writing why they should not be sanctioned under Fed. R. Civ. P. 11 and referred to the relevant disciplinary administrators for signing and submitting documents in this case that contain defective legal citations created through the use of generative artificial intelligence (“AI”), which were not checked and confirmed before filing.

Lexos's attorneys responded to the Court's Order to Show Cause with declarations, and the Court is prepared to rule on whether they should be sanctioned under Rule 11. As described more fully below, the Court finds that all five Lexos attorneys violated Rule 11(b) by signing filings that included fabricated and misrepresented legal authority. The Court releases counsel Michael Doell from further sanctions. The Court sanctions the remaining attorneys proportionate to their role in the violations.

I. Background

A. Attorneys of Record for Lexos and the July 7, 2025 Filings

Six attorneys are listed as counsel of record for Lexos. Kenneth P. Kula, Michael W. Doell, Christopher M. Joe, and Eric W. Buether from the Texas law firm Buether Joe & Counselors, LLC are all admitted pro hac vice. Sandeep Seth of SethLaw PLLC in Texas is also admitted pro hac vice. David R. Cooper of the Kansas firm Fisher, Patterson, Sayler & Smith, LLP, is local counsel. Buether Joe & Counselors, LLC is handling this case on behalf of Lexos on a contingent-fee basis. Mr. Buether and Mr. Kula appeared on behalf of Lexos at the in-person claim construction hearing on September 21, 2023.¹ According to Mr. Joe's declaration, “[i]n October 2024, the lead attorney in charge in this case[,] Eric Buether (and my law partner)[.] passed away. I took his place as the lead attorney in charge of this case after his passing.”² Mr. Seth was permitted to appear as co-counsel in this matter pro hac vice on March 28, 2023.³ He has a small practice comprised of himself and a paralegal who also works as an office manager. “[His] practice largely involves co-counseling with other firms.”⁴

*2 Overstock filed a motion for summary judgment and two motions to exclude expert testimony under  *Daubert* on June 13, 2025.⁵ Relevant to the issues before the Court is Overstock's motion to exclude Samuel Russ, Ph.D., who Lexos designated as its technical expert in this case. In his opening report, Dr. Russ incorrectly identified the stipulated claim construction for "cursor image" as "a movable image on a display screen whose position can be controlled through a user interface."⁶ In other words, he failed to include the second part of the claim construction: "...and that indicates where user input can be received."⁷ Overstock's motion to exclude Dr. Russ's testimony argues that because he considered the incorrect claim construction for "cursor image," his opinion should be excluded.⁸ And as part of its motion for summary judgment, Overstock argues that without Dr. Russ's technical opinion, Lexos cannot show as a matter of law that Overstock infringed.⁹

Lexos responded to Overstock's motions on time.¹⁰ Counsel neither sought, nor apparently discussed, seeking an extension of time. In their declarations submitted in response to the Court's Order to Show Cause, counsel broke down their division of labor on the responses to Overstock's June 13 motions. Mr. Kula worked on the response to Overstock's other motion to exclude, pertaining to Lexos's damages expert, Justin Blok. Mr. Seth "was assigned the ultimate responsibility to draft, review, finalize, and ensure proper filing of both" the summary-judgment response and the response to Overstock's motion to exclude Dr. Russ.¹¹ Mr. Doell worked on "the initial drafting of some sections"¹² of the response to Overstock's summary-judgment motion, but Mr. Seth "was primarily responsible for drafting"¹³ the response to Overstock's motion to exclude Dr. Russ's report and testimony and the response to the summary-judgment motion. Mr. Joe, "never reviewed or looked at the documents at issue prior to their filing with the Court."¹⁴

Mr. Cooper did not research or draft any of these filings. He received the Texas attorneys' drafts on July 7, 2025, the same day they were due. He read them in their entirety and generally understood the arguments being made therein. "[N]one of the quotes or citations drew [his] attention, so [he] did not cite check either document. [He] instead relied upon Mr. Doell and Mr. Seth, whom [he] understood to be the drafters of the documents, for the accuracy and authenticity of the citations in the documents."¹⁵

B. Incorrect Citations, Quotations, and Statements of Law

The response briefs to Overstock's motion to exclude Dr. Russ and motion for summary judgment contain multiple problematic legal citations and statements of authority that were created through the use of generative AI, which were not checked and confirmed before filing. First, and primarily, Plaintiff's response to the motion to exclude Dr. Russ (Doc. 194) contains a litany of problems: (1) nonexistent quotations; (2) nonexistent and incorrect citations; and (3) misrepresentations about cited authority. Overstock submitted a reply brief disclosing the defective citations, quotations, and statements of authority,¹⁶ and Mr. Seth admits that he used generative AI to help research and draft the brief without confirming the accuracy of authority it produced.¹⁷ Second, Part III.D of Plaintiff's Response to Defendant's Motion for Summary Judgment (Doc. 193) addresses Overstock's argument that Dr. Russ's failure to incorporate the correct claim construction for "cursor image" precludes its infringement theory. As part of that argument, Lexos included several of the same defects from the response to Overstock's motion to exclude Dr. Russ.

*3 The  *Daubert* response, Doc. 194, contains the following erroneous citations, quotations, or statements of authority:

1. Lexos cited  *Flexuspine, Inc. v. Globus Medical, Inc.*, 879 F.3d 1369, 1375 (Fed. Cir. 2018) and  *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 856–57 (Fed. Cir. 2010), *aff'd*,  564 U.S. 91, 131 S.Ct. 2238, 180 L.Ed.2d 131 (2011), for the proposition that "the Federal Circuit has cautioned against striking expert opinions for immaterial or correctable errors in claim construction, particularly where the overall analysis is sound and does not mislead the jury."¹⁸

 *Flexuspine* contains no discussion of expert admissibility on the cited page number. On a later page, the Federal Circuit considered a challenge to the district court's ruling of noninfringement on the basis that there was no evidence to support the second portion of the plaintiff's claim construction because the expert did not discuss it.¹⁹ But the court found no error with the district court's order and noted that the plaintiff "does not cite to any evidence that might satisfy the second

requirement of the claim construction.”²⁰ This case does not support the proposition for which it was cited.

In  *Microsoft*, the Federal Circuit considered the district court's decision to admit expert testimony on the appropriate damages calculation and to support the degree of infringement through survey evidence. The court concluded that the damages expert's royalty calculations were based on a sound methodology, and that the defendant's objections went to the weight, rather than the admissibility of the evidence.²¹ The court also considered a challenge to survey evidence that was offered to support the degree of infringement.²² The defendant challenged the survey's methodology and the data used to extrapolate damage calculations from the survey, but the court determined that the survey met the minimum standards required for relevance and reliability.²³ And the court found that the challenges were best addressed through cross-examination and the presentation of contrary evidence.²⁴ Neither challenge to the expert evidence in this case related to an incomplete claim construction. This case does not support the proposition for which it was cited.

2. Lexos cited  *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1123 (10th Cir. 2006) for the proposition that Tenth Circuit case law recognizes a preference for “addressing admissibility disputes that go to weight rather than fundamental reliability [with] ‘[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof,’ not wholesale exclusion.”²⁵ This language is not in  *Rodriguez-Felix*; it is in  *Daubert*.²⁶

Moreover,  *Rodriguez-Felix*, a criminal case, addressed the specific issue of expert testimony on the reliability of eyewitness identification.²⁷ The Tenth Circuit determined that the district court did not abuse its discretion in excluding a defendant's expert testimony about the reliability of eyewitness testimony, largely because such testimony was unlikely to assist the jury.²⁸ Instead, the court explained that “skillful cross-examination provides an equally, if not more, effective tool for testing the reliability of an eyewitness at trial.”²⁹ Although the statement of law by Lexos is not incorrect,³⁰ this particular case neither includes the quotation attributed to it nor discusses the court's preference for testing expert testimony that goes to the weight of the

evidence through cross-examination, contrary evidence, and jury instructions.

*4 3. Lexos twice cited *Hockett v. City of Topeka*, No. 19-4037-DDC, 2020 WL 6796766, at *3 (D. Kan. Nov. 19, 2020). It cited this case first for the proposition that “[e]xclusion is a ‘drastic remedy’ and is only warranted where the report is irreparably unreliable or prejudicially misleading.”³¹ Second, it cited *Hockett* to argue that inadvertent use of an incomplete claim construction by an expert does not require exclusion, but instead cross-examination and supplementation.³² The second citation includes an explanatory parenthetical with a quotation from the case: “The exclusion of evidence is an extreme sanction, and courts should prefer less severe remedies, particularly where the error appears inadvertent or can be cured without prejudice.”³³ Neither this case nor the quotation exists.³⁴

4. Lexos cited *AVM Techs., LLC v. Intel Corp.*, 927 F.3d 1364, 1370–71 (Fed. Cir. 2019) for the proposition that “deficiencies in a report that go to weight, not admissibility, should be resolved by cross-examination.”³⁵ This citation is incorrect. The correct citation is  *AVM Techs., LLC v. Intel Corp.*, 927 F. Supp. 2d 139 (D. Del. 2013). This case involved motions to exclude two expert witnesses in a patent case: (1) an expert witness on royalty damages who relied on a single settlement agreement on a different patent; and (2) the patent inventor's testimony about damages. The court determined that neither expert offered reliable testimony under  *Daubert* and granted motions to exclude them both.³⁶ This case does not support the proposition for which it was cited, even if the citation was correct.

5. Lexos quoted from and relied on  *Liquid Dynamics Corp. v. Vaughan Co.*, 449 F.3d 1209, 1224 (Fed. Cir. 2006).³⁷ There are multiple problems with this authority. First, Lexos provided the following quotation from this case in an explanatory parenthetical: “Expert testimony should not be excluded simply because the expert applied an incorrect claim construction, so long as the expert's analysis can be understood and evaluated in light of the court's proper construction.”³⁸ This quotation does not exist.

Second, Lexos cited this case for the proposition that “[t]he Federal Circuit has consistently held that expert opinions based on even partially incorrect constructions

may be admissible where the expert's methodology remains sound.”³⁹ But *Liquid Dynamics* does not support this proposition. To be sure, the court determined in that case that the defendant's challenge to certain parameters used by the expert in his analysis went to the weight and not the admissibility of the opinion.⁴⁰ But that ruling was not based on an incorrect claim construction used by the expert. The Federal Circuit separately ruled as follows on the issue of the expert's reliance on an incorrect claim construction:

The district court excluded the expert opinion evidence [on enablement] as irrelevant because it was based on an impermissible claim construction and relied heavily on Figure 6 of the patent specification that shows perfect helical flow instead of substantial helical flow. Furthermore, the court found that the evidence could prejudice and confuse the jury. Since the enablement inquiry necessarily depends on an interpretation of the claims, we conclude that the district court did not abuse its discretion in excluding the expert's testimony pertaining to enablement.⁴¹

*5 6. Lexos cited two cases for the proposition that “[t]he Federal Circuit has consistently held that ‘technical flaws in an expert's methodology or assumptions go to the weight of the evidence rather than its admissibility.’”⁴²

Immediately following this quotation, Lexos cited *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1314 (Fed. Cir. 2014), but this quotation does not appear in *Apple, Inc.* Lexos next cited *Liquid Dynamics*. The quote is not in that case either, and, as described above, *Liquid Dynamics* holds contrary to Lexos's statement of law with respect to the relevance of an expert opinion based on an incorrect claim construction.⁴³

7. Lexos cited two Tenth Circuit decisions for the proposition that under that court's standards, “exclusion is a drastic remedy reserved for fundamentally unreliable expert analysis, not for technical deficiencies that can be addressed through

cross-examination”: *Rodriguez-Felix* and *Goebel v. Denver & Rio Grande W. R.R.*, 215 F.3d 1083, 1088 (10th Cir. 2000).⁴⁴ As stated above, *Rodriguez-Felix* addresses the reliability of expert testimony on eyewitness credibility and excluded the expert's opinion in that case.⁴⁵ And *Goebel* does not contain any language about exclusion being a drastic remedy; it reversed the district court's decision to *admit* an expert report because it had not made sufficient findings under *Daubert* to support admitting the expert testimony; it remanded for the district court to put more explicit findings on the record for review.⁴⁶ Neither case discussed nor applied *Daubert* in the context of a “technical deficiency.”

8. Lexos explained the Federal Circuit's decision in *Cordis Corp. v. Medtronic Ave, Inc.*, 511 F.3d 1157, 1174–75 (Fed. Cir. 2008) as follows:

[T]he Federal Circuit considered the phrase “expandable to a diameter.” The Court held that this language did not limit the structure to only that diameter, but rather described a capability or result—not an exclusive state. Likewise, “modify...to [an image] in the shape and appearance of [another image]” does not demand exclusive substitution. Rather, it permits the modified cursor to include or incorporate the specific image's shape and appearance, while retaining or overlaying other visual features.⁴⁷

These quotations do not appear in *Cordis*. Almost as troubling, the patents that are discussed in *Cordis* do not appear to contain any of the language quoted above.

9. Lexos included a citation to *Baldwin Graphic Systems, Inc. v. Siebert, Inc.*, 512 F.3d 1338, 1342 (Fed. Cir. 2008) with the following quotation in an explanatory parenthetical:

“The use of ‘comprising’ ...renders the claim open-ended—meaning that the claim does not exclude additional elements or steps.”⁴⁸ This quotation does not exist.

10. Lexos included a citation to *AstraZeneca AB v. Mutual Pharm. Co.*, 384 F.3d 1333, 1339 (Fed. Cir. 2004) with the following quotation in an explanatory parenthetical: “The open-ended term ‘comprising’ permits the inclusion of other steps or components.”⁴⁹ This quotation does not exist.

11. Lexos purported to quote the earlier-cited  *Microsoft Corp.* case as follows: “[T]he question of whether the expert is credible or whether his theories are correct given the partial reliance on an incorrect claim construction is for the jury to decide after cross-examination.”⁵⁰ This quotation does not exist.

*6 Part III.D.1 of the summary-judgment response repeats the incorrect quotations from  *Cordis*,⁵¹  *Baldwin Graphic Systems, Inc.*,⁵² and  *AstraZeneca AB*.⁵³

C. Motion for Leave to Correct

In the reply to the response on the motion to exclude Dr. Russ, Overstock pointed out the citation errors in Lexos's opposition brief.⁵⁴ Eight days later, Lexos filed a motion for leave to file a corrected response brief.⁵⁵ Lexos stated that after reading Overstock's reply, it reviewed the opposition brief and “discovered that certain case citations and quotations could not be substantiated.”⁵⁶ The motion admitted that Mr. Seth used AI tools in drafting the opposition and that he did not verify the citations before filing. In a footnote, the motion acknowledged that the summary-judgment response also contains “two paragraphs with the same mistake which were carried over concerning the  *Cordis*,  *Baldwin*, and  *AstraZeneca* cases” and requested that “the Court strike these citations.”⁵⁷

Mr. Seth submitted a declaration in conjunction with the reply in support of the motion for leave to correct.⁵⁸ No other attorney for Lexos did so. In that declaration, Mr. Seth acknowledged the errors in Docs. 193 and 194, admitted that they were derived from his research using generative AI that was not independently verified prior to submission, admitted that he “authored the majority of the document,” and stated that he regrets the “oversight” and has put into place “stricter internal review procedures to ensure that all future filings are fully sourced, accurate, and independently verified.”⁵⁹ Mr. Seth indicated in this declaration that at the time of filing, he was struggling with multiple family health emergencies; his mother and aunt were both hospitalized and ultimately passed away in July and early August. He indicated that “[t]hese overlapping personal situations weighed heavily on [his] time, attention and emotional state during the time

of original filing,”⁶⁰ and although he acknowledged that this does not excuse his conduct, he claimed that it was unprecedented and that he did not intend to file the document without first verifying the citations.

The proposed corrected response brief would have: (1) deleted the nonexistent citations and quotations; (2) corrected the incorrect citations; (3) deleted the offending citations from the table of authorities; (4) added one new citation; and (5) added text to shore up Lexos's arguments.

Because there was nothing in the docket text that pointed this Court to an allegation of sanctionable conduct, it was not alerted to this issue until it reviewed the motion to correct in conjunction with the substantive motions several months later. On December 15, 2025, upon review of the relevant filings, the Court denied Lexos's motion for leave to correct to the extent it sought to shore up its substantive research with new or corrected authority, or with new arguments.⁶¹ The Court found that the prejudice to Overstock cannot be overstated, that the errors have wasted judicial resources, and that the need to correct was well within the control of Plaintiff's counsel. The Court acknowledged Mr. Seth's admission that he used generative AI without validation, and his remorse, but it determined that a “do-over” was not warranted. Instead, the Court denied the motion to file the proposed corrected brief, struck Plaintiff's response brief filed as Doc. 194, and granted Plaintiff's motion to correct with a new filing that removed the fake and incorrect citations, quotations, and misstated authority from the document. Lexos timely filed this corrected document on December 19, 2025.⁶²

*7 Also on December 15, the Court entered an Order to Show Cause to all counsel of record for Lexos. The Court was not satisfied with Mr. Seth's declaration that was submitted along with the reply brief on the motion to correct, given that four other attorneys' names are listed on the signature blocks of the offending documents. The Court directed each of the attorneys on the signature blocks of Docs. 193 and 194 to show cause in writing, under penalty of perjury, why they should not be sanctioned under  Rule 11 and referred to the disciplinary panel of this Court and to disciplinary administrators in the jurisdictions where they are licensed for submitting briefs containing nonexistent or misrepresented authority. The Court put counsel on notice that failure to show cause may result in sanctions under  Rule 11, including monetary sanctions, attorneys' fees, revocation of pro hac

vice privileges, continuing legal education requirements, and reporting obligations in their other cases and to the judges whose decisions were misquoted, misrepresented, or made up.⁶³ Counsel have now filed their declarations. The following findings of each attorney's role are based on these declarations.

D. Lexos Attorneys' Roles in Submitting Docs. 193 and 194

1. Mr. Seth

Mr. Seth has practiced law for over thirty years. He makes clear in his second declaration that he alone used generative AI to insert the problematic citations, quotations, and discussions of authority into the offending briefs. After writing an initial draft of the  *Daubert* response on June 28, 2025, Mr. Seth used ChatGPT “as a shortcut to find 10th [C]ircuit and Federal Circuit case law consistent with the facts of the case.”⁶⁴ That first search provided him with the quotations and citations for the mistakes in items 3–5 and 11 above. He admits that he did not check these citations, quotations, or statements of authority for accuracy. He then circulated the draft to the “litigation team.”⁶⁵

Mr. Seth then wrote a second draft that “substantially expanded the factual basis of our argument.”⁶⁶ Again, he queried ChatGPT to find additional case law. Part of that query was: “[t]aking the role of a judge, write an order that denies the motion to strike with caselaw support for the proposition that where the expert report is criticized for inadvertently using an immaterial incomplete claim construction, the remedy is not to strike the entire report/testimony of that expert.”⁶⁷ Mr. Seth believed this would give him the best chance of finding on-point case law. That query resulted in the mistakes in items 1, 2, 6, and 7 above. Mr. Seth does not address the nonexistent quotations set forth in items 8–10 above.

At some point, Mr. Doell provided minor edits to Mr. Seth's draft, but these were exclusively to add exhibit numbers and make small typographical suggestions. As the junior attorney working on this case, he was not instructed to make substantive revisions or second guess the senior co-counsel's work. Mr. Doell made these minor edits and executed a declaration for the exhibits.⁶⁸

Mr. Seth contends that “neither co-counsel nor Lexos were aware of” his use of generative AI, and that “Lexos was not billed for any of [his] time in the drafting of the brief (and the portion of Document 193) containing the erroneous citations or for any subsequent time in connection with their removal.”⁶⁹

Mr. Seth contends that his family's emergency medical situation led him to reach for ChatGPT to help draft the  *Daubert* response and that this was the first and only time he used it. He claims to have been “untrained” on how to use it and a “novice.”⁷⁰ He insists that using ChatGPT is not his normal practice for research and that he made an isolated poor decision due to the strain of end-of-life caregiving for his mother and aunt. Because his focus was elsewhere, he failed to “double-check for accuracy.”⁷¹ He states that only now is he “fully aware of ‘AI hallucinations’ and take[s] full and sole responsibility for the resulting misinformation to the Court.”⁷² At the same time, Mr. Seth states that he “inten[ded] at the time to check [the cites] prior to any filing with the Court, but [he] failed to do so either because [he] thought [he] had already done so, or just because of [his] scrambled state of mind.”⁷³

2. Buether Joe and Counselors, LLC Attorneys

***8** Mr. Joe is the lead attorney in this matter and the managing member of the Buether Joe law firm. Mr. Joe played no role in drafting or compiling the defective citations in Docs. 193 and 194. In fact, he attests that he never reviewed or looked at either document prior to filing. The Buether Joe law firm has a policy of not allowing the use of AI platforms by members of the firm. He provides no information about how this policy is enforced.

Mr. Kula is a senior counsel at the Buether firm. He played no role in drafting or compiling the defective citations in Docs. 193 and 194. He admits that he “never reviewed either document at issue prior to them being filed with the Court.”⁷⁴ Instead, Mr. Kula worked on responding to the other  *Daubert* motion that sought to exclude Lexos's damages expert. When Docs. 193 and 194 were filed, Mr. Kula was on a family vacation out of the country. Mr. Kula understood that Mr. Doell was primarily responsible for drafting “limited sections” of the summary-judgment response, but that Mr. Seth had “overall responsibility to

research, draft, review, finalize, and ensure the proper filing of both documents at issue.”⁷⁵

Mr. Doell is an associate attorney at the Buether Joe law firm. As stated above, he primarily drafted several sections of the summary-judgment response, which did not include section III.D.1. Mr. Doell attests that his portion of the brief did not utilize AI; he understood and abided by his firm's policy prohibiting the use of AI platforms in writing, drafting, or creating documents to be filed in court. Despite reading over and editing Mr. Seth's work, he was not aware, nor did he have reason to be aware, that Mr. Seth used AI in drafting the

 *Daubert* response. He makes clear that in his subordinate role as an associate attorney working with co-counsel who has 30 years of patent law experience, he “did not provide, nor intended to provide, nor was expected to provide a substantive review of the caselaw or arguments in Mr. Seth's draft of Document 194.”⁷⁶

3. Mr. Cooper

Mr. Cooper is local counsel. In that capacity, he signed Docs. 193 and 194 and filed them on behalf of Lexos. Mr. Cooper is a partner at the Fisher Patterson law firm, and has appeared in this Court many times over the last 25 years. He was aware that this Court's local rule requires that “[a]ll pleadings or other papers signed by an attorney admitted pro hac vice must also be signed by a member of the bar of this court in good standing, who must participate meaningfully in the preparation and trial of the case or proceedings to the extent the court requires.”⁷⁷

As already stated, Mr. Cooper received Docs. 193 and 194 on the day that they were due. In a past filing in this case, Mr. Cooper “noticed an incomplete citation in a draft before filing,” which he corrected.⁷⁸ On July 7, 2025, he read the documents provided to him by the Texas attorneys, but because none of the citations or arguments looked suspicious to him, he did not cite check them. He had no knowledge that Mr. Seth used generative AI to compile his research, or that he included defective citations and statements of authority in the briefs. He relied on Mr. Doell and Mr. Seth to include accurate and authentic legal authority in the documents. Mr. Cooper approved affixing his signature and then filed the offending documents in the Court's CM/ECF database.

*⁹ Mr. Cooper apologizes to the Court and sets forth steps his firm has taken since the Court issued its Order to Show

Cause to ensure that this grievous error does not occur again. Fisher Patterson has adopted a formal policy prohibiting the use of generative AI platforms without the consent of the client and the express permission of the supervising partner or attorney on the case. All documents produced using generative AI will be required to be independently verified by the author as being true and accurate. The firm is also developing a policy that will extend this policy to its attorneys' practice as local or co-counsel, requiring local counsel to independently cite-check and verify the accuracy of all citations.

II. Legal Standard

Under  Rule 11(b):

By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

....

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law

As the Supreme Court has explained, “the central purpose of  Rule 11 is to deter baseless filings in district court and thus, consistent with the Rules Enabling Act's grant of authority, streamline the administration and procedure of the federal courts.”⁷⁹ The rule “imposes...an affirmative duty to conduct a reasonable inquiry into the facts and the law before filing, and...the applicable standard is one of reasonableness under the circumstances.”⁸⁰ “The award of  Rule 11 sanctions involves two steps. The district court first must find that a pleading violates  Rule 11. The second step is for the district court to impose an appropriate sanction.”⁸¹

Where, as here, the Court invokes  Rule 11 on its own initiative, it must order “an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated  Rule 11(b).”⁸² The Court met this requirement when it issued its Order to Show Cause on December 15, 2025, giving Lexos's counsel the opportunity

to show cause in writing why they should not be sanctioned for signing Docs. 193 and 194, which contain nonexistent citations and quotations, and misstatements of legal authority, in contravention of  Rule 11(b)(2).

III. Violation: Rule 11(b)

The Court now turns to the first step of the  Rule 11 analysis: whether the Lexos attorneys submitted a pleading that violates  Rule 11(b). In determining whether an attorney's conduct violates  Rule 11, the Court employs an “objective reasonableness” standard.⁸³ The question is, “whether a reasonable attorney admitted to practice before [this] court would file such a document.”⁸⁴ The Advisory Committee's note to the 1993  Rule 11 Amendments explains that the rule “require[s] litigants to ‘stop-and-think’ before initially making legal or factual contentions.”⁸⁵ And this duty is nondelegable.⁸⁶ Thus, when an attorney signs a filing, that attorney pledges that he or she conducted a reasonable inquiry into the existing law stated therein.⁸⁷ “[B]lind reliance on another attorney can be an improper delegation of this duty and a violation of  Rule 11.”⁸⁸

***10** There is no question that citing to a nonexistent case, attributing a nonexistent quotation to an existing case, and misstating the law violates  Rule 11(b).⁸⁹ Such reliance does not constitute “existing law” and certainly does not provide to the Court a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law. As the Tenth Circuit recently noted, “there is nothing inherently problematic with the use of GenAI in the practice of law.”⁹⁰ Instead, the violation here is due to the failure to verify that the cases generated by ChatGPT actually exist and confirm that they stand for the propositions for which they are cited.⁹¹ Because there is no dispute that all five Lexos attorneys signed both documents that included these errors, and they admit that not one of them verified that the case law in those briefs actually exist and stand for the propositions for which they were cited, their conduct violates  Rule 11(b)(2).

All of the attorneys focus their declarations on their lack of bad faith in signing these offending documents. But, as explained above, an attorney violates  Rule 11 even when

that attorney does not subjectively intend to deceive the court.⁹² The standard is an objective one. And the Court cannot find that any of these attorneys met this objective standard here. It is undisputed that only Mr. Seth utilized ChatGPT and inserted the inaccurate legal authority from those queries into the documents, and that none of the other attorneys were aware that he did so. But all of the attorneys who signed the briefs had a nondelegable duty to conduct a reasonable inquiry into the legal authority relied on in the briefs before signing their names.⁹³ By signing their names to Docs. 193 and 194, they “certified that each filing had been reviewed and verified by human judgment,” yet they were not.⁹⁴ As another district court in this circuit has noted under similar circumstances, “ignorance does not excuse [this attorney's]  Rule 11(b) violations. It was [the attorney's] responsibility to ensure that the Brief, which he signed and filed, was accurate.”⁹⁵

***11** The Court finds that Mr. Doell was placed in an untenable position by his superiors. He was directed to draft much of the summary-judgment response, not including the portion that came from Mr. Seth's faulty ChatGPT research. There is no indication that his own work product utilized unverified research, and he attests under penalty of perjury that it did not. He was also told to provide limited edits of Mr. Seth's work, but not to conduct a substantive review. The Court is mindful that this created a difficult power differential—Mr. Doell is the associate attorney on this matter, and Mr. Seth was co-counsel bringing 30 years of experience and no prior ethical lapses or violations to the table. Mr. Doell's superiors at the Buether Joe firm apparently had no role in reviewing these two documents or supervising his work. One of them was out of the country on the date they were filed. Nonetheless, Mr. Doell played a role in drafting and editing these documents, and under the objective standard that applies to  Rule 11(b)(2), he did not make a reasonable inquiry into the law relied on by Mr. Seth before he signed them. Had he done so, he would have discovered these many errors.

Mr. Joe and Mr. Kula did not even read the documents before they were filed. They should have known that giving signature authority without review runs the risk of violating  Rule 11. As another district court in the Tenth Circuit has explained, “[w]hen an attorney gives another permission to sign on their behalf without reviewing the document, it is not only actionable under  Rule 11 but also a possible violation of

a state's ethical rule of competence.”⁹⁶ Indeed, “no inquiry cannot be deemed objectively reasonable even if the reliance is placed in an experienced attorney.”⁹⁷ There was a simple way for these attorneys to avoid the risk of a violation: they did not have to sign the documents. By doing so, they placed their imprimatur on the filings and are therefore subject to the consequences of that decision.⁹⁸

Mr. Cooper, as local counsel, read the documents, but he failed to cite-check them, despite having discovered a citation error in a previous brief submitted to him for filing in this case.⁹⁹ He admits relying on his co-counsel to properly cite the cases therein when he signed his name to the documents. But by blindly relying on his co-counsel, he delegated a nondelegable duty. Adherence to  Rule 11 is particularly important in the context of local counsel. In this district, counsel admitted pro hac vice may not directly file documents in CM/ECF. They are required to use local counsel to do so. And local counsel gives those filings “a presumption of legitimacy.”¹⁰⁰ This is why the Court's local rule requires pleadings prepared by pro hac vice attorneys be signed by local counsel who is in good standing and that local counsel meaningfully participate in the proceedings.¹⁰¹ Mr. Cooper abdicated this responsibility by not confirming the accuracy of the authority in Docs. 193 and 194 before affixing his signature and filing them under his own name.

There was simply no oversight provided by the many seasoned attorneys of record for Lexos when responding to these motions, despite the fact that they each had a duty under  Rule 11, not to mention the rules of professional responsibility, to ensure that the documents they signed were based on existing law. As such, they all violated  Rule 11 when they signed or allowed their names to be added to the signature blocks of Docs. 193 and 194.

IV. Sanctions: Rule 11(c)

***12** While the  Rule 11(b) violation in this case is crystal clear to the Court, the appropriate sanction for each attorney is more difficult. The rule dictates that any sanction imposed “must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated.”¹⁰² And the Court must consider the relative fault of each attorney in fashioning sanctions.¹⁰³

This Court has already stricken Doc. 194 and granted leave to Lexos to file a corrected document that removes the offending citations. As a practical matter, this removed all but three case citations that counsel previously submitted in support of the motion, and all of the substantively-specific authority Lexos previously used to persuade the Court not to grant the motion to strike. Although the Court did not explicitly address the summary-judgment response in its order on the motion for leave to correct, at this time it also strikes the offending authority that was copied from the  *Daubert* response into Part III.D of the summary-judgment response. Beyond this consequence of counsel's conduct, the Court discusses below the relative fault of each attorney and the sanctions, if any, it imposes.

In considering the range of sanctions available, the Court cannot ignore the context in which these violations occur. The sheer amount of case law that has erupted over the last few years due to attorneys' reliance on unverified generative AI research, often generating hallucinated legal authority, is staggering.¹⁰⁴ There are too many sanctions orders at this point by other courts to cite them all,¹⁰⁵ and the problem has been reported in news sources.¹⁰⁶ The American Bar Association¹⁰⁷ and many state bar associations have issued guidance.¹⁰⁸ Several courts now either have notices, local rules, or standing orders that address the use of generative AI by litigants.¹⁰⁹

***13** A reasonably competent attorney filing documents in court should be aware of the pronounced, well-publicized risks of using unverified generative AI for legal research and the ethical obligations associated with signing a court filing without checking it for accuracy. Nonetheless, all of the attorneys here disclaim such knowledge. Mr. Seth claims he was a novice and did not appreciate the risk of case hallucinations. The Buether Joe attorneys suggest that because their firm had a strict prohibition on the use of AI, they had no further obligation to check their own work, and no reason to think that co-counsel, who was not covered by this internal policy, used AI. Mr. Cooper relied on the Texas attorneys to cite check their work. The Court finds that these attorneys' collective failure to devise a system of checking their filings for accuracy in the face of the well-publicized need to do so requires sanctions in order to deter repetition of this conduct by them and by other attorneys who are similarly situated.

The Court has considered the many other cases where judges have sanctioned attorneys for similar conduct. In most of them, courts have imposed monetary penalties ranging from as high as \$31,000,¹¹⁰ to as low as \$500.¹¹¹ In addition to the admonishment contained in this Order, the Court imposes fines proportionate to the individual attorney's violation in this case, with the exception of Mr. Doell, as well as other targeted sanctions designed to ensure that these attorneys and others similarly situated do not commit similar infractions in the future.

A. Mr. Seth

There is no doubt on this record that Mr. Seth carries the most relative fault. He admits that he used ChatGPT without verifying its research results, he admits to not telling his co-counsel or the client that he did so, and he allowed his co-counsel to add their names to the documents despite this knowledge. In fact, Mr. Seth asks the Court not to sanction any of the other attorneys for the violation and states that he is solely to blame.

In fashioning an appropriate sanction for Mr. Seth, the Court is mindful of the difficult family circumstances he was dealing with at the time of filing. This situation was so serious that Mr. Seth states it had “a profound effect on [his] mental state at the time of this error that left [him] distraught and somewhat distracted.”¹¹² While the Court is sympathetic to Mr. Seth's family circumstances, it cannot ignore that there were obvious options open to him short of using a publicly-available generative AI search tool that he had never used before to research his brief without verifying the accuracy of that research. The Court cannot understand why he did not share his situation, even generically, with one or more of his many co-counsel who could have helped him. Mr. Kula handled the claim construction hearing and should have been in a position to assist him on this 🚩 *Daubert* issue. Another obvious option for Mr. Seth would have been to seek an extension of time to file his response brief. Certainly caring for and attending to extremely sick or dying family members would have constituted good cause for an extension of time.¹¹³ Yet, he chose neither of these options. Instead, Mr. Seth chose to use ChatGPT, not once but twice, and then failed to confirm that the very strong authority it generated was accurate.

***14** Mr. Seth claims that this was the first and only time he used this tool that he admits he did not understand. And despite using this tool for the first time while admittedly not understanding it, he claims that he intended to but did not check the accuracy of its output. He blames this oversight on his emotional state at the time. But the Court finds that, in addition to his failure to verify the accuracy of his research, Mr. Seth's admitted use of a generative AI tool without understanding it is an aggravating circumstance that it must consider when imposing a sanction.

The Court also takes into account Mr. Seth's remorse and the fact that he attempted to correct the defective pleading. Mr. Seth apologizes to the Court, his co-counsel, and opposing counsel in his declarations, and assures the Court that he has learned his lesson. While the Court is heartened by his remorse, several statements in Mr. Seth's declaration leave it convinced that further sanctions are necessary to deter future conduct both by Mr. Seth and by others similarly situated.

First, Mr. Seth overemphasizes the fact that he did not deliberately intend to deceive the Court.¹¹⁴ The Court recognizes that he did not set out to deliberately deceive the Court when he chose to use ChatGPT to generate case citations, quotations, and statements of the law that he then inserted into the briefs without checking them for accuracy. But if Mr. Seth was not aware of the very real risk of case hallucinations resulting from unverified generative AI legal research, he should have been. As referenced above, the number of cases, published and unpublished, that resulted in 🚩 Rule 11 sanctions for this very conduct has ballooned in recent years. And it has been highly publicized. The states in which Mr. Seth is licensed have issued guidance. A reasonable, competent attorney in Mr. Seth's position should have been aware of the risks of using this research tool.

Second, the Court is troubled by Mr. Seth's assertion that he was merely seeking to corroborate “the approximately 95% of humanly generated brief and substantive arguments contained therein [that he] personally drafted based upon the facts in this case and not any AI output.”¹¹⁵ This statement conveys that he does not appreciate the magnitude of his error. A quick comparison of Mr. Seth's original and corrected draft belies his claim that the original brief was composed of 95% human-generated content.¹¹⁶ The correct brief is approximately two pages shorter than the faulty one. The eleven misstatements of authority—all either nonexistent or incorrect—pervaded Doc. 194.

Moreover, the only human-generated content in the original brief is either generic, or made without citation to authority. The false quotations, citations, and misrepresented authority were all highly specific to the issue raised in Overstock's motion. And, as set forth in detail earlier in this opinion, these statements of authority were quite strong. Mr. Seth did not merely query ChatGPT for a few citations to add after his own text. He asked it to take on the role of judge and provide him with authority and language opposing the motion. All citations in the brief, other than the generic references to the

 *Daubert* standard, were generated by his unverified use of ChatGPT. All of them were problematic. To deflect attention from this reckless conduct by focusing on the other language in the brief is inconsistent with the remorse that Mr. Seth expresses in other parts of his declaration. The Court instead weighs heavily the severity of the violation when fashioning Mr. Seth's sanction—the repeated instances of hallucinated case citations and quotations, and strong misstatements of authority.

***15** In fashioning a sanction that focuses on deterrence, the Court is also mindful that Mr. Seth has and continues to represent Lexos and others in the field of patent law in courts around the country. Mr. Seth contends that much of his work is through contracts with co-counsel arrangements similar to the one in this case—where he completes work as co-counsel on briefs joined by other attorneys. Thus, his sanction must be designed to deter the violative conduct in this and other cases.

Mr. Seth indicates that it is his “practice going forward to never use AI to identify case law or quotes attributed to case law from AI,” and that his employees and independent contractors will be advised the same.¹¹⁷ Respectfully, this is insufficient. As stated throughout this Order, the  Rule 11(b) violation was not necessarily counsel's use of generative AI to conduct legal research. The violation was (1) failing to understand the technology so that he could use it in an informed way; and (2) failing to check the research it generated for accuracy.¹¹⁸ “As attorneys transition to the world of AI, the duty to check their sources and make a reasonable inquiry into existing law remains unchanged.”¹¹⁹ Nothing about Mr. Seth's stated policy addresses the need for competence and verification. Thus, the Court directs Mr. Seth to implement a more robust policy designed to deter any future instance of submitting unverified authority in a filing. The Court will require him to submit to the Clerk for filing a certificate outlining specific internal procedures at his

firm that he intends to impose that will ensure that the legal authority contained in the firm's work product is accurate.

With these considerations in mind, the Court imposes a monetary fine of \$5,000 against Mr. Seth and revokes his pro hac vice admission to this Court, given that several other competent counsel appear in this matter on behalf of Lexos. The Court further directs Mr. Seth to self-report to the state disciplinary authorities where he is licensed by providing them with a copy of this Order, and to submit to the Clerk for filing by no later than February 28, 2026, a certificate outlining the specific internal procedures at his firm that will ensure that the legal authority contained in the firm's work product is accurate.

B. Mr. Kula

As already discussed, Mr. Kula did not generate the defective citations, nor did he contribute in any way to Docs. 193 and 194. Mr. Kula's violation was signing a filing despite failing to review it or otherwise ensuring that its contents were accurate. Mr. Kula instead assigned an associate, Mr. Doell, to work on the majority of the summary-judgment brief, and to assist Mr. Seth with both defective briefs. Mr. Kula left for a family vacation several days before these briefs were filed.

Because he had no knowledge that Mr. Seth used unverified generative AI to help draft Doc. 194, and inserted some of that defective authority into Doc. 193, and because he was only responsible for handling the response to a different

 *Daubert* motion, Mr. Kula asks that sanctions not be imposed. But as the Court has already explained, Mr. Kula's lack of knowledge that Mr. Seth used hallucinated authority in

Doc. 194 does not absolve him of the  Rule 11(b) violation. It is his failure to review these briefs at all, despite affixing his name to the documents, that constitutes sanctionable conduct; he violated his duty to conduct a reasonable inquiry into the facts and the law before filing.

***16** The Buether Joe attorneys appear to take the position in their declarations that because the firm had a flat prohibition on the use of “AI platforms by firm personnel or attorneys for writing, drafting, or creating documents to be filed with any court” and because they had no reason to believe Mr. Seth used generative AI to draft Doc. 194, they should not be sanctioned.¹²⁰ Neither Mr. Kula nor Mr. Joe accept responsibility for signing the documents or failing to supervise their preparation. Nor do they show any remorse for

the fact that Docs. 193 and 194 were filed bearing their names with fabricated and misrepresented legal authority. Given Mr.

Kula's abdication of his  Rule 11 duties by affixing his name to documents that he failed to review, and his failure to acknowledge this breach, the Court finds a sanction is warranted. In addition to the public admonishment in this Order, the Court imposes a fine of \$3,000.

C. Mr. Joe

Like Mr. Kula, Mr. Joe states that he took no part in drafting or reviewing the defective filings in this case, despite allowing his name to be affixed to the documents and despite being the lead attorney in this matter. And, like Mr. Kula, Mr. Joe fails to acknowledge that he breached a duty under  Rule 11 by delegating his duty to conduct a reasonable inquiry into the facts and law in Docs. 193 and 194 before signing them. For the same reasons the Court sanctions Mr. Kula, the Court finds that a sanction is warranted against Mr. Joe in the form of this public admonishment and a \$3,000 fine.

In addition, given Mr. Joe's role as the managing member of his law firm, the Court imposes the additional sanction of ordering him to reconsider his firm's internal policies addressing the use of AI for generating filings in court. As the Court explained in ordering the same for Mr. Seth, a mere prohibition on the use of AI platforms without any training, enforcement, or verification procedure does not ensure the Court that the Buether Joe firm will not be placed in a similar situation in the future, particularly if they submit briefs with co-counsel from outside the firm who would not be subject to its policy. As the ABA's guidance provides:

Model Rules 5.1 and 5.3 address the ethical duties of lawyers charged with managerial and supervisory responsibilities and set forth those lawyers' responsibilities with regard to the firm, subordinate lawyers, and nonlawyers. Managerial lawyers must create effective measures to ensure that all lawyers in the firm conform to the rules of professional conduct, and supervisory lawyers must supervise subordinate lawyers and nonlawyer assistants to ensure that subordinate lawyers and nonlawyer assistants conform to the rules. These responsibilities have implications for the use of [generative AI ("GAI")] tools by lawyers and nonlawyers.

Managerial lawyers must establish clear policies regarding the law firm's permissible use of GAI, and supervisory lawyers must make reasonable efforts to ensure

that the firm's lawyers and nonlawyers comply with their professional obligations when using GAI tools. Supervisory obligations also include ensuring that subordinate lawyers and nonlawyers are trained, including in the ethical and practical use of the GAI tools relevant to their work as well as on risks associated with relevant GAI use. Training could include the basics of GAI technology, the capabilities and limitations of the tools, ethical issues in use of GAI and best practices for secure data handling, privacy, and confidentiality.¹²¹

Thus, the Court directs Mr. Joe to cause the implementation of specific internal procedures at his firm that will ensure that the legal authority contained in the firm's future court filings are accurate. The Court strongly encourages him to consider verification and training requirements for all members of his firm. He shall file by no later than February 28, 2026, a certificate outlining these procedures.

D. Mr. Doell

***17** As the Court has already discussed, as the most junior attorney on this matter without supervisory authority, Mr. Doell was placed in a difficult position by his supervising attorneys. He was apparently neither expected nor instructed to substantively check Mr. Seth's work, despite being asked to execute a declaration in support of the exhibits attached to it, and despite being asked to conduct a technical edit. One of his supervising attorneys at the firm was out of the country, and the other took no part in preparing, reviewing, or supervising the July 7, 2025 filings. The Court finds that the public admonishment of this Order is sufficient to deter any similar future conduct by Mr. Doell and releases him from further sanctions. The remedial sanctions that the Court imposes on Mr. Joe will apply to him as an associate at the firm and should prevent him from being placed in this situation again.

E. Mr. Cooper

As local counsel, Mr. Cooper signed the defective filings. By doing so, he vouched for the Texas attorneys in this matter. Although Mr. Cooper at least reviewed the filings before he submitted them to the Court, he did not cite-check them. But the Court weighs heavily that, unlike Mr. Kula and Mr. Joe, Mr. Cooper acknowledges that he had a duty to check the filings for accuracy before signing and filing them under  Rule 11 and that such duty was an objective one; he expresses remorse for failing to meet this duty, and he sets

forth in detail his and his firm's efforts to ensure that a similar infraction does not occur again.

The Fisher Patterson firm has adopted a formal policy (1) prohibiting the use of generative AI platforms without the consent of the client and the express permission of the responsible partner and, if different, the overseeing attorney, and (2) requiring that all documents produced using generative AI be independently verified by the author as being true and accurate. The firm is in the process of developing a policy that extends the formal AI policy to all instances where an attorney in the firm is local counsel and sponsors other attorneys as pro hac vice. In addition, Mr. Cooper has voluntarily sanctioned himself in the form of refraining from serving as sponsoring or local counsel for pro hac vice attorneys for a period of 12 months.

Thus, the Court finds that the admonishment in this Order, the policies adopted by Mr. Cooper's firm, and a \$1,000 fine are sufficient to deter Mr. Cooper and any other local counsel who may be similarly situated from committing a similar infraction in the future.

IT IS THEREFORE ORDERED BY THE COURT that the following language is stricken in Lexos's response to Overstock's summary-judgment motion: Doc. 193 at 38 and 39, the entire paragraph under the heading "1. 'Modify...to' Does Not Imply Exclusivity" and the citations on page 39 to  *Baldwin Graphic Systems, Inc.* and  *AstraZeneca*.

IT IS FURTHER ORDERED BY THE COURT that all five Lexos attorneys are publicly admonished for violating

 Fed. R. Civ. P. 11(b) as set forth in this Order. The individual attorneys are further sanctioned under  Rule 11 as follows:

- Mr. Seth is fined \$5,000, the Court revokes his pro hac vice admission to this Court, he shall self-report to the state disciplinary authorities where he is licensed by providing them with a copy of this Order, and he shall submit to the Clerk for filing by no later than February 28, 2026, a certificate outlining specific internal procedures to be imposed at his firm that will ensure that the legal authority contained in the firm's future court filings are accurate.
- Mr. Kula is fined \$3,000.
- Mr. Joe is fined \$3,000 and shall file, by no later than February 28, 2026, a certificate outlining specific internal procedures to be imposed at the Buether Joe law firm that are designed to ensure that the legal authority contained in the firm's future court filings are accurate.
- Mr. Cooper is fined \$1,000.
- *18** • Mr. Doell is released from any further sanctions.

The fines imposed by this Order shall be made payable to the Court's registry within 14 days of this Order.

IT IS SO ORDERED.

All Citations

Slip Copy, 2026 WL 265581

Footnotes

- 1 Doc. 98.
- 2 Doc. 217-5 ¶ 4. The Court notes that no withdrawal of appearance has been filed for Mr. Buether; he still appears as an active attorney on the docket more than one year after his death.
- 3 Doc. 51. The Court is aware that Lexos has filed many other lawsuits around the country to enforce the same patents at issue in this case. A short review of those cases on Westlaw indicates that the Buether law firm and Mr. Seth together represent Lexos in several of those cases too. *See, e.g.,*  *Lexos Media IP, LLC v. eBay Inc.*, 722 F. Supp. 3d 1042 (N.D. Cal. 2024); *Lexos Media IP, LLC v. Amazon.com, Inc.*, No. 2:22-CV-00169-

JRG, 2023 WL 5723642 (E.D. Tex. Sept. 5, 2023); *Lexos Media IP LLC v. MSC Indus. Direct Co.*, No. 3:22-CV-1736-X, 2023 WL 11967299 (N.D. Tex. Sept. 6, 2023).

- 4 Doc. 217-1 ¶ 13.
- 5 Docs. 174, 175, 177.
- 6 Doc. 174-2 at 4.
- 7 See Doc. 92-1 at 8, Doc. 99 at 6.
- 8 Doc. 174 at 8–14.
- 9 Doc. 177 at 31–35.
- 10 Docs. 190, 193, 194 (superseding Doc. 192).
- 11 Doc. 217-5 ¶ 8.
- 12 Doc. 217-3 ¶ 5.
- 13 Doc. 217-1 ¶ 5.
- 14 Doc. 217-5 ¶ 7.
- 15 Doc. 217-2 ¶ 13.
- 16 Doc. 200-1 (providing a table of fabricated and misleading case citations in Plaintiff's response brief to the motion to exclude Dr. Russ).
- 17 Doc. 217-1 ¶¶ 5–9; Doc. 207 at 3 n.1 (admitting that Plaintiff's response to the summary judgment motion also contains “two paragraphs with the same mistake which were carried over concerning the  *Cordis*,  *Baldwin*, and  *AstraZeneca* cases” and requesting that “the Court strike these citations” (citations omitted)).
- 18 Doc. 194 at 6.
- 19  879 F.3d at 1377.
- 20  *Id.*
- 21   *Microsoft*, 598 F.3d at 854.
- 22   *Id.* at 855–56.
- 23   *Id.* at 856.
- 24   *Id.*
- 25 Doc. 194 at 6.

- 26  *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).
- 27  *Rodriguez-Felix*, 450 F.3d at 1123–27.
- 28  *Id.* at 1125.
- 29  *Id.* (emphasis added).
- 30 See  *Daubert*, 509 U.S. at 596, 113 S.Ct. 2786.
- 31 Doc. 194 at 6.
- 32 *Id.* at 13.
- 33 *Id.*
- 34 This case number is a Social Security appeal, *Russell v. Comm'r of Soc. Sec. Admin.* The undersigned, not District Judge Daniel D. Crabtree, presided over that case. There is no case against the City of Topeka in the Court's CM/ECF database by a plaintiff with the last name of Hockett. Nor can the Court locate this case in the Westlaw database in any other federal jurisdiction.
- 35 Doc. 194 at 6.
- 36  *Intel Corp.*, 927 F. Supp. 2d at 141.
- 37 Doc. 194 at 7.
- 38 *Id.*
- 39  *Id.*
- 40  *Liquid Dynamics*, 449 F.3d at 1220–21.
- 41  *Id.* at 1224 n.2.
- 42 Doc. 194 at 8.
- 43  *Liquid Dynamics*, 449 F.3d at 1224 n.2.
- 44 Doc. 194 at 9.
- 45  450 F.3d 1117, 1123–27 (10th Cir. 2006).
- 46  *Goebel*, 215 F.3d at 1088–89.
- 47 Doc. 194 at 12.
- 48  *Id.*

- 49  *Id.*
- 50 Doc. 194 at 13–14 (quoting   *Idi Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 854 (Fed. Cir. 2010), *aff'd*,  564 U.S. 91, 131 S.Ct. 2238, 180 L.Ed.2d 131 (2011)).
- 51 Doc. 193 at 33–34.
- 52 *Id.* at 34.
- 53 *Id.*
- 54 Doc. 200 at 6 & n.1; Doc. 200-1.
- 55 Doc. 207.
- 56 *Id.* ¶ 3.
- 57 *Id.* at 3 n.1.
- 58 Doc. 211-1.
- 59 *Id.* ¶¶ 2, 3, 9.
- 60 *Id.* ¶ 7.
- 61 Doc. 214.
- 62 Doc. 216.
- 63 The Court recognizes that attorneys' fees are not an option for sanctions when it acts sua sponte, as it did here. See  Fed. R. Civ. P. 11(c)(5)(B). Therefore, notwithstanding the language in its Order to Show Cause, the Court will not impose this sanction.
- 64 Doc. 217-1 ¶ 7.a.
- 65 *Id.* Mr. Seth does not specify who the litigation team included.
- 66 *Id.* ¶ 7.b.
- 67 *Id.*
- 68 See Doc. 194-1.
- 69 Doc. 217-1 ¶ 6.
- 70 *Id.* ¶ 8.
- 71 *Id.* ¶ 10.
- 72 *Id.* ¶ 14.
- 73 *Id.* ¶ 9.
- 74 Doc. 217-4 ¶ 6.

- 75 *Id.* ¶¶ 11, 12.
- 76 Doc. 217-3 ¶ 11.
- 77 D. Kan. Rule 83.5.4(b).
- 78 Doc. 217-2 ¶ 14.
- 79 *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990).
- 80 *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 551, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991).
- 81 *Collins v. Daniels*, 916 F.3d 1302, 1319 (10th Cir. 2019) (citation modified).
- 82 Fed. R. Civ. P. 11(c)(3).
- 83 *Predator Int'l, Inc. v. Gamo Outdoor USA, Inc.*, 793 F.3d 1177, 1182 (10th Cir. 2015).
- 84 *Id.* (quoting *Adamson v. Bowen*, 855 F.2d 668, 673 (10th Cir. 1988)).
- 85 Fed. R. Civ. P. 11 advisory committee's note to 1993 amendment.
- 86 *Pavelic & LeFlore v. Marvel Ent. Grp.*, 493 U.S. 120, 126–27, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989).
- 87 *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 542, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991) (“A signature certifies to the court that the signer has read the document, has conducted a reasonable inquiry into the facts and the law and is satisfied that the document is well grounded in both, and is acting without any improper motive.”).
- 88 *Wadsworth v. Walmart Inc.*, 348 F.R.D. 489, 495–96 (D. Wyo. 2025); *see also* *Dehghani v. Castro*, 782 F. Supp. 3d 1051, 1058 (D.N.M. 2025) (finding a Rule 11(b) violation where attorney “outsourced his duties to another attorney and failed to adequately review that attorney’s work-product and ensure its accuracy before putting his own name on it and filing it with th[e] Court”).
- 89 *See, e.g.*, *Park v. Kim*, 91 F.4th 610, 615 (2d Cir. 2024) (“At the very least, the duties imposed by Rule 11 require that attorneys read, and thereby confirm the existence and validity of, the legal authorities on which they rely.”); *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443, 461 (S.D.N.Y. 2023) (“A fake opinion is not ‘existing law’ and citation to a fake opinion does not provide a non-frivolous ground for extending, modifying, or reversing existing law, or for establishing new law.”); *Coomer v. Lindell*, No. 22-CV-01129, 2025 WL 1865282, at *3 (D. Colo. July 7, 2025) (“Courts across the country—both within the United States Court of Appeals for the Tenth Circuit...and outside of it—recognize that Rule 11 applies to the use of artificial intelligence.”).
- 90 *Moore v. City of Del City*, No. 25-6002, 2025 WL 3471341, at *2 (10th Cir. Dec. 3, 2025).
- 91 *See id.*

- 92 See  *White v. Gen. Motors Corp.*, 908 F.2d 675, 680 (10th Cir. 1990) (“A good faith belief in the merit of an argument is not sufficient; the attorney’s belief must also be in accord with what a reasonable, competent attorney would believe under the circumstances.”); *In re Allen*, 248 F. App’x 874, 882 (10th Cir. 2007) (affirming district court’s application of an objective  Rule 11 standard when imposing sua sponte sanctions); *Omniq Corp. v. Redlpr, LLC*, No. 19-CV-437, 2025 WL 525044, at *9 (D. Utah Feb. 18, 2025) (rejecting argument that sua sponte sanctions must be decided under a subjective bad faith standard in the Tenth Circuit). But see *Kyros L. P.C. v. World Wrestling Ent., Inc.*, 78 F.4th 532, 543 (2d Cir. 2023) (“When a court initiates  Rule 11 sanctions sua sponte and the opportunity to correct or withdraw the challenged submission is unavailable, the court must make a finding of bad faith on the part of the attorney before imposing the sanctions.”);  *United Nat. Ins. v. R&D Latex Corp.*, 242 F.3d 1102, 1115–16 (9th Cir. 2001) (explaining that sua sponte sanctions under  Rule 11 should “ordinarily be imposed only in situations that are akin to a contempt of court”).
- 93 *Mattox v. Prod. Innovations Rsch., LLC*, No. 6:24-CV-235-JAR, 2025 WL 3012828, at *5 (E.D. Okla. Oct. 22, 2025) (“Responsibility under  Rule 11 extends to all attorneys of record.”).
- 94 *Id.* at *4.
- 95  *Dehghani v. Castro*, 782 F. Supp. 3d 1051, 1059 (D.N.M. 2025).
- 96  *Wadsworth v. Walmart Inc.*, 348 F.R.D. 489, 496 (D. Wyo. 2025).
- 97  *Id.*
- 98 See *Mattox*, 2025 WL 3012828, at *8 (“When a lawyer lends his signature, or his silence, to filings without inquiry, he converts inattention into representation and transforms friendship into liability.”).
- 99 See Doc. 217-2 ¶ 14 (“The process described in ¶ 13, *supra*, differs from the review and approval of at least one earlier filing where I had noticed an incomplete citation in a draft before filing. I found the original case and corrected the citation before filing the document.”).
- 100 *Mattox*, 2025 WL 3012828, at *8.
- 101 See D. Kan. Rule 83.5.4; Doc. 51 (Mr. Cooper’s signed pro hac vice application on behalf of Mr. Seth agreeing to “participate meaningfully in the preparation and trial of this case.”).
- 102  Fed. R. Civ. P. 11(c)(4).
- 103  *White v. Gen. Motors Corp.*, 908 F.2d 675, 685–86 (10th Cir. 1990).
- 104 See Anna Conley, *Understanding the Duty of Competence for Attorneys Using Generative AI*, 27 N.C. J. L. & Tech. 65, 75 & n.38 (2025) (stating that the author had located over 40 different cases involving attorneys citing generative AI with nonexistent cases and citing to high profile examples); see also Evan Gorelick, *Vigilante Lawyers Expose the Rising Tide of A.I. Slop in Court Filings*, N.Y. Times (Nov. 11, 2025), at B3 (referencing lawyer and researcher Damien Charlotin’s attempt to create online databases tracking cases that deal with fabricated cases generated by A.I. and noting at that time that he had documented 509 such

- cases); *Tracking Federal Judge Orders on Artificial Intelligence*, Law360, <https://www.law360.com/pulse/ai-tracker> (last visited Jan. 27, 2026) (aggregating 59 cases).
- 105 See, e.g.,  *Johnson v. Dunn*, 792 F. Supp. 3d 1241, 1266 (N.D. Ala. 2025) (collecting cases); *Mattox v. Prod. Innovations Rsch., LLC*, No. 24-CV-235, 2025 WL 3012828, at *6–7 (E.D. Okla. Oct. 22, 2025) (same).
- 106 See, e.g., Benjamin Weiser, *So, Have You Heard the One About the Lawyer Using A.I.?*, N.Y. Times (May 29, 2023), at A1; Sarah Martinson, *Judges' AI Orders Keep Trickling in as Fake Citations Persist*, Law360 (July 21, 2025), <https://www.law360.com/pulse/articles/2357542?>; Daniel Wu, *Lawyers Using AI Keep Citing Fake Cases in Court. Judges Aren't Happy*, Washington Post (June 3, 2025), <https://www.washingtonpost.com/nation/2025/06/03/attorneys-court-ai-hallucinations-judges/>.
- 107 A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 512 (2024).
- 108 See A.B.A. Task Force on Law & A.I., Addressing the Legal Challenges of AI, Year 2 Report on the Impact of AI on the Practice of Law, at 47 (Dec. 2025) (compiling state bar ethics rules and guidance). Mr. Seth is licensed in Texas and California. Both state bars provide guidance on attorneys' use of AI. State Bar of Cal. Standing Comm. on Pro. Resp. & Conduct, Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law (2023) (providing guiding principles regarding how the rules of professional responsibility should be applied to lawyers' use of generative AI, including that under Rules 1.1 and 1.3, "AI-generated outputs can be used as a starting point but must be carefully scrutinized. They should be critically analyzed for accuracy and bias, supplemented, and improved, if necessary....A lawyer's professional judgment cannot be delegated to generative AI and remains the lawyer's responsibility at all times"); Tex. Comm. on Pro. Ethics, Op. 705 (Feb. 2025) ("While there may be many ways that generative AI can assist in the practice of law and benefit lawyers and clients alike, Texas lawyers must always be aware of the ethical issues that may arise in the use of generative AI. Among many other issues, lawyers should acquire basic technological competence before using any generative AI tool, should always ensure that the tool does not imperil confidential client information, should always verify the accuracy of any responses received from a generative AI tool, and should not charge clients for the time 'saved' by using a generative AI program.").
- 109 See, e.g., United States District Court for the District of Connecticut, Notice to Counsel and Litigants Regarding AI-Assisted Research, at <https://www.ctd.uscourts.gov/>; E.D. Tex. Admin. R. III(3)(m); *In re Use of Artificial Intelligence*, No. 3:24-mc-104, slip op. (W.D.N.C. June 18, 2024), at <https://www.ncwd.uscourts.gov/sites/default/files/general-orders/AI%20Standing%20Order.pdf>. See generally RAILS, Analysis of AI Use in Courts, at <https://rails.legal/resources/resource-ai-orders/> (providing table of court rules, local rules, and judicial guidelines governing the use of AI through May 2025).
- 110 *Lacey v. State Farm Gen. Ins.*, No. CV 24-5205, 2025 WL 1363069, at *5 (C.D. Cal. May 5, 2025) (special master order sanctioning the plaintiff's law firms, including ordering them to pay compensation to the defense in the total amount of \$31,000).
- 111 See, e.g.,  *Wadsworth v. Walmart Inc.*, 348 F.R.D. 489, 495–96 (D. Wyo. 2025) (\$3,000 fine for drafter; \$1,000 for other attorneys who signed); *Cojom v. Roblen, LLC*, No. 23-CV-1669, 2025 WL 3205930, at *4 (D. Conn. Nov. 17, 2025) (\$500 fine); *Coomer v. Lindell*, No. 22-1129, 2025 WL 1865282, at *8 (D. Colo. July 7, 2025) (\$3,000 per attorney); *Mattox v. Prod. Innovations Rsch., LLC*, No. 6:24-CV-235-JAR, 2025 WL 3012828, at *8 (E.D. Okla. Oct. 22, 2025) (\$3,000 fine for drafter, \$2,000 for counsel of record who did not sign, and \$1,000 for signer who did not review).
- 112 Doc. 217-1 ¶ 10.

113 See Fed. R. Civ. P. 6(b)(1)(A).

114 Doc. 217-1 ¶¶ 12–14.

115 *Id.* ¶ 14.

116 Compare Doc. 194, with Doc. 216.

117 Doc. 217-1 ¶ 11.

118 Whether Mr. Seth also violated the rules of professional responsibility is not before this Court. The Court will defer to Mr. Seth's state disciplinary authorities to make that determination.

119  *Wadsworth v. Walmart Inc.*, 348 F.R.D. 489, 493 (D. Wyo. 2025).

120 Doc. 217-4 ¶ 15; Doc. 217-5 ¶ 11.

121 A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 512, at 10 (2024) (footnotes omitted).

513 P.3d 669
Supreme Court of Utah.

In the MATTER OF the DISCIPLINE
OF Doug BERNACCHI, #10336
Office of Professional Conduct, Appellee,
v.
Doug Bernacchi, Appellant.

No. 20210034
|
Heard: June 6, 2022
|
Filed June 23, 2022

Synopsis

Background: Reciprocal disciplinary proceeding was brought against attorney based upon his suspension in both Indiana and Illinois. The Third District Court, Salt Lake City, Patrick W. Corum, J., imposed one-year reciprocal suspension, and attorney appealed.

Holdings: The Supreme Court, Lee, Associate C.J., held that:

[1] statute providing district courts with jurisdiction over matters of lawyer discipline did not run afoul of Supreme Court constitutional duty to govern the practice of law;

[2] district court had subject-matter jurisdiction over the reciprocal disciplinary proceeding;

[3] Office of Professional Conduct (OPC) had authority over attorney even though attorney had resigned his status as a Utah lawyer;

[4] attorney did not establish that his due process rights were infringed in Indiana disciplinary proceedings;

[5] attorney failed to preserve his claim that the reciprocal disciplinary proceeding was time-barred; and

[6] any error by district court in entering default judgment based on attorney's intemperate, uncivil behavior was harmless.

Affirmed.

Procedural Posture(s): On Appeal; Proceeding on Attorney Discipline.

West Headnotes (9)

[1] **Attorneys and Legal Services** 🗝 Standards of professional conduct; enforcement; discipline

Constitutional Law 🗝 Encroachment on Executive

Legislature's enactment of statute providing that district courts had jurisdiction over matters of lawyer discipline consistent with the rules of the Supreme Court did not run afoul of provision of state constitution that conferred on the Supreme Court the duty to govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law; the legislature did not abrogate Supreme Court's constitutional jurisdiction over attorney discipline cases, but rather it just acknowledged Supreme Court's rules designating the district court as an initial forum for fact-finding and imposition of discipline, if necessary, and no constitutional or statutory provision excluded attorney discipline matters from district courts' original jurisdiction.

Utah Const. art. 8, §§ 4, 5; 🇺🇹 Utah Code Ann. § 78A-5-102(3).

[2] **Attorneys and Legal Services** 🗝 Effect of Foreign Enforcement; Reciprocal Discipline

District court had subject-matter jurisdiction over reciprocal disciplinary proceeding brought against attorney, notwithstanding his claim that he was no longer an attorney admitted to practice in Utah as he resigned from the practice of law in the state. 🇺🇹 Utah Code Ann. § 78A-5-102(3); Utah R. Prof. Conduct 14-522 (2019).

[3] **Courts** 🗝 Determination of questions of jurisdiction in general

A court always has jurisdiction to determine its jurisdiction.

state's disciplinary proceedings that led to the reciprocal proceeding. Utah R. Prof. Conduct 11-567.

[4] **Attorneys and Legal Services** 📌 Effect of Foreign Enforcement; Reciprocal Discipline
Office of Professional Conduct (OPC) had authority over attorney subject to reciprocal disciplinary proceeding, even though attorney had effectively resigned his status as a Utah lawyer and was no longer actively licensed to practice law in the state, since attorney was formerly admitted to practice law and was licensed to practice or was practicing law in Utah at the time of his alleged violation of the Rules of Professional Practice. Utah R. Prof. Conduct 14-506(a), 14-522 (2019).

[7] **Appeal and Error** 📌 Presumptions and Burdens on Review
Threshold burden of appellant is to identify and challenge basis for lower court decision on appeal.

[5] **Attorneys and Legal Services** 📌 Suspension
Constitutional Law 📌 Conduct and discipline
Attorney identified no basis for a determination that it was clear upon the face of the record in Indiana disciplinary proceedings, which gave rise to reciprocal discipline of suspension in Utah, that his due process right to notice and an opportunity to be heard was infringed, notwithstanding that four separate state and federal courts had determined that attorney was provided due process in Indiana; the record included at least two documents indicating attorney had notice and opportunity to be heard, namely Indiana Supreme Court order that imposed a suspension and a hearing officer's findings of fact and conclusions of law, which outlined that attorney participated in disciplinary process in Indiana, that he admitted to the allegations against him, and that he agreed to a sanctions hearing. U.S. Const. Amend. 14; Utah R. Prof. Conduct 14-522 (2019).

[8] **Attorneys and Legal Services** 📌 Preservation of error; waiver and estoppel; record
Attorney failed to preserve for appeal to the Supreme Court his claim that reciprocal disciplinary proceeding brought against him was time-barred, where attorney did not raise this defense in his answer or in any other pleadings in the district court, but instead he raised it for the first time on appeal, and he did not identify or argue in favor of any exception to the rules of preservation. Utah R. Prof. Conduct 14-522 (2019).

[9] **Attorneys and Legal Services** 📌 Harmless and reversible error
Any error by district court, in entering a default judgment imposing reciprocal suspension on attorney due to his intemperate, uncivil behavior and his decision to abruptly leave the summary judgment hearing, was harmless, given that the district court proceeded to provide an independent, adequate basis for imposition of a reciprocal sanction against attorney on the merits. Utah R. Civ. P. 10(h), 55(c); Utah R. Prof. Conduct 14-522 (2019).

[6] **Attorneys and Legal Services** 📌 Effect of Foreign Enforcement; Reciprocal Discipline
An action for reciprocal discipline against an attorney under Rules of Professional Practice is not a forum for a collateral attack on another

*671 Third District, Salt Lake City, The Honorable Patrick W. Corum, No. 190907101

Attorneys and Law Firms

Billy L. Walker, Emily A. Lee, and Barbara Townsend, Salt Lake City, for appellee

Doug Bernacchi, Charlottesville, Virginia, pro se appellant

Associate Chief Justice Lee authored the opinion of the Court, in which Justice Pearce, Justice Petersen, Judge Pohlman, and Judge Harris joined.

Having recused himself, Chief Justice Durrant does not participate herein; Court of Appeals Judge Ryan Harris sat.

Justice Diana Hagen became a member of the Court on May 18, 2022, after the oral argument panel was assigned, and accordingly did not participate; Court of Appeals Judge Jill Pohlman sat.

Opinion

Associate Chief Justice Lee, opinion of the Court:

¶1 This is an appeal in an attorney discipline matter involving Doug Bernacchi. Bernacchi was suspended by the Indiana Supreme Court in October 2017. The Illinois Bar subsequently suspended him in a reciprocal disciplinary proceeding. It then notified the Utah Office of Professional Conduct (OPC) of the disciplinary actions against Bernacchi in Illinois and Indiana. And OPC initiated its own disciplinary action in response to the notice, asserting that Bernacchi was subject to reciprocal sanctions in Utah under rule 14-522 of the rules governing the State Bar. SUP. CT. R. PRO. PRAC. 14-522 (2019).¹

¶2 The district court entered a one-year reciprocal suspension against Bernacchi on two alternative grounds. It first concluded that Bernacchi had “defaulted” when he abruptly withdrew from a hearing on the parties’ cross-motions for summary judgment—striking Bernacchi’s answer and pleadings and entering default judgment. In the alternative, it concluded that a reciprocal suspension was appropriate on the merits—upholding the basis of OPC’s charges and rejecting a series of Bernacchi’s grounds for opposing them.

¶3 On this appeal, Bernacchi challenges the district court’s judgment in a rambling diatribe² that fails to engage with the district *672 court’s analysis on a number of points.³ The legal basis for Bernacchi’s appeal is often lost in the mire of his caustic rhetoric, much of which is directed at relitigating the Indiana proceeding or at maligning various actors in the

judicial system. These flourishes are hardly helpful to our task of rendering an evenhanded assessment of the legal issues presented for our decision. Yet that is still our job, and one we take seriously even when litigants sling mud at the court and call judges names⁴ instead of engaging in measured legal analysis.

¶4 As best we can tell, Bernacchi advances five grounds for challenging the imposition of a reciprocal sanction against him. He asserts: (1) that the district court lacked subject-matter jurisdiction; (2) that OPC lacked power to suspend him because he had already “resigned” his status as an attorney; (3) that reciprocal sanctions are improper due to an alleged failure of “due process” in the underlying Indiana proceedings; (4) that OPC’s charges are time-barred; and (5) that the district court had no basis for entering default judgment, particularly in the absence of an opportunity for Bernacchi to brief that question.

¶5 OPC vaguely asserts that the district court “was correct in entering reciprocal discipline against Mr. Bernacchi.” But it presents no legal analysis of a basis for default judgment under our rules of civil procedure, and offers no response to Bernacchi’s assertion that the court erred in entering default without first giving Bernacchi an opportunity to be heard on the matter. Instead, OPC defends the district court’s judgment on the merits—offering its position on each of the first four grounds listed above.

¶6 We affirm under the standard of review that governs our decisions in attorney discipline cases. *See Utah State Bar v. Lundgren (In re Discipline of Lundgren)*, 2015 UT 58, ¶ 9, 355 P.3d 984 (declaring that this court “review[s] district court findings in attorney discipline matters with less deference” than it affords in other cases, and “retain[s] the right to draw different inferences from the facts in order to make an independent determination of the correctness of the discipline the district court imposed” (citations and internal quotation marks omitted)). We uphold the jurisdiction of the district court and the OPC, conclude that Bernacchi has failed to show that there was a due process problem sufficient to defeat the imposition of a reciprocal *673 sanction, and hold that his time-bar defense was forfeited because he did not preserve it in the district court. In so doing, we identify potential concerns with the imposition of a default judgment on this record, but conclude that any error was harmless in light of our agreement with the district court’s analysis of the merits.

I

¶7 Bernacchi asserts that the district court lacked subject-matter jurisdiction over an attorney discipline matter that is committed to the jurisdiction of this court under the Utah Constitution. He then argues that OPC lacked the authority to prosecute him under rule 14-506 of our rules of professional practice. He also contends that the Indiana proceeding was an improper basis for a reciprocal sanction under rule 14-522(d) in light of certain “due process” defects in the Indiana action. And he claims that OPC’s charges against him are time-barred under rule 14-529 (2019). We reject each of these challenges to the district court’s order.

A

¶8 Bernacchi’s challenge to the district court’s jurisdiction is rambling and confusing. But it seems to start with the assertion that this court has constitutionally established jurisdiction to “govern the practice of law.” UTAH CONST. art. VIII, § 4. And it appears to pivot to the proposition that neither the legislature nor this court is “permitted” to confer jurisdiction on the district court. Among other assertions, Bernacchi claims that the legislature ran afoul of article VIII, section 4 when it enacted Utah Code section 78A-5-102(3)—a provision that recognizes that “[t]he district court has jurisdiction over matters of lawyer discipline consistent with the rules of the Supreme Court.”

¶9 Bernacchi cites *Barnard v. Utah State Bar*, 857 P.2d 917 (Utah 1993), for the proposition that this court’s jurisdiction over attorney discipline matters is exclusive—and preclusive of the jurisdiction of the district court. And because he claims that he had resigned or was administratively suspended by the Utah Bar before OPC sought a reciprocal sanction against him, he also asserts that there is no jurisdiction in an attorney discipline matter over a non-attorney.

[1] ¶10 None of these arguments holds water. First, article VIII, section 4 admittedly confers on this court the duty to “govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law.” UTAH CONST. art. VIII, § 4. But the legislature has not stripped this court of jurisdiction, or in any way run afoul of this provision. In enacting Utah Code section 78A-5-102(3), the legislature was not abrogating

the supreme court’s constitutional jurisdiction over attorney discipline cases. It was just acknowledging *this court’s rules* designating the district court as an initial forum for fact-finding and imposition of discipline, if necessary. See Utah Code § 78A-5-102(3) (stating that “[t]he district court has jurisdiction over matters of lawyer discipline consistent with the rules of the Supreme Court” (emphasis added)); SUP. CT. R. PRO. PRAC. 14-511(a), (g) (2019), amended and renumbered as 11-536 (December 15, 2020) (providing for initial district court jurisdiction over attorney discipline matters, subject to our appellate review).

¶11 The *Barnard* case is not to the contrary. In *Barnard*, we were asked to decide whether the district courts had jurisdiction over a declaratory judgment action aimed at establishing that an attorney’s use of paralegals did not constitute the unauthorized practice of law. *Barnard*, 857 P.2d at 918. The case arose prior to our adoption of a rule delegating authority to the district courts. *Id.* at 919 n.5. And the majority in *Barnard* held that the district courts lacked subject-matter jurisdiction to decide a matter that was committed to the exclusive jurisdiction of the supreme court at the time that case was filed. *Id.*

¶12 Our court adopted the new rule during the pendency of the *Barnard* case. *Id.* at 919 n.5. And that development defeats Bernacchi’s reliance on this decision. The holding in *Barnard* is distinguishable on its face. It is based on a legal regime that prevailed prior to our adoption of a rule designating the district courts as an initial forum for attorney discipline matters. Bernacchi fails to address *674 or even acknowledge that point. And his reliance on *Barnard* fails on this basis.

¶13 Bernacchi invokes the dissent in *Barnard* in support of an assertion that this court lacks the power to involve the district courts in attorney discipline. In dissent, Justice Stewart asserted that the “language” of article VIII did not “confer[]” on this court “the power either to control the jurisdiction of district courts or to confer jurisdiction on district courts.” *Barnard*, 857 P.2d at 921 (Stewart, J., dissenting). “That power,” in Stewart’s view, “lies within the province of the Legislature,” *id.*—a point the majority addressed only by noting that the rule delegating authority to

the district courts was not in effect at the time the case was filed, and thus “ha[d] no bearing on the outcome.” See  *id.* at 919 n.5.

¶14 Bernacchi does not develop Justice Stewart's point in his briefing. And the point is difficult to reconcile with the text of the Utah Constitution. Article VIII, section 4 confers broad power on this court to “govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law.” UTAH CONST. art. VIII, § 4. That greater power may encompass the lesser power to involve the district courts in our process of governing the practice of law and of resolving disciplinary proceedings. And our rule, in any event, does not appear to “confer jurisdiction on district courts” that they do not otherwise possess.

¶15 Our district courts have “original jurisdiction in all matters except as limited by this constitution or by statute.” UTAH CONST. art. VIII, § 5. No constitutional or statutory provision excludes attorney discipline matters from the district courts’ original jurisdiction. To the contrary, as noted above, the legislature has confirmed that the district courts have “jurisdiction over matters of lawyer discipline consistent with the rules of the Supreme Court.”  UTAH CODE § 78A-5-102(3). And Bernacchi's argument fails on that basis.

¶16 Under our law as it now stands, this court cannot be viewed as intruding on the prerogative of the legislature “to control the jurisdiction of district courts or to confer jurisdiction on district courts.”  *Barnard*, 857 P.2d at 921 (Stewart, J., dissenting). And Bernacchi's reliance on the  *Barnard* dissent accordingly fails.

[2] [3] ¶17 That leaves only Bernacchi's assertion that there can be no subject-matter jurisdiction here because he is not an attorney admitted to practice in Utah. This argument is simply mistaken. It confuses the merits with jurisdiction. And it misses the well-settled point that a court always has jurisdiction to determine its jurisdiction. See  *Union Pac. R.R. v. Utah Dep't of Transp.*, 2013 UT 39, ¶ 13, 310 P.3d 1204.⁵

B

[4] ¶18 Bernacchi's next argument is a challenge to the authority of OPC over a person who is no longer actively

licensed to practice law in Utah. The focus of this argument is on the language of rule 14-506—which speaks generally to the “disciplinary jurisdiction of the Supreme Court and the OPC.” SUP. CT. R. PRO. PRAC. 14-506(a) (2019). By rule, such jurisdiction extends broadly to “any lawyer admitted to practice law in Utah,” to “any lawyer admitted but currently not properly licensed to practice in Utah,” and to “any formerly admitted lawyer” who violates a rule of professional conduct “where the attorney was licensed to practice or was practicing law at the time of the alleged violation.” *Id.* In both the district court and *675 on appeal, Bernacchi was focused solely on the language of this rule. And the district court followed suit. It concluded that “14-506 does apply to Mr. Bernacchi and his status as a once-admitted lawyer” since the rule covers persons “formerly admitted” to practice who violate a rule of professional conduct “where the attorney was licensed to practice or was practicing law at the time of the alleged violation.”

¶19 Both the parties and the district court proceeded on the premise that the reciprocal sanction rule—rule 14-522—covers any and all persons subject to rule 14-506. And we can see a plausible basis for that view. Rule 14-522(a) requires OPC to “obtain a certified copy” of a disciplinary order entered by another regulatory body “having disciplinary jurisdiction” over any “lawyer within the jurisdiction of the Supreme Court.” *Id.* 14-522(a). And that language could be viewed as a cross-reference to the jurisdictional coverage provided in rule 14-506—indicating that rule 14-522 likewise extends not just to a “lawyer admitted to practice in Utah” but also to a “lawyer admitted but currently not properly licensed to practice in Utah” and to a “formerly admitted lawyer” who violates a rule of professional conduct “where the attorney was licensed to practice or was practicing law at the time of the alleged violation.” *Id.* 14-506(a).

¶20 Elsewhere, rule 14-522 seems to provide for reciprocal sanctions only for a “lawyer admitted to practice in Utah.” *Id.* 14-522(a). And that language could be read as limiting the availability of reciprocal sanctions to a subset of all persons subject to the general jurisdiction of this court and OPC under rule 14-506. A “lawyer admitted to practice,” on this reading, could be viewed as encompassing only those who are currently admitted *to practice*—those with an active license. That reading could be reinforced by the distinct categories of persons set forth in the coverage of rule 14-506, in language that seems to describe a “lawyer admitted to practice in Utah” in contrast to a “formerly admitted lawyer.”

¶21 We flag this ambiguity for our advisory committee, since we see enough ambiguity here to merit some clarification or cleanup of the language of our rules.⁶ And frankly, we can see arguable policy grounds for a clarification in either direction—for reinforcing the view that the coverage of both rules is coextensive, or for establishing that only currently admitted lawyers are subject to reciprocal sanctions. With that in mind, we reserve the policy decision for resolution on another day, after studied input from our advisory committee.

¶22 We need not and do not resolve any possible mismatch between the coverage of rules 14-506 and 14-522 here because Bernacchi has not preserved or argued that there is any such mismatch, and there is at least a plausible argument that the two rules are coextensive. For that reason, we need only review the district court's determination that Bernacchi is subject to rule 14-506 because he is at least a lawyer “formerly admitted” to practice who violated a rule of professional conduct “where the attorney was licensed to practice or was practicing law at the time of the alleged violation.” *Id.* 14-506(a). And we can easily affirm that conclusion. Bernacchi has not addressed or refuted the district court's analysis. So we can accept his factual assertions about his status—as a lawyer who had effectively resigned his status as a Utah lawyer at all relevant times—while still affirming the district court. We thus affirm on the basis of the district court's decision.

C

[5] [6] ¶23 Bernacchi's due process argument is also rather hard to follow. A threshold point is clear: Bernacchi is not pleased with the imposition of the sanction against him in Indiana, as he rails at great length about alleged injustices and errors in the Indiana proceedings. *See, e.g.*, Brief of Appellant *676 at 22–23 (asserting that “liability [in Indiana] was based on a perjury trap and duress” and the “process [was] flawed Constitutionally”); Reply Brief of Appellant at 5–11 (calling the Indiana process “a case of rigged justice” that “targeted” him “for so called ‘death’ without due process”). But this is not a forum for a collateral attack on the Indiana proceedings. It is an action for reciprocal discipline under our Rules of Professional Practice. To prevail on appeal, Bernacchi bears the burden of demonstrating error in the district court's imposition of a reciprocal sanction.

¶24 Bernacchi takes a step in the direction of our rules when he paints the cited problems in the Indiana case with the broad

brush of an infringement of his right to “due process.” Rule 14-522, after all, establishes an exception to the requirement of imposing “equivalent discipline” in Utah where “it clearly appears upon the face of the record from which the discipline is predicated that ... the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process.” SUP. CT. R. PRO. PRAC. 14-522(d)(1) (2020).

[7] ¶25 Yet Bernacchi has fallen far short of carrying his burden of persuasion under the rule. A threshold burden of an appellant is to identify and challenge the basis for the lower court decision on appeal. *Supra* ¶ 3 n.3. Bernacchi has failed to even acknowledge the basis for the district court's disposition of this claim—its conclusion that “four separate courts” (the Seventh Circuit Court of Appeals, the Indiana Supreme Court, a federal district court in Indiana, and the Illinois Supreme Court) had “already determined that Mr. Bernacchi was provided due process” in Indiana. And he has identified no basis for a determination that it was clear “upon the face of the record” in Indiana that Bernacchi's due process right to “notice” and an “opportunity to be heard” was infringed. SUP. CT. R. PRO. PRAC. 14-522(d)(1) (2020). The district court record includes at least two documents indicating that Bernacchi had notice and an opportunity to be heard—the Indiana Supreme Court Order, which imposed a suspension on Bernacchi; and the Hearing Officer's Findings of Fact and Conclusions of Law, which outlined that Bernacchi participated in the disciplinary process in Indiana, that he admitted to the allegations against him, and that he agreed to a sanctions hearing. Bernacchi does not address these documents, or present any argument rooted in the language of the operative rule. Besides his angry rants and vague complaints about an infringement of due process, he presents no reasoned basis for a conclusion that the alleged infringement of due process was clear “upon the face of the record” in Indiana. And his argument fails on that basis.⁷

D

[8] ¶26 Bernacchi's time-bar argument is easily disposed of. Bernacchi failed to preserve this defense in his answer or in any other pleadings in the district court.⁸ He raised it for the first time on appeal. And he has not identified or argued in favor of any exception to our rules of preservation. We reject this argument on this basis. *See* 📄 *State v. Johnson*, 2017 UT 76, ¶ 15, 416 P.3d 443 *677 (“When a party fails to raise and argue an issue in the trial court, it has failed to preserve

the issue, and [we] will not typically reach that issue absent a valid exception to preservation.” (citation omitted)).

II

[9] ¶27 Bernacchi also questions the basis for the imposition of a default judgment against him, particularly in the absence of a motion or an opportunity to be heard on the matter. He may have a point here. At a bare minimum, Bernacchi should have been afforded an opportunity to brief this issue before the court imposed a default judgment. And the district court entered no findings or conclusions on the basis for imposing a sanction of default. On such a record, it is not apparent that Bernacchi’s admittedly intemperate, uncivil behavior and decision to abruptly leave the summary judgment hearing were an adequate basis for a default judgment. *See* UTAH R. CIV. P. 10(h) (stating that Utah courts are given authority to “strike and disregard all or any part of a pleading or

other paper that contains redundant, immaterial, impertinent or scandalous matter”); *see also* UTAH R. CIV. P. 55(c) (permitting the court to set aside an entry of default “[f]or good cause”).

¶28 We can assume (without deciding) that the district court may have erred in entering a default judgment on this record. That still would not be a basis for reversal. Any such error is harmless given that the district court proceeded to provide an independent, adequate basis for imposition of a reciprocal sanction against Bernacchi on the merits. For that reason, we affirm despite our misgivings with the manner in which the district court arrived at its alternative assertion that it was treating Bernacchi’s misconduct as a basis for a default judgment.

All Citations

513 P.3d 669, 2022 UT 25

Footnotes

1 Our Rules of Professional Practice were amended and renumbered effective December 15, 2020. We cite to and apply the rules in effect at the time of the disciplinary proceedings in Indiana—that is, when Bernacchi was “publicly disciplined by another court” in October 2017 and the reciprocal discipline rule would have been triggered. SUP. CT. R. PRO. PRAC. 14-522(a), *amended and renumbered as* SUP. CT. R. PRO. PRAC. 11-567 (2020); *see also*  *In re J.A.L.*, 2022 UT 12, ¶ 18 n.5, 506 P.3d 606 (“[W]e apply the law as it exists at the time of the event regulated by the law in question.” (alteration in original) (citation omitted) (internal quotation marks omitted)).

2 Bernacchi’s briefing repeatedly stoops to name-calling and motive-questioning. *See, e.g.*, Brief of Appellant at 40 (calling OPC staff “Nazis”); Reply Brief of Appellant at 22 (“[T]he leadership of the Utah State Bar and the OPC ... can’t see or shoot straight out there in pioneer land.”); Brief of Appellant at 16 (characterizing the OPC’s efforts as “gaslighting the third district court judge, this Court, and [Bernacchi]”); *id.* at 26–27 (asserting that the Indiana disciplinary commission “tricked” and “entrapped” him and engaged in racial bias against him); *id.* at 28 (characterizing the December 2020 summary judgment hearing as a “sham”); *id.* at 29 (calling this disciplinary action “pure harassment”); *id.* at 30 (asserting that OPC “lied” to Judge Corum and engaged in “actual fraud”); *id.* at 32 (stating that Judge Corum “retaliated” against him for leaving the summary judgment hearing by entering default judgment); *id.* at 45 (asserting that Judge Corum was “over-focused on his agenda-driven, rigged-justice ‘performance art’ ”); *id.* at 53 (stating that Judge Corum “acted[] above the law” and “had been improperly influenced by [OPC]”).

And in so doing, Bernacchi’s briefing runs afoul of our rules of procedure and standards of professionalism and civility. UTAH R. APP. PROC. 40(b)(1) (authorizing discipline and sanctions for submitting filings that are presented for “any improper purpose” including to “harass”); SUP. CT. R. PRO. PRAC. 14-301(3) (establishing that lawyers “should avoid hostile [or] demeaning” words and “shall not, without an adequate

factual basis, attribute to other counsel or the court improper motives, purpose, or conduct”). These and other moves by Bernacchi could call for an order striking offending portions of the brief. UTAH R. APP. PROC. 24(i) (establishing that the court “may strike or disregard a brief that contains burdensome, irrelevant, immaterial, or scandalous matters”). Or they could justify a referral to our Professionalism and Civility Counseling Board. SUP. CT. R. PRO. PRAC. 14-303(b)(1). But the former seems unnecessary now that we have called out the bad behavior in a published opinion. And the latter is probably a moot point for Bernacchi, who is already resigned from the practice of law in Utah and proclaims that he is not “ever likely to practice law in Utah, has ... retired, and moved from Utah long ago” to which “he [is] never returning.” Brief of Appellant at 33, 50; *see also* Appellant's Motion for Summary Disposition at 23 (describing himself as a “long-retired” lawyer); Reply Brief of Appellant at 22–23 (stating that he has not practiced law “anywhere” for “many years” and is “fully retired and ... not working”).

- 3 *See Living Rivers v. Exec. Dir. of the Utah Dep't of Env't. Quality*, 2017 UT 64, ¶¶ 41–43, 50–51, 417 P.3d 57 (declining to reach the “important questions” of the appeal where the appellant “utterly fail[ed] to engage with the substance of the [lower tribunal's] ruling”); *Federated Cap. Corp. v. Shaw*, 2018 UT App 120, ¶ 20, 428 P.3d 12 (clarifying that an appellant who “does not meaningfully engage with the district court's reasoning ... falls short of demonstrating any error on the part of the district court” (citation omitted)); *see also* UTAH R. APP. PROC. 24(a)(8) (requiring the appellant to “explain, with reasoned analysis supported by citations to legal authority and the record, why the party should prevail on appeal”).
- 4 Name-calling unfortunately abounds in our increasingly tribal culture. But for any who may be wondering, it won't help your cause in our justice system. You may privately question a judge's wisdom, sanity, or consistency. You may even be inclined to reduce your animus to an epithet aimed at a member of the court you are appearing in. *See* Appellant's letter to the Court (April 4, 2022) (calling one of us a “flip flopping Justice”). That might make you feel better in the moment. But we can assure you—it's not a best practice in appellate briefing.
- 5 In passing, Bernacchi also vaguely asserts that the district court lacked personal jurisdiction. But on appeal and in the district court, Bernacchi did little more than mouth the words “personal jurisdiction.” He provided no substantive analysis—no identification of a governing legal principle, or application of such principle to the facts of this case. That is insufficient. *See* UTAH R. APP. PROC. 24(a)(8) (“[Briefs] must explain, with reasoned analysis supported by citations to legal authority and the record, why the party should prevail on appeal.”); *see also*  *Hill v. Superior Prop. Mgmt. Servs., Inc.*, 2013 UT 60, ¶ 47, 321 P.3d 1054 (holding that neither district nor appellate courts are “depositor[ies] in which [a party] may dump the burden of argument and research” and declining to reverse the district court “for failing to undertake that task” on behalf of a party (second alteration in original) (citations omitted) (internal quotation marks omitted)).
- 6 The text of the reciprocal sanction rule has been altered in a recent amendment to our rules. *See* SUP. CT. R. PRO. PRAC. 11-567 (2020). But the new language may provide an even stronger basis for a mismatch in coverage, as it speaks of reciprocal sanctions for “a Lawyer licensed to practice in Utah.” *Id.* Perhaps both the old rule and the new one are impliedly meant to extend to anyone who was ever “admitted” or “licensed” to practice in Utah. But the text of the rule is at least confusing. And it at least merits some cleanup.
- 7 Bernacchi also seems to hint at a basis for an exception under rule 14-522(d)(3)—an exception that applies where “the misconduct established warrants substantially different discipline in Utah or is not misconduct in this jurisdiction.” SUP. CT. R. PRO. PRAC. 14-522(d)(3). He seems to be attempting to invoke this exception when he asserts that “Utah has never found strict attorney misconduct for subcontracting staff, paralegal firms, or temps”—activity that, in Bernacchi's view, formed the basis for the Indiana sanction. But Bernacchi offers no reasoned, authority-rooted analysis in support of this assertion. And he has accordingly failed to

carry his burden of persuasion on appeal. *See supra* ¶ 17 n.5 (discussing that the parties—not the court—carry the burden of argument and research on appeal under our rules and case law).

- 8 Bernacchi made bare assertions to the district court that the OPC disciplinary process was “untimely” and that there was a statute of limitations problem. But Bernacchi did not refer to the applicable statute of limitations rule or the relevant limitations period in the proceedings below. *See* SUP. CT. R. PRO. PRAC. 14-529. In so doing, he failed to present the substantive legal analysis required to preserve an issue for appeal. *See*  *State v. Johnson*, 2017 UT 76, ¶ 15, 416 P.3d 443 (holding that a party must “raise *and argue* an issue” to preserve the issue in the district court (emphasis added) (citation omitted)).

2026 WL 436479

Only the Westlaw citation is currently available.

United States District Court, S.D. New York.

UNITED STATES of America,

v.

Bradley HEPPNER, Defendant.

25 Cr. 503 (JSR)

I

Signed February 17, 2026

Synopsis

Background: Defendant who pleaded not guilty to grand jury charges of securities fraud, wire fraud, conspiracy, making false statements to auditors, and falsifying corporate records asserted privilege over documents he created using publicly available generative artificial intelligence (AI) platform. Government moved for ruling that AI documents were not protected by attorney-client privilege or work product doctrine.

Holdings: The District Court, Jed S. Rakoff, J., held that:

[1] in matter of first impression, AI user's communications in connection with pending criminal investigation were not protected by attorney-client privilege, and

[2] in matter of first impression, AI user's communications in connection with pending criminal investigation were not protected by work product doctrine.

Motion granted.

Procedural Posture(s): Pre-Trial Hearing Motion.

West Headnotes (13)

[1] **Privileged Communications and Confidentiality** 🗝️ Elements in general; definition

The “attorney-client privilege” attaches to, and protects from disclosure, communications (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept

confidential (3) for the purpose of obtaining or providing legal advice.

[2] **Privileged Communications and Confidentiality** 🗝️ Construction

Courts construe the attorney-client privilege narrowly because it operates as an exception to the rule that all relevant proof is essential for a complete record and for confidence in the fair administration of justice.

[3] **Privileged Communications and Confidentiality** 🗝️ Documents and records in general

Defendant's communications that he memorialized in documents created using publicly available generative artificial intelligence (AI) platform, in connection with pending criminal investigation of him for securities fraud, wire fraud, conspiracy, making false statements to auditors, and falsifying corporate records, were not protected by attorney-client privilege, although he had inputted into AI platform information he learned from counsel, created AI documents in order to speak with counsel to obtain legal advice, and later shared AI documents with counsel; AI documents were not communications between defendant and counsel, communications in AI documents were not confidential, and defendant did not communicate with AI platform to obtain legal advice or at counsel's suggestion or direction.

[4] **Privileged Communications and Confidentiality** 🗝️ Relation of Attorney and Client

In the absence of an attorney-client relationship, the discussion of legal issues between two non-attorneys is not protected by attorney-client privilege.

- [5] **Privileged Communications and Confidentiality** 🗝️ Privileged Communications and Confidentiality
Privileged Communications and Confidentiality 🗝️ Elements in general; definition
All recognized privileges require a trusting human relationship, such as, in the attorney-client context, a relationship with a licensed professional who owes fiduciary duties and is subject to discipline.
- [6] **Privileged Communications and Confidentiality** 🗝️ Documents and records in general
In determining whether the attorney-client privilege applies to communications memorialized in documents by a user of an artificial intelligence (AI) platform, users of AI platforms do not have substantial privacy interests in their conversations with another publicly accessible AI platform which users voluntarily disclosed to the platform and which the platform retains in the normal course of its business.
- [7] **Privileged Communications and Confidentiality** 🗝️ Waiver of privilege
Even assuming that defendant inputted information protected by attorney-client privilege into publicly available artificial intelligence (AI) platform, in connection with pending criminal investigation of him for securities fraud, wire fraud, conspiracy, making false statements to auditors, and falsifying corporate records, defendant waived attorney-client privilege for that information, where he shared that information with AI platform, just as if he had shared it with any other third party, and in light of AI platform's privacy policy, he had no reasonable expectation that inputs would not be shared with other third parties.
- [8] **Privileged Communications and Confidentiality** 🗝️ Effect of delivery of nonprivileged materials to attorney; preexisting documents
Non-privileged communications are not somehow alchemically changed into privileged ones, under the attorney-client privilege, upon being shared with counsel.
- [9] **Federal Civil Procedure** 🗝️ Work Product Privilege; Trial Preparation Materials
Related to but distinct from the attorney-client privilege, the work product doctrine, at its core, shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case.
- [10] **Federal Civil Procedure** 🗝️ Work Product Privilege; Trial Preparation Materials
The “work product doctrine” provides qualified protection for materials prepared by or at the behest of counsel in anticipation of litigation or for trial.

1 Case that cites this headnote
- [11] **Federal Civil Procedure** 🗝️ Work Product Privilege; Trial Preparation Materials
As with the attorney-client privilege, the work product doctrine is not lightly created nor expansively construed.
- [12] **Federal Civil Procedure** 🗝️ Work Product Privilege; Trial Preparation Materials
The work product doctrine's availability in reference to materials in the possession of a client depends upon the existence of a real, rather than speculative, concern that the thought processes of the client's counsel in relation to pending or anticipated litigation would be exposed.

[13] **Federal Civil Procedure** 📌 Work Product Privilege; Trial Preparation Materials

Defendant's communications that he memorialized in documents created using publicly available generative artificial intelligence (AI) platform, in connection with pending criminal investigation of him for securities fraud, wire fraud, conspiracy, making false statements to auditors, and falsifying corporate records, were not protected by work product doctrine, even assuming that they were prepared in anticipation of litigation, since AI documents were not prepared by or at behest of counsel, but rather, were prepared by defendant on his own volition, so he was not acting as counsel's agent when he communicated with AI platform, and AI documents did not reflect defense counsel's strategy at time that defendant created them although they did affect counsel's strategy going forward.

Attorneys and Law Firms

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MEMORANDUM

JED S. RAKOFF, United States District Judge:

*1 At a pretrial conference in this matter held on February 10, 2026, the Court, after hearing the arguments of counsel, granted from the bench the Government's motion for a ruling that certain written exchanges that defendant Benjamin Heppner had with a generative artificial intelligence ("AI") platform were not protected from Government inspection by either the attorney-client privilege or the work product doctrine. See ECF No. 22 ("Gov't Mot."). This Memorandum sets forth the reasons for the Court's ruling.

I. Background and Procedural History

Generative artificial intelligence tools have become increasingly prevalent across various domains of human activity. It has reliably been estimated, for instance, that more than half of United States households have adopted AI in some form. See Bond, Trends - Artificial Intelligence (2025), https://www.bondcap.com/report/pdf/Trends_Artificial_Intelligence.pdf at 59 (accessed February 12, 2026). Only three years after its release, one prominent AI platform is being used by more than 800 million people worldwide every week. Id. at 55. Yet the implications of AI for the law are only beginning to be explored. Thus, the Court's ruling in this case appears to answer a question of first impression nationwide: whether, when a user communicates with a publicly available AI platform in connection with a pending criminal investigation, are the AI user's communications protected by attorney-client privilege or the work product doctrine?¹ For the reasons that follow, the answer is no.

On October 28, 2025, a grand jury in this District returned an indictment charging Heppner with securities fraud, wire fraud, conspiracy to commit securities fraud and wire fraud, making false statements to auditors, and falsifying corporate records. ECF No. 3. The indictment was unsealed on November 4, 2025, see ECF No. 4, and Heppner was arrested the following day in the Northern District of Texas. On November 10, 2025, Heppner pleaded not guilty before this Court to all the charges against him and was released on bond. See ECF Nos. 16, 18. Trial is set to commence April 6, 2026. See ECF No. 16.

The charges against Heppner arise from his alleged misconduct as an executive of several corporate entities, including the publicly traded company GWG Holdings, Inc. ("GWG"). See generally ECF No. 3. At a high level, the indictment charges that Heppner defrauded GWG's investors out of more than \$150 million by making false representations about, and causing GWG to enter into undisclosed self-serving transactions concerning, two privately held companies that Heppner controlled, Beneficient Company Group, L.P. and Highland Consolidated L.P. See id. ¶¶ 1-3.

In connection with Heppner's arrest on November 4, 2025, agents with the Federal Bureau of Investigation executed a search warrant at Heppner's home and seized numerous documents and electronic devices. See Gov't

Mot. at 3; ECF No. 23-1 at 1. Heppner's counsel later represented to the Government that among the seized materials were approximately thirty-one documents that memorialize communications that Heppner had with the generative AI platform "Claude," which is operated by the private company Anthropic. See Gov't Mot. at 3; ECF Nos. 23-1 23-2. According to Heppner's counsel, the documents represent communications between Heppner and Claude that took place "in 2025, after Mr. Heppner had received a grand jury subpoena [and] after it was clear with discussions with the government that Mr. Heppner was the target of this investigation." Transcript, February 10, 2026 ("Tr.") at 4. Without any suggestion from counsel that he do so, Heppner "prepared reports that outlined defense strategy, that outlined what he might argue with respect to the facts and the law that we anticipated that the government might be charging." Id. Thus, counsel asserted, Heppner "was preparing these reports in anticipation of a potential indictment." Id.

*2 In exchanges with the Government, Heppner, through his counsel, asserted privilege over these documents (the "AI Documents"), arguing that (1) Heppner had inputted into Claude, among other things, information that Heppner had learned from counsel; (2) Heppner had created the AI Documents for the purpose of speaking with counsel to obtain legal advice; and (3) Heppner had subsequently shared the contents of the AI Documents with counsel. See Gov't Mot. at 3-4, 11; ECF Nos. 23-2, 23-4, 23-5. Heppner's counsel conceded, however, that counsel "did not direct [Heppner] to run Claude searches." ECF No. 23-5. Pursuant to a "Privilege Protocol Stipulation," the Government and Heppner's counsel agreed that the Government would segregate the AI Documents and not inspect them pending the resolution of Heppner's claims of privilege, and Heppner's counsel listed the AI Documents in Heppner's privilege log. See Gov't Mot. at 3-4 & n.1; ECF Nos. 23-1, 23-2.

On February 6, 2026, the Government moved, in writing, for a ruling that the AI Documents are protected by neither the attorney-client privilege nor the work product doctrine. Gov't Mot. The Court heard oral argument on the Government's motion at the pretrial conference held on February 10, 2026, and, as noted, orally granted the motion.

II. Attorney-Client Privilege

[1] [2] It is well established that the attorney-client privilege attaches to, and protects from disclosure, "communications (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept

confidential (3) for the purpose of obtaining or providing legal advice."  United States v. Mejia, 655 F.3d 126, 132 (2d Cir. 2011).² Courts construe the attorney-client privilege narrowly because it operates as an exception to the rule that "all relevant proof is essential" for a complete record and for "confidence in the fair administration of justice." In re Six Grand Jury Witnesses, 979 F.2d 939, 943 (2d Cir. 1992). See also, e.g.,  Calvin Klein Trademark Tr. v. Wachner, 198 F.R.D. 53, 55 (S.D.N.Y. 2000).

[3] [4] Applying these principles here, the AI Documents lack at least two, if not all three, elements of the attorney-client privilege. First, the AI Documents are not communications between Heppner and his counsel. Heppner does not, and indeed could not, maintain that Claude is an attorney. "In the absence of an attorney-client relationship, the discussion of legal issues between two non-attorneys is not protected by attorney-client privilege." E.g., In re OpenAI, Inc., Copyright Infringement Litig., 802 F. Supp. 3d 688, 699 (S.D.N.Y. 2025). Because Claude is not an attorney, see ECF No. 23-6, that alone disposes of Heppner's claim of privilege.

[5] The Court is aware that some commentators have argued that whether Claude is an attorney is irrelevant because a user's AI inputs, rather than being communications, are more akin to the use of other Internet-based software, such as cloud-based word processing applications. But the use of such applications is not intrinsically privileged in any case, and the argument that Claude is like any other form of software only cuts against the invocation of privilege because all "[r]ecognized privileges" require, among other things, "a trusting human relationship," such as, in the attorney-client context, a relationship "with a licensed professional who owes fiduciary duties and is subject to discipline." See Ira P. Robbins, Against an AI Privilege, JOLT Dig., Harvard L. Sch. (Nov. 7, 2025), <https://jolt.law.harvard.edu/digest/against-an-ai-privilege>. No such relationship exists, or could exist, between an AI user and a platform such as Claude.

[6] Second, the communications memorialized in the AI Documents were not confidential. This is not merely because Heppner communicated with a third-party AI platform but also because the written privacy policy to which users of Claude consent provides that Anthropic collects data on both users' "inputs" and Claude's "outputs," that it uses such data to "train" Claude, and that Anthropic reserves the right to disclose such data to a host of "third parties," including "governmental

regulatory authorities.” See Anthropic, Privacy Policy (as of February 19, 2025), <https://www.anthropic.com/legal/archive/a2eecf43-807a-4a53-89dd-04c44c351138>. The policy clearly puts Claude’s users on notice that Anthropic, even in the absence of a subpoena compelling it to do so, may “disclose personal data to third parties in connection with claims, disputes[,] or litigation.” *Id.* More generally, as another court in this District recently observed, AI users do not have substantial privacy interests in their “conversations with [another publicly accessible AI platform] which users voluntarily disclosed” to the platform and which the platform “retains in the normal course of its business.” *In re OpenAI, Inc., Copyright Infringement Litig.*, No. 25 MD 3143, ECF No. 1021 at 3 (Jan. 5, 2026). For these reasons, Heppner could have had no “reasonable expectation of confidentiality in his communications” with Claude. See  *Mejia*, 655 F.3d at 132-34. And the AI Documents are not like confidential notes that a client prepares with the intent of sharing them with an attorney because Heppner first shared the equivalent of his notes with a third-party, Claude. Cf.  *United States v. DeFonte*, 441 F.3d 92, 95-96 (2d Cir. 2006) (per curiam).

*3 *Third*, Heppner did not communicate with Claude for the purpose of obtaining legal advice. This issue perhaps presents a closer call because Heppner’s counsel asserts that Heppner communicated with Claude for the “express purpose of talking to counsel.” ECF No. 23-5. But, as Heppner’s counsel also conceded, Heppner did not do so at the suggestion or direction of counsel. See *id.* (noting that counsel “did not direct [Heppner] to run Claude searches”). Had counsel directed Heppner to use Claude, Claude might arguably be said to have functioned in a manner akin to a highly trained professional who may act as a lawyer’s agent within the protection of the attorney-client privilege. Cf.  *United States v. Adlman*, 68 F.3d 1495, 1498-99 (2d Cir. 1995) (citing  *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961)). But because Heppner communicated with Claude of his own volition, what matters for the attorney-client privilege is whether Heppner intended to obtain legal advice from Claude, not whether he later shared Claude’s outputs with counsel. And Claude disclaims providing legal advice. Indeed, when the Government asked Claude whether it could give legal advice, it responded that “I’m not a lawyer and can’t provide formal legal advice or recommendations” and went on to recommend that a user “should consult with a qualified attorney who can properly assess your specific circumstances.” ECF No. 23-6 at 1-2.

[7] [8] Thus, the communications between Heppner and Claude were not privileged at the time they took place.³ Moreover, even assuming that Heppner intended to share these communications with his counsel and eventually did so, it is black-letter law that non-privileged communications are not somehow alchemically changed into privileged ones upon being shared with counsel. Thus, because the AI Documents “would not be privileged if they remained in [Heppner’s] hands,” they did not “acquire protection merely because they were transferred” to counsel. See  *Gould, Inc. v. Mitsui Min. & Smelting Co., Ltd.*, 825 F.2d 676, 679-80 (2d Cir. 1987).

III. Work Product Doctrine

[9] [10] [11] [12] Related to but distinct from the attorney-client privilege, the work product doctrine, “[a]t its core[,] ... shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client’s case.”  *United States v. Nobles*, 422 U.S. 225, 238, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975). The doctrine “provides qualified protection for materials prepared by or at the behest of counsel in anticipation of litigation or for trial.”  *In re Grand Jury Subpoenas Dated March 19, 2002, and August 2, 2002*, 318 F.3d 379, 383 (2d Cir. 2003). As with the attorney-client privilege, the work product doctrine is not “lightly created nor expansively construed,”  *id.* (quoting  *United States v. Nixon*, 418 U.S. 683, 710, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974)), and the Second Circuit has repeatedly held that the doctrine’s purpose “is not generally promoted by shielding from discovery materials in an attorney’s possession that were prepared neither by the attorney nor his agents,”  *id.* (citing  *Matter of Grand Jury Subpoenas Dated Oct. 22, 1991, and Nov. 1, 1991*, 959 F.2d 1158 (2d Cir. 1992)). The doctrine’s availability in reference to materials in the possession of a client “depends upon the existence of a real, rather than speculative, concern that the thought processes of [the client’s] counsel in relation to pending or anticipated litigation would be exposed.” *Matter of Grand Jury Subpoenas*, 959 F.2d at 1167 (quoting  *Gould*, 825 F.2d at 680).

[13] The AI Documents do not merit protection under the work product doctrine because, even assuming, *arguendo*, that they were prepared “in anticipation of litigation,”  *In re Grand Jury Subpoenas*, 318 F.3d at 383, they were

nevertheless not “prepared by or at the behest of counsel,” [id.](#), nor did they reflect defense counsel’s strategy, [see](#) [Matter of Grand Jury Subpoenas](#), 959 F.2d at 1167. As to the former, Heppner’s counsel confirmed that the AI Documents “were prepared by the defendant on his own volition.” Tr. at 5. That means that Heppner was not acting as his counsel’s agent when he communicated with Claude. As to the latter, counsel conceded that while the AI Documents did “affect” counsel’s strategy going forward, they did not “reflect” counsel’s strategy at the time that Heppner created them. [See id.](#)

*4 At oral argument, Heppner resisted these conclusions by relying on two authorities. The first, [Federal Rule of Criminal Procedure 16\(b\) \(2\) \(A\)](#), is inapplicable on its face. That rule provides that, where the Government provides a defendant with pretrial discovery and the defendant thereby becomes obligated to satisfy the Government’s pretrial discovery requests, the defendant’s obligation does not extend to “discovery or inspection of reports, memoranda, or other documents made by the defendant, or the defendant’s attorney or agent, during the case’s investigation or defense.” [Id.](#) Here, however, the AI Documents were seized from Heppner, at the time of his arrest, pursuant to a search warrant the validity of which Heppner’s counsel does not challenge. [See](#) Gov’t Mot. at 3. The Government did not request them, and Heppner did not produce them, in pretrial discovery.

Heppner’s second authority is [Shih v. Petal Card, Inc.](#), 565 F. Supp. 3d 557 (S.D.N.Y. 2021). In that case, a Magistrate Judge in this District authorized the plaintiff to withhold certain communications that she had with an individual who was then her lawyer, and later became her husband, that the plaintiff prepared in anticipation of litigation or for trial. The court held that the work product doctrine protected such communications, “regardless of whether [the lawyer/husband] was acting as her counsel at the time, and without showing that another attorney ‘directed the work.’” [Id.](#) at 574.

[Shih](#), of course, is not binding on this Court, and this Court respectfully disagrees with its holding. As relevant here, the court in [Shih](#) principally concluded that the work product doctrine is not limited to materials prepared by or at the direction of an attorney. [Id.](#) But that conclusion undermines the policy animating the work product doctrine,

which, as one of the cases cited in [Shih](#) explains, is “to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy ‘with an eye toward litigation.’” [Parneros v. Barnes & Noble, Inc.](#), 332 F.R.D. 482, 492 (S.D.N.Y. 2019) (quoting [United States v. Adlman](#), 134 F.3d 1194, 1196 (2d Cir. 1998) (quoting, in turn, [Hickman v. Taylor](#), 329 U.S. 495, 510-11, 67 S.Ct. 385, 91 L.Ed. 451 (1947))); [see](#) [Shih](#), 565 F. Supp. 3d at 574 (citing [Parneros](#)). While it is true that the work product doctrine may apply to materials generated by non-lawyers, the Second Circuit has repeatedly stressed that the purpose of the doctrine is to protect lawyers’ mental processes. [See, e.g., In re Grand Jury Subpoenas](#), 318 F.3d at 383-85 (extensively describing doctrine’s rationale and applying it to material “prepared by or for counsel”); [Adlman](#), 134 F.3d at 1197 (similar); [Adlman](#), 68 F.3d at 1500-02 (similar); [Matter of Grand Jury Subpoenas](#), 959 F.2d at 1166 (doctrine “generally does not shield from discovery documents that were not prepared by the attorneys themselves, or their agents”); [see also Bice v. Robb](#), 511 F. App’x 108, 110 (2d Cir. 2013) (summary order) (declining to extend protection to documents “not the work product of an individual acting as [plaintiffs’] attorney”).

Here, there is no dispute that Heppner acted on his own when he created the AI Documents. [See](#) ECF No. 23-5 (noting that defense counsel “did not direct [Heppner] to run Claude searches”); Tr. at 5 (confirming same). Because the AI Documents were not prepared at the behest of counsel and did not disclose counsel’s strategy, they do not merit protection as work product.

IV. Conclusion

Generative artificial intelligence presents a new frontier in the ongoing dialogue between technology and the law. Time will tell whether, as in the case of other technological advances, generative artificial intelligence will fulfill its promise to revolutionize the way we process information. But AI’s novelty does not mean that its use is not subject to longstanding legal principles, such as those governing the attorney-client privilege and the work product doctrine. Because Heppner’s use of Claude fails to satisfy either of these rules, the AI Documents do not merit the protections Heppner has claimed.

All Citations

--- F.Supp.3d ----, 2026 WL 436479

Footnotes

- 1 The Court is unaware of, and the parties have not identified, any case to date that has presented this issue. Most published decisions involving generative artificial intelligence have had to do with attorneys' misuse of that technology. That set of concerns is plainly not present here.
- 2 Except where otherwise indicated, all quotations in this Memorandum omit citations, quotation marks, footnotes, brackets, ellipses, and other alterations in source material.
- 3 At oral argument, Heppner's counsel suggested in passing that the AI Documents may be privileged because they "incorporated information that we had conveyed to Mr. Heppner over the course of our representation." Tr. at 3. But even if certain information that Heppner input into Claude was privileged, he waived the privilege by sharing that information with Claude and Anthropic, just as if he had shared it with any other third party. Further, in light of Anthropic's privacy policy discussed above, Heppner had no reasonable expectation that the inputs would not be shared with other third parties.

17-04

Opinion No. 17-04

Utah Ethics Opinion

Utah State Bar Ethics Advisory Opinion Committee

September 26, 2017

ISSUE

1. When a Utah attorney acts as local counsel, what are the Utah attorney's duties under the Utah Rules of Professional Conduct where the lead attorney is not licensed in Utah and is admitted pro hac vice, and the client and/or the pro hac vice attorney want local counsel to do as little as possible so that the client incurs the minimum amount of fees for local counsel's work?

OPINION

2. Acting as local counsel for a pro hac vice attorney is not a minor or perfunctory undertaking. Local counsel violates the Utah Rules of Professional Conduct when local counsel acts as nothing more than a mail drop or messenger for the pro hac vice attorney. All attorneys admitted to the Utah State Bar are required to comply with all of the Utah Rules of Professional Conduct, including when they are acting as local counsel. Under Rule 5.1 of the Utah Rules of Professional Conduct, local counsel has a general duty to adequately supervise pro hac vice counsel and to provide expertise regarding Utah law, statutes, cases, rules, procedures, and customs in Utah. Local counsel is responsible to the client and responsible for the conduct of the Utah court proceedings. Under Rule 1.2 of the Utah Rules of Professional Conduct, local counsel may be able to limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. Regardless of any limited scope representation agreement, if local counsel determines that the pro hac vice attorney is engaging in conduct that is likely to seriously prejudice the client's interests, or the administration of justice, local counsel must communicate local counsel's independent judgment to the client, and, if necessary, to the court or tribunal.

BACKGROUND

3. Rule 14-806 of the Utah Rules of Judicial Administration sets forth the requirements for admission of attorneys pro hac vice who are not admitted to the Utah State Bar but are admitted to practice in another state or a federal court. Rule 14-806 provides that local counsel, who must be a resident of Utah, shall move "to admit the

applicant pro hac vice" and shall "file a written consent to appear as associate counsel." Utah R. Jud. Admin. 14-806(e), (f)(3). Local counsel must "sign the first pleading filed, ... continue as one of the counsel of record in the case unless another member of the [Utah State] Bar is substituted as associate counsel," and "be available to opposing counsel and the court for communication regarding the case and the service of papers." *Id.* 14-806(f)(4)-(6). Further, the "court may require Utah counsel to appear at all hearings. Utah counsel shall have the responsibility and authority to act for the client in all proceedings if the nonresident attorney fails to appear or fails to respond to any order of the court." *Id.* 14-806(g). Rule 14-806 requires a pro hac vice attorney to comply with and be subject to "Utah statutes, rules of the Supreme Court, including the Rules of Professional Conduct and Article 5, Lawyer Discipline and Disability, the rules of the court in which the attorney appears, and the rules of the Code of Judicial Administration." *Id.* 14-806(h).

4. In the federal district court for the District of Utah, nonresident attorneys may be admitted pro hac vice if they associate with "an active member of the bar of [the] court with whom opposing counsel and the court may communicate regarding the case and upon whom papers will be served." DUCivR 83-1.1(d)(2)(b). Further, DUCivR 83-1.1(g) provides:

All attorneys practicing before this court, whether admitted as members of the bar of this court, admitted pro hac vice ... are governed by and must comply with the rules of practice adopted by this court, and unless otherwise provided by these rules, with the Utah Rules of Professional Conduct, as revised and amended and as interpreted by this court. The court adopts the Utah Standards of Professionalism and Civility to guide attorney conduct in cases and proceedings in this court.

5. The Ethics Advisory Opinion Committee has been asked to opine as to what a Utah attorney acting as local counsel must do, at a minimum, to fulfill local counsel's obligations under the Utah Rules of Professional Conduct, regardless of what the client or pro hac vice attorney want local counsel's level of involvement to be in the case.

ANALYSIS

6. A Utah attorney serving as local counsel is sometimes encouraged to be, or thought of, as a mere mail drop or messenger for pro hac vice attorney in a matter. There is nothing in the Utah Rules of Professional Conduct, however, that limits the duties of an attorney admitted to the Utah State Bar who happens to be acting as local counsel for a pro hac vice attorney. In fact, Rule 5.5 provides, in

pertinent part:

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and *who actively participates in the matter....*

Utah R. Prof. Conduct 5.5(c)(1) (emphasis added).

7. All attorneys admitted to the Utah State Bar are required to comply with the Utah Rules of Professional Conduct, including when they are acting as local counsel. These Rules include, but are not limited to, Rule 1.1, which states that "a lawyer shall provide competent representation to a client," meaning the "legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Utah R. Prof. Cond. 1.1. They also include Rule 1.3 that provides: "A lawyer shall act with reasonable diligence and promptness in representing a client." Utah R. Prof. Cond. 1.3. Local counsel must also follow Rule 1.4's mandates, which require a lawyer to:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

Utah R. Prof. Cond. 1.4(a). Rule 1.4 also dictates that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Utah R. Prof. Cond. 1.4(b).

8. While local counsel must comply with Rules 1.1, 1.3, and 1.4 governing a lawyer's competence, diligence, and client communication, local counsel does not have to duplicate the work already performed by the pro hac vice attorney so long as the pro hac vice attorney is complying with the Utah Rules of Professional Conduct. Indeed, such duplication would be unnecessary and unduly expensive,

and would be to the client's detriment. *See* Utah R. Prof. Cond. 1.5(a) ("A lawyer shall not make an arrangement for, charge or collect an unreasonable fee or an unreasonable amount for expenses.").

9. Local counsel has a duty, however, to take reasonable steps to ensure that the pro hac vice attorney follows the Utah Rules of Professional Conduct, even if that entails some duplication of efforts. Rule 5.1(b) states that "[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure the other lawyer conforms to the Rules of Professional Conduct." Rule 8.4(a) states that it is professional misconduct for a lawyer to "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through acts of another...." Utah R. Prof. Cond. 8.4(a). Local counsel should thus advise the pro hac vice attorney of pertinent law, rules, procedures, and customs in Utah applicable to the matter at hand and monitor the pro hac vice attorney closely enough to know whether the pro hac vice attorney is following them. An efficient way for local counsel and the pro hac vice attorney to minimize the added expense of local counsel's involvement in the case while still ensuring that both lawyers comply with the Utah Rules of Professional Conduct would be for the pro hac vice attorney and the client to copy local counsel on all substantive written communications and to include local counsel in substantive attorney client meetings, perhaps with local counsel appearing by telephone to save on costs.

10. In some circumstances, the client and/or the pro hac vice attorney do not want local counsel to have any direct contact with the client and want all communications with the client to go through the pro hac vice attorney only. Rule 1.2 allows a lawyer to "limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Utah R. Prof. Cond. 1.2(c). Comment 3 to Rule 1.2 provides: "At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such advance authorization." It may thus be possible for the client (as opposed to the pro hac vice attorney) to give informed consent that the pro hac vice attorney shall alone communicate directly with the client about the matter and that local counsel may rely upon the representations of the pro hac vice attorney as to the substance of those communications. *See* Utah R. Prof. Cond. 1.2(a) ("Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."). This informed consent would commonly be encompassed in the engagement letter between local counsel and the client at

the outset of the representation.

11. Where local counsel is retained in a contingency fee case, and/or if a contingency fee agreement already exists between the pro hac vice attorney and the client, local counsel should ensure that an (amended) fee agreement is entered into with the client that explains local counsel's role in the case and the portion of the contingency fee to which local counsel is entitled. That percentage may vary depending upon the extent of local counsel's involvement, the scope of which, if limited, should be explained in the agreement and signed by the client. *See* Utah R. Prof. Cond. 1.5(e).

12. Only an attorney who is a member of the Utah State Bar and counsel of record is both required and allowed to electronically file documents with the Utah district courts. Utah R. Jud. Admin. 4-503(1), (3). Local counsel must therefore file all documents with the court under local counsel's electronic signature, including those that are prepared by the pro hac vice attorney. Rule 11 of the Utah Rules of Civil Procedure provides:

(b) By presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or advocating), an attorney ... is certifying that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Utah R. Civ. P. 11(b); *see also* Utah R. App. P. 40(a) ("Every motion, brief, and other document must be signed by at least one attorney of record who is an active member in good standing of the Bar of this state or by a party who is self-represented."). Likewise, Rule 3.1 of the Utah Rules of Professional Conduct states that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous...." *See also* Utah R. Prof. Cond. 3.3 & 3.4. Local counsel must therefore investigate the merits of

the case to the extent necessary to be satisfied that the substance of the documents, both legal and factual, prepared by the pro hac vice attorney complies with Rule 11 and Utah law generally before filing them with the district court. *See, e.g., Lewis v. Celina Fin. Corp.*, 655 N.E.2d 1333, 1338 (Ohio Ct.App. 1995) (holding that local counsel had personal, nondelegable duty to determine that pleadings complied with Rule 11 and could not rely on the pro hac vice attorney who forwarded pleadings for filing by local counsel under local counsel's signature to fulfill that duty). The pro hac vice attorney should give local counsel an opportunity to review all documents to be filed with the court far enough in advance of the filing deadline that local counsel can advise the client and the pro hac vice attorney about any revisions that need to be made to the documents to comply with Utah law before local counsel files them with the court or they are served on the other parties.

13. Along these same lines, because Utah Rule of Judicial Administration 14-806 requires local counsel to "be available to opposing counsel and the court for communication regarding the case and the service of papers," local counsel has a duty to keep reasonably informed about the case as it progresses and to take reasonable measures to ensure that the pro hac vice attorney appears at hearings and complies with court orders. *See* Utah R. Prof. Cond. 5.1(b).

14. Some violations of the Utah Rules of Professional Conduct by the pro hac vice attorney may require local counsel to take remedial action to fulfill local counsel's duties to the court and to other counsel or parties. If local counsel becomes aware that the pro hac vice attorney is violating or has violated such rules as Rule 3.3 (Candor towards the Tribunal), Rule 3.4 (Fairness to Opposing Party and Counsel), Rule 3.5 (Impartiality and Decorum of the Tribunal), or Rule 8.4 (Misconduct) of the Utah Rules of Professional Conduct, local counsel must take remedial action to prevent the avoidable consequences of the misconduct. Rule 5.1 states, in pertinent part:

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) The lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Utah R. Prof. Cond. 5.1(c). Local counsel might first address the matter directly with the pro hac attorney, but if

the pro hac attorney does not or will not take appropriate action, then local counsel must do so. *See, e.g.,* Utah R. Prof. Cond. 5.1 Cmt. [5] ("A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.").

15. Similarly, if local counsel determines that the pro hac vice attorney is engaging in conduct that is likely to seriously prejudice the client's interests, such as failing to respond to discovery, local counsel has a duty to advise the client of local counsel's independent judgment that differs from that of the pro hac vice attorney and to take action to protect the client's interests, even where local counsel has agreed not to have any direct contact with the client. Rule 2.1 provides: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, or political factors that may be relevant to the client's situation." Utah R. Prof. Cond. 2.1; *see* Utah R. Prof. Cond. 5.1(c)(1) (stating that a lawyer is responsible for another lawyer's violation of the Utah Rules of Professional Conduct where the lawyer, "with knowledge of the specific conduct, ratifies the conduct involved"); Utah R. Prof. Cond. 8.4(d) ("It is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice.") Regardless of the extent of the pro hac vice attorney's involvement, local counsel remains responsible to the client for the conduct of the case before the Utah court. Depending upon the severity of the misconduct and the pro hac vice attorney's willingness or ability to rectify it, local counsel may also decide to withdraw from the representation of the client or to have the pro hac vice attorney's admission revoked. Local counsel would need to discuss either of those options with the client before pursuing them, assuming local counsel could reach the client, and would need to comply with Rule 1.16 of the Utah Rules of Professional Conduct governing the conditions under which an attorney may withdraw from representation of a client.

Faculty

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