

Lou Jones Breakfast Talk
December 10, 2013
Federal Courthouse (rm 190)
Milwaukee, Wisconsin
Ethics (approx. 8:30 am – 9:30 am)

Bill Weigel
Litigation Counsel
Office of Lawyer Regulation
Jack Zaharopoulos
Staff Attorney
Office of the Chapter 13 Trustee

A Breakfast Buffet:
OLR; Misconduct Issues in Bankruptcy Cases; War Stories

OFFICE OF LAWYER REGULATION (OLR)

Basic Lawyer Regulation Statistics:

- Around 25,000 attorneys are admitted to practice law in Wisconsin
- OLR receives around 2,400 new grievances each year
- About 85% of new grievances are resolved within 90 days
- Roughly 1,100 investigations pending
- Almost 450 matters are over a year old

- In fiscal year 2012-2013, 58 attorneys received a public disciplinary sanction:
 - 8 revocations (3 were by consent)
 - 12 lengthy suspensions (of 6 months or more)
 - 7 shorter term suspensions
 - 13 public reprimands imposed by the Supreme Court
 - 18 consent public reprimands issued by Supreme Court Referees

- 198 disciplinary matters were pending in litigation before the Supreme Court, as of 9/30/13

- Other numbers for FY 2012-2013:
 - 19 private reprimands (1 was imposed by the Court)
 - 1 disciplinary case dismissed by the Court
 - 200 diversions (alternative to discipline)
 - 10 temporary suspensions for non-cooperation

GRIEVANCES RECEIVED BY OLR IN FISCAL YEAR 2012-2013

AREA OF PRACTICE	% OF TOTAL ALLEGATIONS
Administrative & Government Law	2.2%
Bankruptcy-Receivership	4.93%
Collections,Garnishments	1.54%
Contracts,Commercial, Consumer Law	0.75%
Corporate-Banking	0.79%
Criminal Law	31.1%
Environmental	0.09%
Estate-Probate, Guardianship & Wills	6.87%
Family Law & Juvenile	21.85%
Immigration & Naturalization	0.62%
Insurance	0.09%
Labor, Unemployment Compensation	0.66%
Landlord-Tenant	1.23%
Litigation	6.21%
Patent/Trademark	0.13%
Real Property Law	4.93%
Taxation	0.44%
Torts-Civil Rights	4.85%
Workers Compensation, Social Security	1.85%
Not Available-Other	8.87%

BANKRUPTCY MISCONDUCT MOST COMMONLY SEEN BY OLR

- **Neglect**

Examples: taking a fee and failing to file; delay in filing a petition; failing to amend petitions; failing to appear at creditors' meeting; failing to file or defend an adversary proceeding

- **Communication issues**

Examples: failing to keep clients informed; failing to respond to clients' reasonable requests for information; failing to explain courses of action or the consequences of making certain choices.

- **Competence:**

Examples: failing to prepare or complete accurate schedules; failure to comply with court procedures; conveying inaccurate information or advice.

- **Dishonesty**

Examples: fraudulent disclosure of assets, debts, income, expenses, non-filing spouse information; false statements to the court; false statements to third parties; lying to clients

- **Failure to supervise non-lawyer assistants**

- **Conflicts of interest**

AN ATTORNEY'S DUTIES TO HER CLIENT AND THE COURT – APPLYING SCRs

Q: What should a debtor's attorney do when a client does not want to disclose assets?

SCR 20:1.6 Confidentiality

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in pars. (b) and (c).

(b) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another.

(c) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably likely death or substantial bodily harm;

(2) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(3) to secure legal advice about the lawyer's conduct under these rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
or

(5) to comply with other law or a court order.

SCR 20:3.3 Candor toward the tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in pars. (a) and (b) apply even if compliance requires disclosure of information otherwise protected by SCR 20:1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Q: Does an attorney who represents a client in an underlying bankruptcy case have a duty to represent the client in an adversary proceeding filed against the client?

Comprehensive opinion on unbundling of fees in bankruptcy in which a debtor's attorney was sanctioned for failing to represent a debtor in an adversary proceeding:

- *In re Seare*, 493 B.R. 158 (Bankr. D. Nev. 2013)

SCR 20:1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

SCR 20:1.2 Scope of representation and allocation of authority between lawyer and client

(a) Subject to pars. (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by SCR 20:1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case or any proceeding that could result in deprivation of liberty, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer has been retained by an insurer to represent an insured pursuant to the terms of an agreement or policy requiring the insurer to retain counsel on the client's behalf, the representation may be limited to matters related to the defense of claims made against the insured. In such cases, the lawyer shall, within a reasonable time after being retained, inform the client in writing of the terms and scope of the representation the lawyer has been retained by the insurer to provide.

SCR 20:1.5 Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

(b)

(1) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate as in the past. If it is reasonably foreseeable that the total cost of representation to the client, including attorney's fees, will be \$1000 or less, the communication may be oral or in writing. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing to the client.

(2) If the total cost of representation to the client, including attorney's fees, is more than \$1000, the purpose and effect of any retainer or advance fee that is paid to the lawyer shall be communicated in writing.

(3) A lawyer shall promptly respond to a client's request for information concerning fees and expenses.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by par. (d) or other law. A contingent fee agreement shall be in a writing signed by the client, and shall state the method by which the fee is to be determined, including the percentage or percentages that shall

accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee:

(1) in any action affecting the family, including but not limited to divorce, legal separation, annulment, determination of paternity, setting of support and maintenance, setting of custody and physical placement, property division, partition of marital property, termination of parental rights and adoption, provided that nothing herein shall prohibit a contingent fee for the collection of past due amounts of support or maintenance or property division.

(2) for representing a defendant in a criminal case or any proceeding that could result in deprivation of liberty.

(e) A division of a fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and:

(1) the division is based on the services performed by each lawyer, and the client is advised of and does not object to the participation of all the lawyers involved and is informed if the fee will increase as a result of their involvement; or

(2) the lawyers formerly practiced together and the payment to one lawyer is pursuant to a separation or retirement agreement between them; or

(3) pursuant to the referral of a matter between the lawyers, each lawyer assumes the same ethical responsibility for the representation as if the lawyers were partners in the same firm, the client is informed of the terms of the referral arrangement, including the share each lawyer will receive and whether the overall fee will increase, and the client consents in a writing signed by the client.

SOME BANKRUPTCY-RELATED 2013 LAWYER MISCONDUCT CASES

Disciplinary Proceedings Against Biester, 2013 WI 85. A bankruptcy case was among 30 misconduct counts for which Biester was disciplined. A client retained Biester to represent her in a bankruptcy matter, paying a \$750 retainer. There was no written retainer agreement and no receipt was given to the client. Biester later requested and was paid another \$150 in the matter. Biester never deposited the funds into any client account, and no funds were set aside to pay the bankruptcy filing fee. Biester filed a chapter 7 petition on behalf of the client and filed a request for a waiver of the filing fee. The waiver of filing fees was denied but options were given for installment payments. Biester never informed the client about the bankruptcy court's fee waiver decision. The filing fee was never paid, and the bankruptcy court entered an order dismissing the petition for failure to pay the filing fee. Biester never informed her client about the dismissal. Biester's law license was suspended for one year. One misconduct count was not adjudicated, but rather was stayed, based on the Court's finding that it was appropriate to do so pending a potential criminal case being filed against Biester.

Disciplinary Proceedings Against Boyd, 2013 WI 20. Boyd's misconduct generally involved her being hired to pursue debtor relief in bankruptcy actions or being hired to pursue post-conviction relief in criminal cases. In one bankruptcy matter, Boyd incompetently advised her clients to file a Chapter 13 bankruptcy in order to allow her clients to keep their truck, when they lacked the resources they would need for a reorganization plan under Chapter 13; she failed to inform her clients that her law license was suspended during the representation; and she stated to a bankruptcy judge that she had notified her clients that her law license was suspended when she, in fact, had not. In another bankruptcy matter, Boyd failed to refund the unearned portion of her fee when her license became suspended and she could no longer represent her client. In a third bankruptcy matter, Boyd failed to inform her clients that her law license was going to be suspended and she would no longer be able to represent them after she filed their bankruptcy petition; she took a fee from the clients knowing that she could not conclude the representation; and she failed to refund the unearned portion of her fee. On February 21, 2013, pursuant to a petition for consensual license revocation, the Wisconsin Supreme Court revoked Joan Boyd's law license. Boyd could not successfully defend against 28 counts of misconduct stemming from eight grievance matters that OLR was about to charge in a disciplinary complaint, as well as multiple additional misconduct allegations in seven more grievances pending with OLR.

Disciplinary Proceedings Against Engl, 2013 WI 36. Engl communicated via e-mail with a female who explicitly informed Engl that she was 15 years old, including discussions about meeting to have sex. Engl picked up the girl from work, engaged in sexual contact with her including having her perform oral sex on him. Engl pled no contest to two of six felonies: child enticement – sexual contact and sexual assault of a child under 16 years of age. In another matter, Engl accepted \$2,300 in advanced fees from a couple who hired Engl to represent them in a bankruptcy proceeding. Because Engl did not have his own client trust account, he gave the funds to an attorney with whom he shared office space, who placed the funds into that attorney's client trust account. Engl did not have any formal professional association with the attorney in whose client trust account the funds were placed. Upon learning that Engl was facing felony charges, the couple requested and received a full refund of the advanced fees they had paid. On April 30, 2013, the Wisconsin Supreme Court revoked Engl's license.

Disciplinary Proceedings Against Mross, 2013 WI 44. Mross committed three counts of misconduct in two bankruptcy matters. In the first matter, Mross failed to ensure his clients met the requirements for discharge, resulting in the court's decision to close the case without discharge, and he subsequently failed to seek a reopening of the bankruptcy for eighteen months despite repeated requests from his clients that he do so. In a second case, Mross undertook representation of clients on referral from an independent paralegal who solicits individuals facing foreclosure. Mross did not meet with the clients at the outset of the representation and provide them a written agreement explaining the basis or rate of his fee. Mross also failed to submit all required documentation in support of the bankruptcy petition he filed on the clients' behalf. When faced with the trustee's motion before the bankruptcy court to examine Mross' fee, Mross agreed to refund the entire fee to the clients. Mross also agreed to no longer take bankruptcy referrals from the independent paralegal. Mross' law license was suspended for 60 days.

Disciplinary Proceedings Against Stern, 2013 WI 46. Walter Stern III was disciplined in connection with his conviction for money laundering, relating to his holding payments due a woman to hide her ownership interest while she filed for bankruptcy. The woman and her then-husband entered into a marital settlement agreement (MSA) under which the woman was to receive \$95,000. Her divorce attorney deposited \$29,000 toward the MSA in a trust account. Stern referred her to a bankruptcy attorney. She filed a Chapter 7 bankruptcy petition, concealing the MSA and the funds received and due under the MSA from her bankruptcy attorney. Her divorce attorney received a second MSA payment of \$20,000. The bankruptcy court determined her petition to be a no-asset case and discharged her debts. Her divorce attorney received a third MSA payment of \$20,000. She gave the funds from the three MSA payments to Stern. Stern purchased a bank certificate of deposit (CD) in his own name, with the proceeds going to the woman upon his death. The woman received a fourth MSA payment of \$26,000. Stern used the proceeds from the earlier CD and the fourth MSA payment to purchase another CD, also in his name, payable to the woman upon his death. Stern was indicted and found guilty of knowingly conspiring with the woman to commit money laundering to conceal the \$95,000 she received, thereby committing bankruptcy fraud. For his bankruptcy fraud and criminal conviction, the Wisconsin Supreme Court suspended his license for two years. Postscript: In July 2013, the Seventh Circuit vacated Stern's conviction and remanded the case for a new trial. Their basis was their conclusion that the trial court wrongly prevented Stern from testifying about his own conduct—testimony central to Stern's defense that he did not intend to conceal assets. However, his two year law license suspension was not negated. It was based on Stern's no contest plea to the misconduct charge and his agreement that the Supreme Court could use the allegations in the disciplinary complaint and his criminal conviction as an adequate factual basis in the record for a determination of misconduct.

In the Matter of Charlotte Spadaro, Case Nos.: 09-O-15762-RAP (10-O-5994; 10-O-06216; 10-O-08989; 10-O-08990; 10-O-08992; 10-O-08993; 10-O-08994; 10-O-08995; 10-O-10248; 10-O-10800; 10-O-10807; 11-O-16040) 11-O-17875-RAP (Cons.) (California July 6, 2013). Former Beverly Hills Mayor Charlotte Spadaro has been previously disciplined. This time around, her misconduct resulted in disbarment. The State Bar Court found Spadaro committed professional misconduct in 16 of 19 counts spanning numerous client matters. One matter involved Spadaro having her client sign blank bankruptcy forms and delivering them to Spadaro at a dog boarding kennel. She then had her paralegal prepare the bankruptcy schedules, which were found to be inaccurate and deficient. To remedy the deficient schedules, Spadaro hired another paralegal to prepare amended schedules. The second paralegal was a disbarred attorney. Meanwhile, the clients paid Spadaro money to prepare home loan modification proposals. Spadaro neglected the bankruptcy, which was dismissed. When the clients initiated a fee arbitration proceeding against Spadaro, she filed a small claims court action against them for fees. Also, Spadaro had several clashes with animal control and code enforcement officers, including being convicted of animal cruelty. She has insisted in the past that she is acting in the best interest of animals by keeping them out of public shelters where they may be euthanized. But authorities and former associates have said she keeps amassing dogs and cats in such numbers that they cannot be properly maintained and suffer as a result. She denied that she is a hoarder, instead claiming "I am a rescuer." Meanwhile,

Spadaro filed a personal Chapter 7 bankruptcy, but lied to a court hearing an injunction case seeking to prevent her from operating her kennel by falsely telling that court she listed her dogs as personal assets in her bankruptcy. In another matter, residents of a mobile home park hired Spadaro to pursue a class action against the mobile home park's owner. Most client meetings took place at a client's home, but one occurred in what was described by her clients as "an abandoned house that had a terrible odor, was filled with cats, and had barking dogs outside." Spadaro collected over \$16,000 in advanced fees from the group and told them that they could win up to \$1,000,000 from the defendant. The class action was ultimately filed by a client per the (erroneous) instructions of Spadaro. The case was dismissed when Spadaro failed to prosecute it or respond to motions filed by the defendant. In another matter, Spadaro asked a client to help her obtain an automobile in her own name or with him as a co-signer. Spadaro later borrowed the client's 1991 Oldsmobile, despite telling him that she did not have a driver's license but her son did. The client told Spadaro she could use the car only for travel related to the class action and had to be in the car if her son was driving. Ultimately, Spadaro left a message on the client's cell phone informing him that the car had broken down at some undefined location on the freeway. The car was later vandalized: the battery and hoses were gone and the engine was damaged. The State Bar Court found that Spadaro "blamed everyone else, including homeless people, for the missing parts and damage." Further, Spadaro had gotten parking tickets in Beverly Hills in Los Angeles. Spadaro also bounced checks from her client trust account and repeatedly wrote checks to cover her personal or business expenses. At trial, Spadaro invoked the Fifth repeatedly.

Questions or comments about this presentation?

jzaharopoulos@chapter13milwaukee.com

414-271-3625

bill.weigel@wicourts.gov

608-267-8915