ABC Panel at ASM Covers Ethics, Competence and Standard of Care

The American Board of Certification (ABC) hosted a panel at ABI’s Annual Spring Meeting last April that included board-certified Bankruptcy Judges James M. Carr from the Southern District of Indiana, David W. Hercher from the District of Oregon, Jerry C. Oldshue from the Southern District of Alabama, James J. Tancredi from the District of Connecticut and Madeleine C. Wanslee from the District of Arizona. The panel was moderated by ABC Chair J. Scott Bovitz (Bovitz & Spitzer; Los Angeles). Bovitz brought Wesley H. Avery, a chapter 7 and 12 trustee from Pasadena, Calif., and an ABC director, into the discussion at several points to identify the concerns and policies of the U.S. Trustee and panel trustees.

The presentation generated much discussion between the judges and the audience. Several experienced practitioners in the audience participated in the discussion, and in a couple of instances, panelists softened — if not amended — their initial reactions to the topics after hearing the audience input.

The discussion began with scenarios involving excessive compensation, neglect and dishonesty, on which there was general agreement among the judicial panel, Avery and the practitioners in the audience. The panel discussed the typical fees charged in their districts and the timing and priority of their payment. They also discussed the engagement of special counsel and the triggers that might bring compensation issues to their attention. Avery and Bovitz discussed the ongoing problem of limited-service engagements and the issues they present for courts and parties. Bovitz reminded the audience that professional certification was a factor that courts consider in adjudicating the reasonableness of compensation.

Judge Carr found the exclusive focus on standards for debtors’ counsel interesting given the solicitation that he has seen to creditors in his district under terms and conditions that would prompt sanctions if solicited by the debtors’ bar. He described deals in which nonlawyers solicited contracts to prepare claims for “outrageous amounts” or even a “percentage of recovery.” He was concerned that creditors were being duped into paying substantial fees or forgoing substantial recovery for “ministerial work.” Avery added that these claims services had become a “big business” across the nation and suggested that these claim agents are often helpful to trustees, since they often have incentive to stay engaged in the case. Judge Hercher expressed concern that the claims services were engaged in the unauthorized practice of law. He accepted that nonlawyer employees of creditors were able to prepare and file claims for their employers, but was troubled by nonlawyer third parties engaged in the practice.

ABC-certified practitioner Richard P. Carmody (Adams and Reese LLP; Birmingham, Ala.) took issue with the blanket dismissal of claims preparation being “ministerial acts.” Judge Hercher expanded on Carmody’s concern by highlighting decisions that need to be made in preparing a claim that could materially impact a creditor’s recovery, including secured status, priority and waivers, and that might result from the filing of a claim, including jurisdiction of the bankruptcy court over disputes that the claimant might have with the debtor. Judge Carr acknowledged the importance of claim submission and noted that some large banks have adopted a policy to not file claims to avoid bankruptcy court jurisdiction. All agreed that some legislative solution was necessary to address the claim-preparer situation, as nothing in the current Bankruptcy Code appeared to give courts a tool to police the problem.

The discussion then moved to more egregious problems with counsel, including dishonesty to the court and failure to provide services. All on the panel acknowledged that a very small minority of lawyers account for most of their problems and that they were impressed by the work completed by the bulk of their bankruptcy bars. Bovitz pointed out that these serious problems were nonexistent among board-certified lawyers. None of the panelists recalled disgorging fees for misconduct sua sponte, and most had stories of their criminal referrals after discovering misconduct being ignored. Former Judge Bruce A. Markell, who is now a professor at Northwestern University School of Law, was in the audience and agreed that the Justice Department had not shown much interest in criminal referrals during his tenure as a judge in Las Vegas.

The discussion became livelier and elicited less consensus when the topic turned to standards for diligence by individual debtors’ lawyers under 11 U.S.C. § 707(b)(4)(D). The panel was prompted by the facts and standards set forth in In re Withrow.¹

¹ For a copy of this session, visit cle.abi.org/product/ain-t-misbehaving.

The judges were generally in agreement with the premise that the debtors’ bar could not rely on their clients for information and that § 707(b)(4)(D) requires some use of outside records searches. The panel discussed the quick and cheap (and sometimes free) public record resources available in their states. With the exception of Judge Carr, the panel’s initial reaction appeared to be all in with the Withrow standard and the additional burdens on debtors’ lawyers that it endorsed. Bovitz reminded the panel that these practitioners were charging only $900, but Judge Tancredi dismissed this concern. “Your business model is not my problem,” Judge Tancredi said. “My problem is what the law says, and the law says that you have a duty of verification, and I think that means, at a minimum, you probably have to do things like a [Uniform Commercial Code] search and a title search. Where the debtor’s information is less than clear, dig a little bit to get those documents.” Judge Wanslee pointed out that the $900 being charged by debtor’s lawyers in her district to conduct these inquiries was much higher than the $60 being paid to interim trustees. There was stunned silence in the room when a panelist suggested that $150 for a title search was a reasonable expense in a typical consumer case.

A few participants spoke about the harm caused by the added time and expense of the additional diligence required by Withrow and the cases following its reasoning. They pushed back about the benefits of the added work being introduced into the consumer process, which was initially endorsed by the panel without reservation. Some in the audience argued that the current fee structure in their districts would not support the time and expense of running title searches, Uniform Commercial Code searches and other third-party research to determine whether their clients were being honest. The issue to these advocates was not the profitability of the “business model.” The pertinent issue was whether debtors in the most need of relief would be able to afford a chapter 7 bankruptcy if the high-volume lawyers who serve this community are forced to perform searches and complete other diligence that would necessarily raise the cost of even the simplest petition. One lawyer explained that the additional diligence was akin to group punishment. The time and cost of these additional searches and other diligence constituted an unnecessary burden upon the overwhelming majority of debtors who are honest in order to police the small minority who are not forthright. These extra expenses might keep these honest-but-unfortunate debtors from receiving the relief they need.

Judge Wanslee acknowledged the burdens posed by additional diligence and suggested more of a probable-cause standard in which the need for the searches may be triggered by knowledge that an issue may exist. She said that “bankruptcy is all about transparency … and to make sure you have sufficient information so that you can make the disclosures that are required.” She added that “when something doesn’t feel right, then you investigate a little bit more.” Judge Tancredi noted that the additional diligence was necessary to give meaning to the new language created by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). He reframed the diligence as a client service rather than checking clients’ stories. He said, “We have to give meaning to the statutory changes that were made in 2005 when Congress added the requirement for reasonable investigation or no knowledge after inquiry. I think that’s got to mean something other than asking your clients [and] having your clients say what their assets are.” He recalled stories from practitioners about the lack of sophistication from many consumer clients and the challenges of obtaining accurate information even when clients are doing their best to be truthful, noting:

It seems to me that the technology and low cost of basic-level real property searches is such that it probably ought to be part of the base level of services provided in every [chapter] 7, especially because clients don’t understand. The clients might for example understand that because a foreclosure judgment has been entered that they lost their house, when in fact, the sale has not occurred. Clients may think that because they have a mortgage, they don’t own their house. The bank owns the house. There are all sorts of reasons why unsophisticated lay clients might not appreciate the correct answers to the technical questions on the schedules and why the lawyer needs to take independent action to inquire on some kind of basic level of public resources and not take the debtor’s word for basic things like, “What property do you own?”

Judge Tancredi expressed the opinion that online real property searches were necessary in all cases. His opinion on this issue elicited nodding and general approval from most of the panel.

Judge Carr had an interesting observation about the additional time and expense that BAPCPA created for debtors. He said that the Act was not “pure” and referenced the intense lobbying that preceded its adoption. Judge Carr’s comment highlights a problem that is difficult to address in attempting to uncover Congress’s intent in interpreting BAPCPA. In stark contrast to the 1978 Code, BAPCPA was not the product of an enclave of experienced and respected practitioners, scholars and jurists. It has been widely criticized by both the debtors’ and creditors’ bar. Judge Carr noted that the real intent was to discourage chapter 7 filing and force as many filers as possible into chapter 13. Increasing costs by creating burdens on consumer lawyers is certainly consistent with this realistic take on BAPCPA’s intent. The most effective way to

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who had been suggested by their bankruptcy counsel, and
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in perfecting a lien on the eve of filing a case for the debtors. They did not produce any documentation of the lien.
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to ensure that the lien was perfected before filing. He was
This is not a case in which counsel blindly believed his
vehicle. They did not produce any documentation of the lien.
when working in Nevada. The couple borrowed money from
livelihood because one of the debtors used it as a residence
was a former chapter 7 and 13 trustee, for insolvency advice.
The materials for the presentation referenced In re Dean,3
a case that illustrates the problems even a conscientious consumer lawyer may face under BAPCPA’s verification
provisions. This case prompted some strong reactions from
ABC directors who represent individual debtors. In Dean,
the debtors visited an experienced bankruptcy lawyer, who was a former chapter 7 and 13 trustee, for insolvency advice.
In the course of their conversation, the debtors told the lawyer
that they owned a motorhome that was essential to their livelihood because one of the debtors used it as a residence
when working in Nevada. The couple borrowed money from
a parent and claimed that she had been granted a lien on the vehicle. They did not produce any documentation of the lien.

This is not a case in which counsel blindly believed his
clients. He advised them to seek independent legal counsel
to ensure that the lien was perfected before filing. He was
concerned about the potential conflict of assisting a creditor
in perfecting a lien on the eve of filing a case for the debtors. The debtors did not like the fees proposed by the lawyer
who had been suggested by their bankruptcy counsel, and

they attempted to perfect the lien without help from counsel. They told their bankruptcy counsel that they had contacted the lawyer he suggested and that the lien was now perfected. They neglected to tell him that they had not hired the lawyer he suggested, nor any other lawyer. Counsel prepared schedules in which the lien was disclosed, which were signed, with each page initialed by the debtors. The bankruptcy counsel did not ask his clients to produce documentation that the lien had been perfected.

The interim trustee ran a title search and discovered that the lien had not been perfected. He informed the debtors’
attorney of the problem and of his intent to seek turnover. Debtors’ counsel informed his clients of his conversation with the trustee and instructed them to not attempt to fix the problem. The debtors attempted to perfect the lien in violation of the automatic stay. The trustee successfully avoided the post-petition lien and recovered the motorhome. The trustee filed a motion under § 329(b) to compel the debtors’ counsel to disgorge his fees. The trustee argued that the counsel’s lack of diligence in confirming the perfection of the lien prior to filing cost the debtors their motorhome. The Dean court considered the same questions framed by now-retired Bankruptcy Judge Henry J. Boroff in the Withrow case to evaluate the
(1) Did the attorney impress upon the debtors the
importance of accuracy in the documents to be pre-

sented to the court?
(2) Did the attorney seek and review documents in the
debtors’ possession, custody or control to verify his
clients’ statements?
(3) Did the attorney employ external verification tools that were both available and not time- or cost-

prohibitive?4

The court believed that the debtors’ attorney’s practice of having clients initial each page of the petition and schedules might have satisfied the first prong. The judge was not

ABC Congratulates New Member; Make Plans to Take Your ABC Exam

The American Board of Certification announced that Elizabeth L. Gunn
of the Virginia Office of the Attorney General in Richmond, Va., became board certified during its final Standards Committee meeting this year. An
ABI 2017 ABI “40 Under 40” honoree, she became certified in consumer bankruptcy law. If you are considering board certification and are unable
to attend a convention where an exam is scheduled, ABC can schedule a proctor to come to your office for a nominal fee. In addition, ABC and
ABI have joined forces and prepared a course in order to better prepare applicants who are planning to become board certified. The full ABC Prep
course also provides 6 hours of CLE credit (where permitted for online learning), including 1 hour of ethics. The course is $295 for ABI members and
$395 for non-members (the non-member fee also includes one year of ABI membership, a $350 value). Visit abi.org/abcprep or abcworld.org
for more information.

3 In re Dean, 917 (Bankr. D. Idaho 2008).

prongs, however, since an online search of public records or even a telephone call to the lawyer that his clients claimed to have hired would have alerted him of the problem. The court found that the attorney could not reasonably rely on his clients’ statements in preparing the schedules because he was sufficiently concerned about the lien to refer them to outside counsel, and he should have known the lien would be subject to close scrutiny by the trustee, since the lienholder was an insider. The court concluded that the fee charged was not reasonable given the deficiencies in the lawyer’s services and ordered him to disgorge one-half of his fee.

This case illustrates the problems addressed by the panel facing lawyers who represent individual debtors. In this case, the debtor’s lawyer was not only not permitted to believe his clients about the current status of a vehicle lien, but was tasked with verifying his client’s story with another lawyer to whom he referred the debtor to ensure that it was perfected. There is nothing in the opinion or the Bankruptcy Code provisions that it references that limits the inquiry as to liens. Will a court find that diligence for claiming an entireties exemption in real estate requires production of a marriage license and a 50-state search to ensure that it had never been followed by a divorce? There are endless possibilities for client misrepresentations, both intentional and benign, that in hindsight “could have easily been discovered” by some additional diligence.

The ABC-certified judicial panelists made an informative and timely presentation that generated a lively discussion of difficult issues facing practices. ABC thanks the panelists and moderators who assisted with this program.