Alabama State Bar

Bankruptcy at the Beach

June 6-9, 2019

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Informal Opinions

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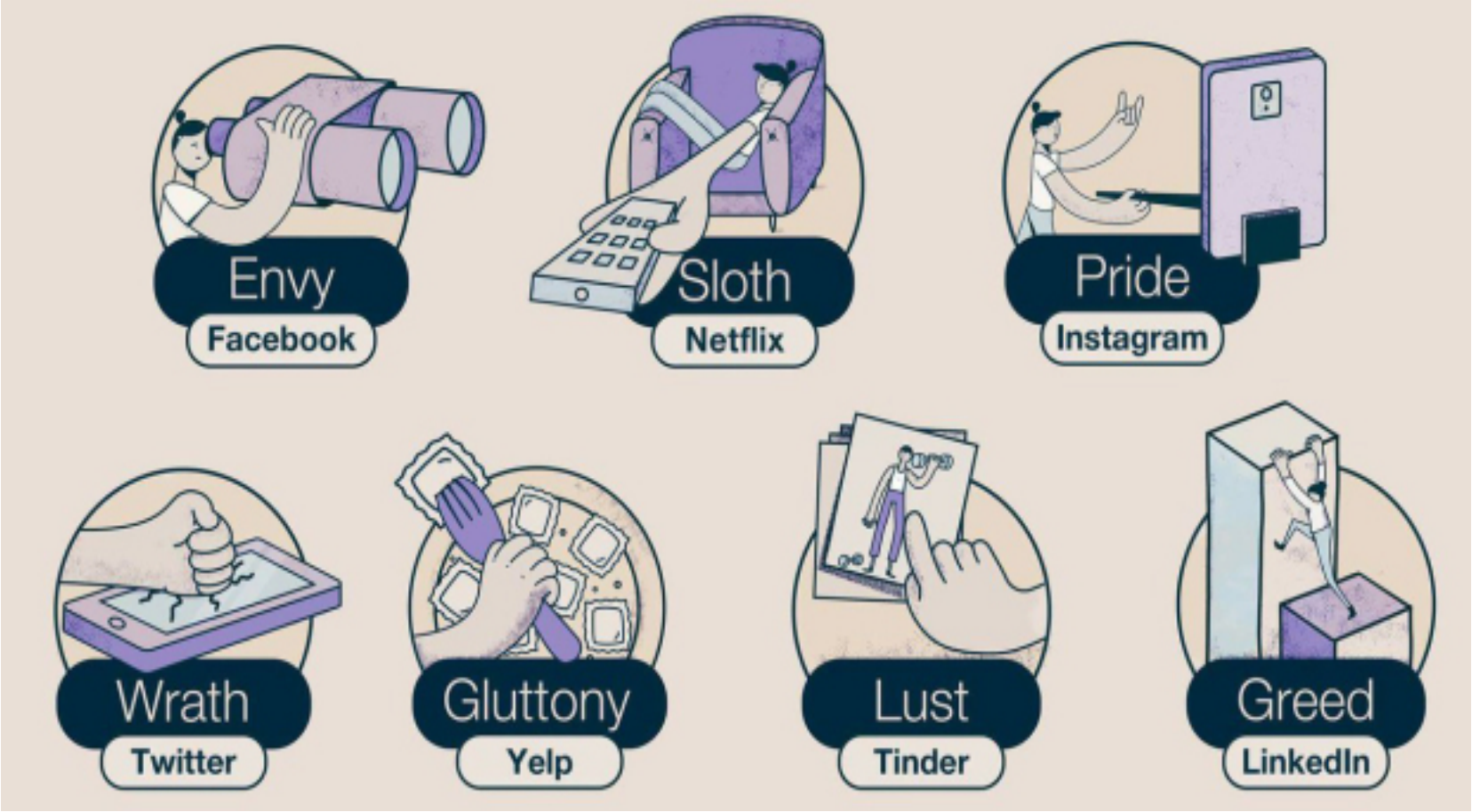
The Seven Deadly Sins



The Seven Deadly Sins


Lust

- An Alabama attorney was suspended from the practice of law for engaging in a sexual relationship with a client. The attorney offered to provide “pro bono” representation in exchange for sexual favors.
- Another Alabama attorney offered to swap services with a potential client. He would represent the client on a civil and criminal matter, if she would pose naked for his “photography business”.

Rule 1.8 Conflicts of Interest: Prohibited Transactions

(l) A lawyer shall not engage in sexual conduct with a client or representative of a client that exploits or adversely affects the interests of the client or the lawyer-client relationship, including, but not limited to:

(1) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of legal representation;

(2) continuing to represent a client if the lawyer's sexual relations with the client or the representative of the client cause the lawyer to render incompetent representation.

(m) Except for a spousal relationship or a sexual relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitive. This presumption is rebuttable.

Rule 1.7
Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

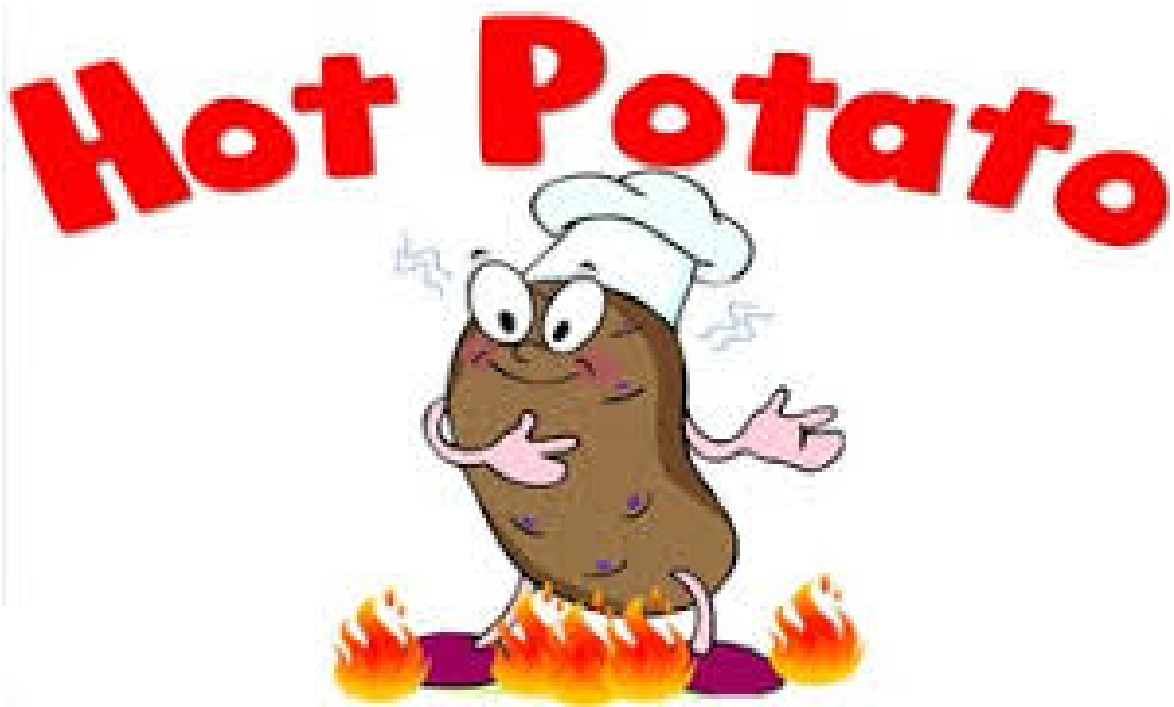
(2) Each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or a third person, or by the lawyer's own interests, unless:

(1) The lawyer reasonably believes the representation will not be adversely affected; and

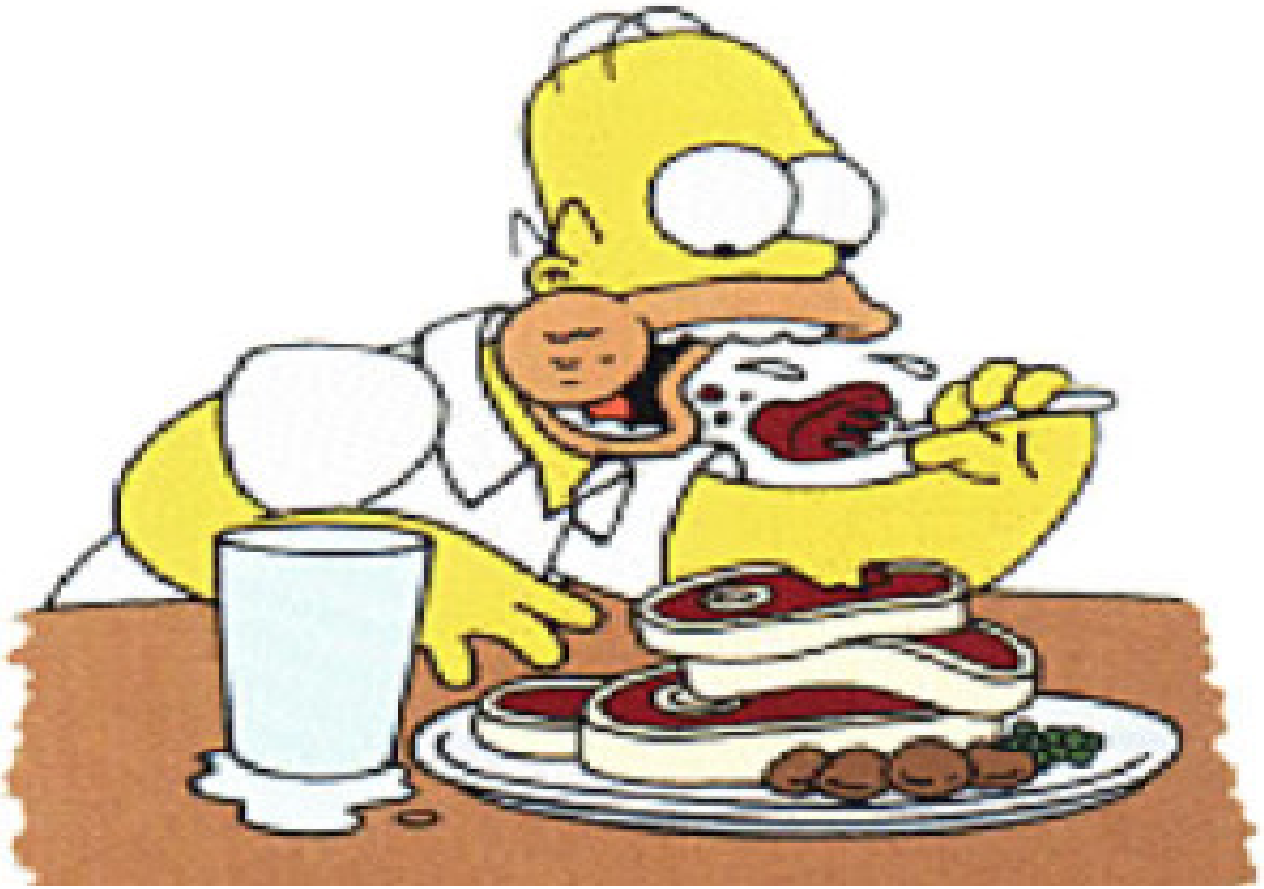
(2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Formal Opinion 1991-08



- Your representation of client A in the construction litigation is directly adverse to client C and for that reason you must withdraw from representing A in that matter. You may continue to represent A and C in other matters totally unrelated to the construction litigation. Additionally you may not, by discontinuing your representation of C, take advantage of the less stringent conflict rule regarding former clients and thereby continue to represent A.

GLUTTONY



In re Premier Farms, 305 B.R. 717 (N.D. Iowa 2003)

- Law firm which Chapter 11 debtor-in-possession (DIP) sought to employ as its bankruptcy counsel had an adverse interest and, thus, was not “disinterested” and would be disqualified from representing DIP; firm also represented bank that was DIP's major creditor, bank had been firm's regular client for approximately two years, other creditors objected to DIP's employment of firm, there was a potential conflict of interest, bank was not merely one of a number of creditors holding general unsecured claims but, instead, was DIP's largest creditor and the only creditor scheduled to have a security interest in DIP's property, DIP's counsel would have to deal with bank's counsel concerning numerous and important issues, and there was a legitimate and real concern that firm's attorney-client relationship with bank could detrimentally affect firm's zealous representation of DIP.

In re Interwest Business Equipment Inc., 23 F.3d 311 (10th Cir. 1994).

Interwest Business Equipment Inc., Green Street, Retail Systems Inc., and the individual who controlled each of the corporations filed Chapter 11 bankruptcy petitions. One law firm applied to represent all three of the corporate debtors. An investigation revealed three substantial intercompany debts, but there was no indication of whether there were possibilities of avoiding transfers between the three debtors.

- There was also a management contract between Green Street and Retail that the two debtors intended to maintain. The bankruptcy court denied the application for one law firm to represent all three debtors because it found conflicts of interest.

- One conflict existed because there was a debtor–creditor relationship between the companies, meaning that the firm would be representing an adverse interest to the estate and would not be disinterested. The bankruptcy court also found a conflict in representing associated estates.

- “These interlocking interests can only be served by utilizing separate counsel who can fairly and fully advise each debtor as to its rights and responsibilities.” Id. at 314 (quoting In re Green Street, 132 B.R. 460, 462 (Bankr. D. Utah 1991). The district court and Court of Appeals agreed.

- The court of appeals noted that § 327(c) did not preclude finding a conflict because the dual representation of a creditor was not the sole reason for the bankruptcy's denial of representation.
- The bankruptcy court was also concerned with the representation of related debtors. Without separate counsel, the attorneys may not be willing to scrutinize the payments made prior to filing, the payments to insiders, the benefit of executory contracts, or the claims of the creditors that were related to the other entities.

In re Big Mac Marine, Inc., 326 B.R. 150 (B.A.P. 8th Cir. 2005).

- This case involved an attorney who wanted to represent debtors in two different Chapter 11 cases. The debtor in one Chapter 11 case was a family business involved in selling boats. The parents originally owned the business and had personally guaranteed the business's loans. The parents then sold the business to their son. The parents filed a Chapter 11 bankruptcy. In the parents' Chapter 11 case, they challenged the bank's security interest. Nine months after the parents filed bankruptcy, the family business filed a Chapter 11 petition.

- The parents were the largest creditor and claimed have a secured interest in the business's inventory, despite the lack of documentation to support their secured claim. The same attorney who represented the parents filed an application to represent the family business in its Chapter 11 case. The bankruptcy court denied the application because the attorney was not disinterested and represented adverse interests.
- The parents later withdrew their claim against the family business, but they remained the sole shareholders and still challenged the bank's security interest. The bankruptcy court denied the attorney's second attempt to become the attorney for the family business. The B.A.P. affirmed, finding that there was an actual conflict of interest in wanting to represent the largest creditor and sole shareholders in the family business's bankruptcy case.

GREED


"Greed...is good!"
- Michael Douglas,
as Gordon Gekko,
in *Wall Street* (1987)

- An Alabama attorney was disbarred for violating Rule 1.15(a), Ala. R. Prof. C. The attorney collected credit counseling fees from clients and then failed to forward the fees to the credit counseling company. Instead, the attorney misappropriated the credit counseling fees.

Brown v. Gore (In re Brown), (11th Cir. 2014)

An Alabama attorney was disciplined after filing Chapter 13 bankruptcy petitions on behalf of debtors in which the attorney's fee was the primary repayment obligation. According to the attorney, the debtors could not afford to pay the upfront attorney fee for a Chapter 7 bankruptcy. As such, the debtors chose to file a Chapter 13 bankruptcy which would allow the debtors to pay the attorney's fee over time. In the petition at issue, the debtors had a relatively small amount of debt.

- The Eleventh Circuit upheld the lower court's denial of confirmation in the debtor's fee-only Chapter 13 plan finding that it did not satisfy the good faith requirements of section 1325(a)(3) and (7). *Brown v. Gore (In re Brown)*, No. 13-10260 (11th Cir. Feb. 14, 2014). Despite the lower court's language suggesting the application of a *per se* rule, the 11th Circuit upheld the denial of confirmation, but it did so in reliance on a case-by-case, "totality of circumstances," analysis in keeping with the decisions out of the first and fifth circuits.

The Wrong Way to Collect a Fee

- Alabama attorney was sanctioned by the bankruptcy court for using post-dated checks to collect attorney's fees in Chapter 7 cases.
- From July 1, 2012 through July 11, 2014, prospective debtors were told by the attorney to bring their checkbook during their initial visit and consultation.
- The attorney would instruct each client to sign fifteen checks which were then postdated for fifteen consecutive months. Each check would be stamped with $100.00 as the amount payable to the attorney.
- The checks were then put into a pre-paid postage envelope addressed to the attorney's law firm. The debtors were then instructed to mail back the envelope once the debtor's Chapter 7 case had been filed.
- After filing, the debtor would mail back the envelope and the attorney would deposit one check every month into his operating account.

- Each client signed a two-page, 14-paragraph agreement entitled “Contract Required under Code Section 528”.
- The contract did not mention the post-dated checks.
- The contract did advise the client the attorney had no right to payment for any fees owed at the time of filing or at the discharge of their bankruptcy. However, the client did have the right to voluntarily pay his fee after the bankruptcy was discharged or dismissed.

- The Court found that more than half of the debtors could have had their filing fee waived if the attorney had sought in forma pauperis on their behalf.

- The Court found the attorney's use of the post-dated checks to be in violation of the Bankruptcy Code.

- The Court subsequently sanctioned the attorney by disgorging him of $127,971.66 in fees.

- In addition, the Court ordered the attorney to refund $48,654.00 in filing fees to debtors, to repay $12,880.00 in NSF fees, and to participate in the Alabama Practice Management Assistance Program.

In re Engolio, 7 So. 3d 1162 (La. 2009).

- In the process of representing debtors in Chapter 13 cases, the attorney would accept funds from clients that needed to be used for filing fees or to be forwarded to the Chapter 13 Trustee. Instead of paying the trustee or the filing fees, the attorney kept the money for himself, totaling $13,118. In one Chapter 13 case, the attorney told the clients to make their mortgage payments to the law firm, but the attorney never made the mortgage payments. As a result of these actions and twelve other counts of misconduct, the attorney was permanently disbarred.

In re Randolph, 554 S.E.2d 485 (Ga. 2001).

- Two clients asked an attorney to represent them in bankruptcy. The clients gave the attorney $350 before the attorney filed the Chapter 7 petition for filing fees and attorney's fees. The attorney cashed the checks instead of depositing them into a trust account, only paid $60 in filing fees, and represented in the petition that he had not been paid any attorney's fees. The court found that these actions violated the rule against handling client funds. As a result of several aggravating factors, such as failure to pay bar dues in time, failure to meet CLE requirements, and previous disciplinary actions, the attorney was disbarred.

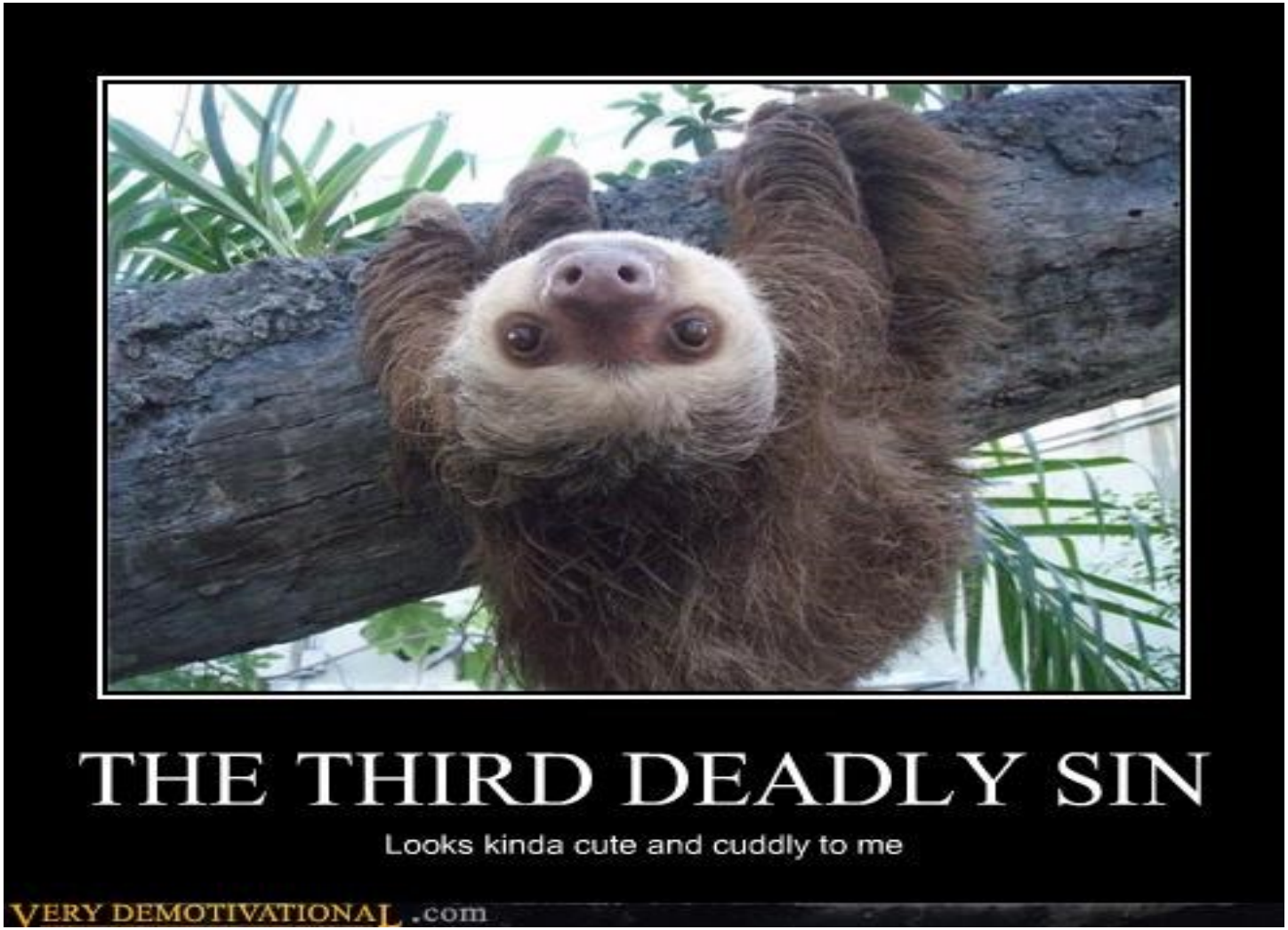
Mississippi Bar v. Drungole, 913 So. 2d 963 (Miss. 2005).

- An attorney filed a bankruptcy petition for her client, paying $100 of the $200 filing fee and disclosing that she had not received any attorney's fees. She failed to pay the second half of the filing fee, and an investigation revealed that she had received $425 in attorney's fees before paying the filing fee. Rule 1006 of the Federal Rules of Bankruptcy Procedure requires that filing fees must be fully paid before the attorney can accept compensation. As of result of her actions, she was suspended from practicing law for thirty days.

Cuyahoga County Bar Association v. Jurczenko, 871 N.E.2d 564 (Ohio 2007).

- A couple hired an attorney to represent them in a Chapter 13 bankruptcy. The couple gave the attorney $22,500 from a personal-injury settlement they had received with the intent that the attorney should use this money to negotiate with creditors. The bankruptcy court dismissed the bankruptcy petition for lack of prosecution, but the attorney never told his clients that the petition was dismissed, and never returned the $22,500. In another bankruptcy case, the attorney had his client make his mortgage payments directly to the attorney, but the attorney had not forwarded the payments. These actions violated rules about preserving identity of client funds, appropriately accounting for client funds, and promptly delivering client funds. As a result of these actions and numerous other violations, the attorney was permanently disbarred.

SLOTH


THE THIRD DEADLY SIN
Looks kinda cute and cuddly to me
VERY DEMOTIVATIONAL .com

- Alabama attorney was suspended from the practice of law in the State of Alabama by Order of the Disciplinary Commission of the Alabama State Bar for a period of ninety-one (91) days. The attorney was found guilty of violating Rules 5.3(a), 5.3(b) and 5.3(c)(1), Ala. R. Prof. C. The attorney failed to supervise a non-lawyer employee in regards to preparation and filing of bankruptcy petitions on behalf of his clients.

- An Alabama attorney was disbarred after routinely accepting fees for the filing of bankruptcy petition and then failing to file the petition. The fees accepted by the attorney were subsequently misappropriated.
- An Alabama attorney was issued a private reprimand for violating Rules 1.1, 1.3, and 1.4(a) Ala. R. Prof. C. In February of 2015, the attorney was hired to represent a client to file a Chapter 7 bankruptcy. The Chapter 7 petition was filed on June 25, 2015. A notice of deficient filing was issued the following day based on the attorney's failure to submit the client's income record. The case was subsequently dismissed for failure to comply.

- An attorney received a public reprimand without general publication for violations of Rules 1.1, 1.3, 1.4(a), 3.2 and 8.4(a) & (g) , Ala. R. Prof C., as previously ordered by the Disciplinary Commission. In January of 2013, the attorney represented a client in a Chapter 7 bankruptcy proceeding. After the filing of the petition, the court issued numerous notices advising the attorney that documents were missing or that the filed documents were deficient. Despite these notices, the attorney failed to take corrective action on behalf of the client. As a result, the client's bankruptcy petition was dismissed.

PRIDE

PRIDE

- An attorney was disbarred from the practice of law in the State of Alabama. The attorney was found guilty of violating Rules 3.3(a)(1), 8.4(a), 8.4(c) and 8.4(g), Ala. R. Prof. C. The attorney filed a personal Chapter 7 bankruptcy petition, and in the petition he falsely stated his county of residence in an effort to avoid venue in the jurisdiction in which he normally practices. The use of the false address was discovered by the court during a separate investigation into the filing of similar false bankruptcy petitions by the attorney's counsel. As a result, the court found that the attorney had committed a fraud upon the court and revoked and vacated his bankruptcy discharge.

An attorney was suspended from the practice of law in the State of Alabama by Order of the Disciplinary Commission of the Alabama State Bar for a period of one (1) year for violating Rules 8.4(c), (d), and (g), Ala. R. Prof. C. The attorney intentionally provided false information on a petition for bankruptcy to avoid venue in the jurisdiction in which the attorney normally practices. The attorney representing him was disbarred from the practice of law.

WRATH

During a hearing in a Chapter 11 Bankruptcy case, a lawyer informed the Court it was a few french fries short of a happy meal in understanding the matters involved.

- During a Chapter 7 Bankruptcy case, the lawyer for the debtor attacked the court as a complete stranger to the rules of evidence and informed the court the matter was a case study “in what occurs when a judge mindlessly sucks down material that is spoon fed to him in a proposed order and then regurgitates it into his own order.”

An attorney was disbarred after:

- Verbally abusing the clerk's office;
- Engaging in a physical confrontation with the U.S. Marshall's after refusing to remove his watch while going through security; and
- Questioning in open court whether the judge was a pedophile

- An Alabama attorney was suspended for ninety-one days for violating Rule 8.4(g). After his bankruptcy hearing, the respondent attorney left a series of telephone messages for the Bankruptcy Judge in which the respondent attorney demanded an apology for what he deemed were inappropriate comments by the Court during the hearing and then called the judge a crook. In another conversation with Judge Sawyer's secretary, the respondent attorney told the secretary to tell Judge Sawyer to call him back if he really had "any balls".

ENVY

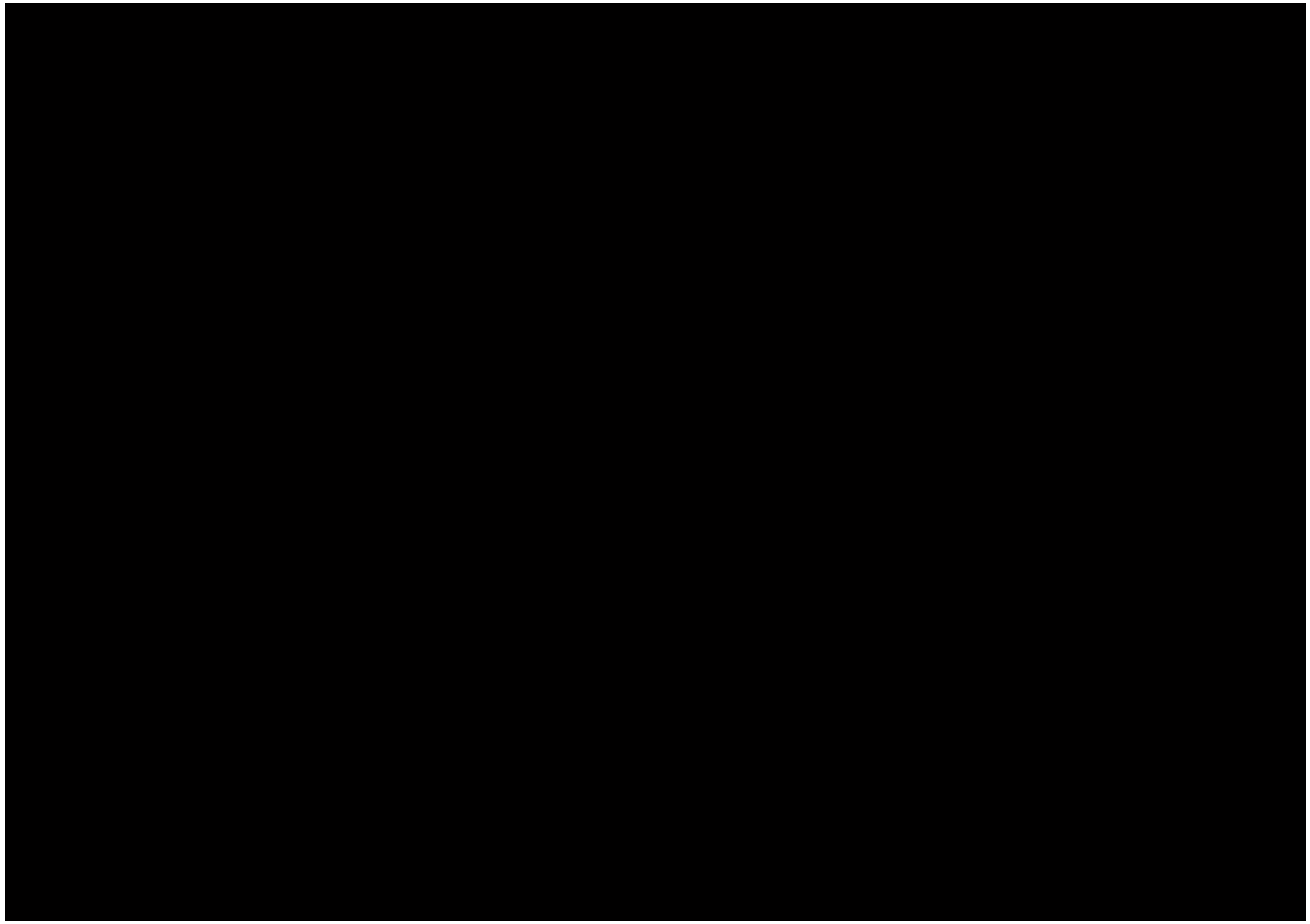
- An attorney received a public reprimand without general publication for violating Rules 4.2, 7.3(b) and 8.4(g), Ala. R. Prof. C. The attorney mailed improper bankruptcy solicitation letters to a competing bankruptcy attorney's clients, offering to represent the individuals and seek a "second chance at a successful bankruptcy", when in fact, the bankruptcy petitions had not been dismissed and the individuals were still being represented by counsel.

- An attorney received a private reprimand for violating Rules 7.1(a), 7.5(a), and 8.4(g), Ala. R. Prof. C. The attorney purchased two web domains using the names of two other bankruptcy attorneys in the area. Whenever a potential client clicked on links to these domains, the client would be directed to the respondent attorney's webpage, luring the clients away from the other two bankruptcy attorneys.

THE 8TH DEADLY SIN

BAD TASTE?


FICTIONALIZED REENACTMENT



THE COMPETITION

THE FOUR C'S OF BANKRUPTCY

Competency

Rule 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. A lawyer and client may agree, pursuant to Rule 1.2(c), to limit the scope of the representation with respect to a matter. In such circumstances, competence means the knowledge, skill, thoroughness, and preparation reasonably necessary for such limited representation.

Compensation

Rule 1.5.

Fees.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

CONFLICTS

RULE 1.9
CONFLICT OF INTEREST: FORMER CLIENT

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client consents after consultation; or

(b) Use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.

CANDOR

Rule 3.3.
Candor Toward the Tribunal.

(a) A lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a tribunal;

(2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; or

(3) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take
reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

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

Scenario #1

What are the ethical obligations of a debtor's attorney to file an adversary proceeding (for example, to discharge taxes or for a stay violation), if the debtor has not retained the attorney for this specific purpose and the contract states that attorney must be retained in order for him to represent the debtor in a separate adversary proceeding?

Applicable Rules

- Rule 1.2 [Scope of Representation]
- Rule 1.4 [Communication]
- Rule 1.5 [Fees]

- The lawyer should let the debtor know that the debtor may have a possible cause of action or may be able to get an otherwise non-dischargeable debt discharged (or whatever the circumstances), and either renegotiate the terms of the original agreement to include the additional services or refer the debtor to other counsel.

Scenario #2

Lawyer has represented husband and wife in a prior joint bankruptcy. Now they both want to file for bankruptcy again, however, they are now divorced. Can the lawyer ethically represent both of them in two separate cases?

Applicable Rules

- Rule 1.9 [Conflict of Interest: Former Client]

- Rule 1.6 [Confidentiality]

Scenario #3

Lawyer is told by a client at initial interview that he does not want to disclose a certain asset or a certain debt to the bankruptcy court. What is the lawyer's position? What should the lawyer do?

Applicable Rules

- Rule 1.2 [Scope of Representation]
- Rule 1.6 [Confidentiality]
- Rule 3.3 [Candor Toward the Tribunal]
- Rule 8.4 [Misconduct]

Scenario #4

Same scenario as above, but the debtor decides not to file with the original lawyer. The debtor files with a different lawyer, but does not disclose the asset to the new lawyer. What should the original lawyer do?

Applicable Rule

- Rule 1.6 [Confidentiality]

Scenario #5

After the bankruptcy filing, the lawyer discovers that the debtor failed to disclose assets to the bankruptcy court. What is the lawyer's position? What should the lawyer do?

Applicable Rules

- Rule 1.2 [Scope of Representation]
- Rule 1.6 [Confidentiality]
- Rule 1.6 [Declining or Terminating Represenation]
- Rule 3.3 [Candor Toward the Tribunal]
- Rule 8.4 [Misconduct]

Scenario #6

Debtor wins big at the casino. Then, before the debtor discloses the winnings to his bankruptcy attorney, he spends the money. Is the debtor's attorney bound by the duty of confidentiality from disclosing this information to the court? Is this true even if the debtor's attorney finds out about the windfall after the debtor has already spent the money?

Applicable Rules

- Rule 1.2 [Scope of Representation]
- Rule 1.6 [Confidentiality]
- Rule 1.6 [Declining or Terminating Represenation]
- Rule 3.3 [Candor Toward the Tribunal]
- Rule 8.4 [Misconduct]

Chapter 7

- If the case was filed under *Chapter 7* of the Bankruptcy Code, and the cause of action arose *after* the petition was filed (i.e., the cause of action arose post-petition), the lawyer may not have a duty to disclose. The cause of action would not be considered property of the estate.

Chapter 13

- Section 1306(a) defines “property of the estate” in chapter 13 cases expansively to also include “all property acquired by the debtor after the case commences and until it ends or is converted.”

- The Eleventh Circuit holds that post-petition acquired assets are property of the estate under § 1306(a). *In re Waldron*, 536 F.3d 1239 (11th Cir. 2008).

- Therefore, if the asset is either pre- or post-petition in a case filed under Chapter 13, or if it is a pre-petition asset in a Chapter 7 case, the lawyer has a duty to disclose the asset.

Scenario #7

Debtor had a bankruptcy case. Unknown to attorney, the debtor committed bankruptcy fraud and is now being prosecuted by the U.S. Attorney. The debtor comes to the attorney to tell him about the fraud and the prosecution. Is the attorney ethically obligated to represent the debtor when the trustee moves to reopen the case to collect restitution on behalf of the creditors?

Applicable Rules

- Rule 1.2 [Scope of Representation
- Rule 1.6 [Confidentiality]
- Rule 3.7 [Lawyer as Witness Rule]

Top Ethical Pitfalls in Bankruptcy

- Failure to Communicate – Rules 1.4(a) and (b)
- Failure to Provide Competent Representation – Rule 1.1
- Failure to Disclose Fraud by the Client –Rule 3.3
- Trust account Mismanagement – Rule 1.15
- Improper Notarization/Signature – Rule 8.4(c)
- Failure to diligently represent the client – Rule 1.3

Retention and Destruction of Client Files 2010-02

- Lawyer's should adopt a file retention policy and disclose such to clients at the outset of representation
- Generally, the file is the property of the client
- Segregate file from property of attorney and other clients
- Promptly produce to client upon request, except, if the attorney has a valid attorney's lien. (Ala. Code § 34-3-61 (1975))
- Providing contemporaneous copies during representation does not terminate lawyer's obligation to provide client full copy of file at the end of representation unless provided for in employment agreement

2010-02

- Initial copy must be provided at no charge
- Must retain client's file for a minimum of six years
- May store client files electronically
- May use a cloud server for storage
- Must reproduce file in the format requested by the client

2010-02

- Disciplinary Commission has adopted the entire file approach in determining what must be given to the client. Exceptions do exists, such as, client has a mental health disorder or where information in the file could endanger the safety and welfare of the client or others.

3 Categories of property

- Category 1 is intrinsically valuable property such as original wills and deeds. Such property may not be destroyed.
- Category 2 is valuable property of the client. Such property may be destroyed with the actual consent of the client or upon implied consent or within 60 days of a date established by the lawyer's file retention policy or as provided by notice to the client by the lawyer of the item's impending destruction. (Ex. Notifying client of such by written notice to client's last known address)
- Category 3 is property with no value. It may be destroyed after six years without notice to the client.
- Lawyer must maintain an index of all destroyed files and should identify the following: identity of client, nature or subject matter of the representation, date the file was opened and closed, court case number, general description of property destroyed, and the date of destruction.

Lawyer Assistance Program

- **Robert B. Thornhill, MS, LPC, MLAP**
  Director

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