

# Ethical Issues for “Frequent Filers” and a Guide to Best Practices

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What are the ethical issues that “frequent filers” encounter? Frequent filers is the term generally used in consumer bankruptcies to describe law firms that routinely represent a large number of debtors or creditors: In other words, the attorney has a volume practice. It is difficult to run a volume practice without good office practices. Several questions arise.

If you work in a volume practice, how do you make sure the clients receive the services for which they have paid? How do practitioners follow up when they have so much to do? What duties do volume firms and attorneys have to courts, trustees and opposing counsel. Finally, what can we do to improve all levels of practice of bankruptcy law?

I have been a chapter 13 trustee since July 1, 1992. With all of our technological advances, “I do so much more every day with my Blackberry® and the computer, but there is also so much more expected of me,” and I am sure the consumer bar feels the same way. I have always marveled at the fact that my good lawyers rarely let me down, and the “marginal” lawyers stay marginal no matter how much CLE they obtain.

A skilled consumer bankruptcy attorney possesses a unique set of skills that allow him or her to organize the multi-dimensional puzzle of the debtors’ financial lives and lead and guide clients to correct financial and legal decisions. Why do certain attorneys not follow the rules?

1. Are they overwhelmed in a chaotic office?
2. Do they lack organizational and management skills?
3. Are they challenged by computer technology?
4. Do they have such pride or hubris in what they do that the attorney cannot see the need to improve?
5. Is there a substance abuse or psychological problem?

<sup>1</sup> The author thanks Hon. Thomas Waldron (ret.) for a referral to [www.considerchapter13.org](http://www.considerchapter13.org), where he has written extensively on the subject of ethics. The author also thanks Claude R. Bowles, Jr. for asking me to write this article; my husband, Tom, for loaning his college instructor’s books on ethics; and Edwin W. Patterson III, the local Cincinnati Bar Association General Counsel.

## About the Author

Margaret Burks is a chapter 13 trustee in Cincinnati.

6. Is the attorney’s internal ethical compass set to a different point?

We all know of sad circumstances where counsel has a substance-abuse problem. This article will ponder the issues brought on by numbers 1-5. Number 6—moral compass—I will leave to other, more learned writers.

In just several weeks, I have encountered a number of situations in which law firms or attorneys have “dropped the ball.” Sadly, these circumstances happen every week and are likely not unique to my jurisdiction.

For example, some debtors faxed a letter to the chapter 13 office because they had been trying to reach their chapter 13 attorney for weeks. The debtor husband had been laid off and wanted

Ohio Rules of Professional Conduct 5.1, 5.2, and 5.3. Rule 5.1—Responsibilities of Partners, Managers and Supervisory Lawyers—provides that:

(c) A lawyer shall be responsible for another lawyer’s violation of the Ohio Rules of Professional Conduct if either of the following applies:

- (1) the lawyer orders or, with *knowledge* of the specific conduct, ratifies the conduct involved;
- (2) the lawyer is a *partner* or has comparable managerial authority in the *law firm* or government agency 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

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to know what to do with his severance package. He wanted to know if he could pay off his case.

In another instance, a creditor’s attorney in a volume “frequent filer” office gave her word that she would withdraw a motion for relief from stay when the debtor sent in the funds to the mortgage company. The funds were timely received, but counsel forgot to tell her staff, and the order granting relief from stay was uploaded and entered by the court.

A third situation arose when debtor’s counsel appeared at a § 341 meeting without any of the documents required by the Local Rules, even though it was a complicated real estate case. He said his staff forgot to request them from the client and neglected to put what he needed into his briefcase.

Were these attorneys violating any ethical rules by these problems? Let’s check state law.

All of these examples were governed by the Ohio Rules of Professional Conduct, which were crafted to follow the Model Rules with a few small exceptions. The above issues are governed by

avoided or mitigated but fails to take *reasonable* remedial action.

Rule 5.2—Responsibilities of a Subordinate Lawyer—provides that:

- (a) A lawyer is bound by the Ohio Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
- (b) A subordinate lawyer does not violate the Ohio Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of a question of professional duty.

Rule 5.3—Responsibilities Regarding Non-Lawyer Assistants—provides that: With respect to a non-lawyer employed by, retained by, or associated with a lawyer, all of the following apply:

- (a) a lawyer who individually or together with other lawyers possesses managerial authority in a law firm or government agency

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shall make reasonable efforts to ensure that the firm or government agency has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer;

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Ohio Rules of Professional Conduct if engaged in by a lawyer if either of the following applies:

- (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved;
- (2) the lawyer has managerial authority in the law firm or government agency in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

These rules are generally made applicable in bankruptcy cases by 11 U.S.C. §§ 526(c) and 707(b)(4)(c), as well as Fed. R. Bankr. P. 9011.

The Ohio Rules of Professional Conduct and the Model Rules clearly mandate that supervising attorneys know what is happening in their offices, and that subordinate attorneys be responsible for their own actions. In addition, volume or “frequent filer” firms routinely have large paralegal and clerical staffs that need to be supervised so that they do not cross the line and start practicing law. Even solo practices have multiple paralegals to assist the attorneys who regularly file chapter 13 and 7 cases. Most chapter 13 trustees have large clerical staffs as well.

Communication is an artform, and most office communication could use some improvement. For example, our office holds staff meetings to explain why I and my attorneys need certain

items a certain way. I have organized my office into teams. We communicate largely by e-mail so that the entire claims team, for instance, knows how claims should be reviewed. Teams meet at least monthly to review.

I am preparing for a large motions docket as I write this article. One creditor attorney has a motion for relief pending. His paralegal staff does most of the work, and he is rarely available for telephone calls. He routinely sends a “hired” attorney to court who does not have the required knowledge of the mortgage claim, or a junior staff attorney from his office appears who has not been able to reach the client and the hearing is continued. Does this rise to the level of a violation of 5.1 and 5.2 or 5.3? Perhaps so, if the violation is continual.

How should we, the bar in general, address these kinds of issues? For my part, I call the attorney and try to reason with counsel. My office also encourages education about how to structure volume practices to meet ethical standards. One of our frequent filers was asked by a judge to speak to our bar about the difficulties of a volume practice and what streamlining remedies he had instituted. As a nearly last resort, my office will request attorney fees for my increased workload from the attorney’s failure to take care of his cases. Finally and sadly, I have had to refer matters to our Cincinnati Bar Association ethics committee.<sup>2</sup>

We all need to exercise forward-ethical leadership. A good example is the National Association of Chapter 13 Trustees (NACTT) Mortgage Committee. The NACTT saw that there were issues with mortgage claims and information contained therein, then formed a committee with creditors to rectify how claims were filed and reviewed. The mortgage committee has worked hard to improve the process, but we still have a long way to go.

Things are slowly getting better. The NACTT committee has drafted model rules or “Best Practices” for handling mortgage claims. Some of these practices may become part of the Federal Rules of Bankruptcy Procedure. For instance, mortgage claims should include an arrearage statement that specifies the

<sup>2</sup> See Ohio Prof. Cond. Rule 8.3.

exact charges for the escrow account, late fees, principal and interest rates.<sup>3</sup>

The U.S. Trustee’s office has also taken a leadership role by recommending standards for review of mortgage claims and instituting litigation to curb practices of some mortgage companies, but let us go back to my original three points listed above. How can courts, trustees and the bar help attorneys function better? It takes one person at a time.

Again, we all need to exercise some forward-ethical leadership. My office holds small “classes” at no cost for new attorneys or attorneys in need of improvement. I call the attorney to address problems as they arise. My two staff attorneys try to assist counsel by educating them on local practices. We try to ascertain whether the attorney is (1) overwhelmed in a chaotic office, (2) lacks organizational and management skills or (3) has such pride or hubris in what they do that the attorney cannot see the need to improve.

The egregious cases are reported, but it is the smaller issues that plague us every day. A few of the egregious cases that came to light during research for this article show the serious nature of this problem.

In *In re Martin*,<sup>4</sup> the court concluded that “Mr. Bingley [debtor counsel] authorized a non-attorney to prepare this petition and supporting documents and to sign his, Mr. Bingley’s, name to them... The evidence reflects that the most fundamental and minimal of professional services required of an attorney to his client are lacking.”

In *In re Dean*,<sup>5</sup> the debtor’s attorney referred the client to another attorney to perfect a security interest for the debtor’s mother in his motor home. The debtors attempted to perfect the lien on their own and did not let counsel know. The court determined that counsel did not make “adequate inquiry” into the lien status prior to filing. The trustee was able to sell the motor home and objected to attorney fees. This case has a good discussion of § 707(b)(4)(C). Debtor’s counsel must exercise careful review so that the debtor’s schedules are accurate and complete.

<sup>3</sup> See [www.nactt.org](http://www.nactt.org) and [www.considerchapter13.org](http://www.considerchapter13.org) for the “Mortgage Best Practices” promulgated by this joint committee.

<sup>4</sup> See *Geibank Indus. Bank v. Martin (In re Martin)*, 97 B.R. 1013, 1019 (Bankr. N.D. Ga. 1989).

<sup>5</sup> See *In re Dean*, 401 B.R. 917 (Bankr. D. Idaho 2008).

In *Cleveland Metropolitan Bar Association v. Kaplan*,<sup>6</sup> counsel was sanctioned for his conduct in a bankruptcy case. The court wrote that “[i]n accordance with the master commissioner’s report, the board recommends that the court indefinitely suspend respondent’s license to practice law based upon its findings that respondent neglected client matters, failed to maintain a record documenting his receipt of a client’s fee, failed to comply with reasonable client requests for information, failed to keep a client reasonably informed about the status of the client’s legal matter, and failed to cooperate in a disciplinary proceeding.” The board found that the attorney “violated Prof. Cond. R. 1.3 (a lawyer shall comply as soon as practicable with reasonable requests for information from the client), and 1.15(a) (a lawyer shall maintain a record for each client on whose behalf funds are held).”

The mortgage debacle in which we currently find ourselves has generated its fair share of consumer ethics cases. Below are some examples.

In *In re Martinez*,<sup>7</sup> the court stated, in the context of a “mistaken” stipulation lifting the automatic stay, that “the court finds Cooper Castle and its law-

yer who appeared in this case failed to maintain their professional independence from Wells Fargo. In particular, this court finds that they each violated Rule 9011, as well as Rules 1.2, 1.4 and 1.16 of Nevada’s Rules of Professional Conduct. Wells Fargo, which also violated [Rule] 9011, produced evidence that demonstrated the lack of a coherent or consistent policy regarding correcting mistakes, and when pressed to reconcile their position with other similar situations, it concocted fabricated differences, thereby acting in bad faith.”<sup>8</sup>

In *In re Taylor*,<sup>9</sup> the judge wrote a thoughtful decision that began with an objection to claim and the creditor attorney’s inability to communicate with his mortgage client. All information about the mortgage was generated via NewTrak, an electronic information system. The judge concluded that “[a]t issue in these cases are the homes of poor and unfortunate debtors, more and more of whom are threatened with foreclosure due to the historic job loss and housing crisis in this country... The thoughtless mechanical employment of computer-driven models and communication to inexpensively traverse the path to foreclosure offends the integrity of our American bankruptcy system. It is

for those involved in the process to step back and assess how they can fulfill their professional obligations and responsibly reap the benefits of technology. Nothing less should be tolerated.”<sup>10</sup>

We all know attorneys who cannot organize their chaotic offices either because they lack the skills or supervising attorneys above them make it impossible to function. The attorneys who fall into category three (excessive pride) are often the most difficult because they never realize the error of their ways. To stay on top of these “frequent filers,” trustees such as myself must schedule conference calls and appear at confirmation hearings. The constant vigilance for professionalism and ethics is tiring.

We all know attorneys who have wonderful support staffs and who rarely—if ever—miss a deadline, lead their clients to the best decisions and seem to enjoy working with people. I commend and admire these attorneys, and fortunately, I work with quite a few attorneys of this caliber. After 18 years as a trustee, people sometimes ask me if I am bored. I laugh and say my job changes every day. I see new issues every day, and there is so much more to do every day. ■

<sup>6</sup> See *Cleveland Metropolitan Bar Association v. Kaplan*, 124 Ohio St. 3d 278, 280, 2010-Ohio-167, 921 N.E.2d 645 (2010).

<sup>7</sup> See *In re Martinez*, 393 B.R. 27, 42 (Bankr. D. Nev. 2008).

<sup>8</sup> See also *In re Schuessler*, 386 B.R. 458 (Bankr. S.D.N.Y. 2008).

<sup>9</sup> See *In re Taylor*, 407 B.R. 618, 651 (Bankr. E.D. Pa. 2009).

<sup>10</sup> See also Henry E. Hildebrand III, “HAMP and Your Chapter 13 Practice,” 12 *ABI Journal* (February 2010), for a great synopsis of what every debtor attorney should know about the Home Affordable Modification Program (HAMP), a federal program under which lenders have been considering mortgage loans for temporary payment reduction.

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