22-125

~~NO. 23-~~

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN P. FITZGERALD, III,
Acting U.S. Trustee for Region Four,
Appellee,

vs.

DARREN THOMAS DELAFIELD,
Appellant.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Darren Thomas Delafield
4311 Williamson Rd NW
Roanoke, VA 24012
(540) 366-8665
darren@delafieldlawfirm.com

I. QUESTIONS PRESENTED

1. In *Watts v. Indiana*, 338 U.S. 49 (1949), Supreme Court Justice Jackson writes "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." In this case, the bankruptcy court made a finding of bad faith and imposed a sanction on attorney Delafield for advising his clients to remain silent by asserting attorney-client privilege in response to a subpoena issued to his clients by the United States Trustee's (UST) office, a branch of the Department of Justice.

The first question is: Did the Bankruptcy Court abuse its discretion by sanctioning Delafield for bad faith for asserting attorney-client privilege for his clients, when the privilege belongs to the clients, the clients directed Delafield to assert the privilege, the file contained evidence potentially harmful to the clients, and the UST asserted the debtors had participated in a criminal scheme?

2. In *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1193 (9th Cir. 2003), *Adell v. John Richards Homes Bldg. Co., L.L.C.*, 552 F. App'x 401, 415 (6th Cir. 2013), and *PHH Mortg. Corp. v. Sensenich (In re Gravel)*, 6 F.4th 503 (2nd Cir. 2021), the Court of Appeals held that § 105(a) grants bankruptcy courts the authority to award mild non-compensatory punitive damages, it does not provide a basis for awarding serious non-compensatory punitive damages. In this case, the UST argued a sanction should be imposed on Delafield to vindicate the authority of the court. The bankruptcy court stated it imposed a sanction on Delafield so that

Delafield would feel the "pain." Pet. App. 138a. The sanction was not measured by actual monetary loss but was to redress the debtors for "inconvenience." Pet. App. 155a n85, 63a n11. The Fourth Circuit affirmed the bankruptcy court's imposition of a serious non-compensatory punitive sanction without applying this court's guidance set forth in *Int'l Union v. Bagwell*, 512 U.S. 821 (1994).

The second question presented is: Does a bankruptcy court have inherent authority to award a serious non-compensatory punitive sanction on an attorney which is not measured by actual monetary harm but for "inconvenience" to his clients?

3. In *Int'l Union v. Bagwell*, 512 U.S. 821 (1994), this Court ruled that sanctioned parties must be afforded the protections of criminal due process where sanctions are punitive, but not where they are compensatory. Here, the UST argued for sanctions to vindicate the authority of the court. The bankruptcy court stated "the pain is going to be felt at home" when local attorneys join "multi-jurisdictional law firms."

The third question presented is: If the second question is answered in the affirmative and a bankruptcy court is permitted to impose a serious non-compensatory punitive sanction, should an attorney be afforded the protections of criminal due process?

4. *In re Ruffalo*, 390 U.S. 544, 550 (1968) this Court held the charge must be known before the disciplinary proceeding commences. In this case, the Fourth Circuit approves of new allegations asserted

at trial and asserted after the close of evidence in the written closing argument of the UST because other allegations were detailed in a written complaint and because "Delafield was given the opportunity to respond" to the new allegations "through his direct testimony" at trial and post-trial "briefing." Pet. App. 11a.

The fourth question presented is: Must the charge be known before the disciplinary proceeding commences because due process requires the party subject to the sanctions proceedings be given notice in advance of the specific conduct which is alleged to be sanctionable?

5. In *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964), this Court held that an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law. In this case, the bankruptcy court cited New York case law when it expanded the application of the Virginia Rules of Professional Conduct. Pet. App. 131a. Furthermore, this Court has held that bad faith is personal to the offending attorney and inherent power does not permit a federal court to sanction other lawyers at the firm, or even the firm itself, on a *respondeat superior*-type theory. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991).

The fifth question presented is: Did the bankruptcy court abuse its discretion by sanctioning Delafield where the bankruptcy court applied the wrong standard, created a strict liability standard, and improperly created an ex post facto law?

II. LIST OF PARTIES

All parties to this matter are enumerated in the caption of this Petition for a Writ of Certiorari.

III. RULE 29.6 STATEMENT

Petitioner Darren Delafield is not incorporated.

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VI. PETITION FOR WRIT OF CERTIORARI

Introduction

Mr. Delafield respectfully petitions for a writ of certiorari to review the judgment of the Fourth Circuit. This case, involving a revocation of a license to practice law and a Five Thousand Dollar sanction award for "inconvenience" to his clients, creates a conflict of law with its sister circuit courts, and is irreconcilable with the holdings of this Court. Arising against the backdrop of the client's right to remain silent, attorney-client privilege, inherent authority, and the limited jurisdiction of the bankruptcy court, these questions are exceptionally important.

First, the Fourth Circuit in this case affirmed the bankruptcy court's sanction for bad faith when Delafield asserted attorney-client privilege on behalf of his clients when his clients directed him to assert the privilege, the file contained evidence potentially harmful to his clients, there was a colorable basis for asserting attorney-client privilege, and the UST asserted the debtors had participated in a criminal scheme. Pet. App. 150a n68.

Second, the Fourth Circuit held that the monetary sanction on Delafield was compensatory despite the fact that (1) the bankruptcy court said it was for "inconvenience" to the debtors, (2) the debtors were compensated by a co-defendant, (3) the sanction was fixed with no opportunity to cure, and (4) all references to deterrence in the opinion of the bankruptcy court were directed to co-defendants and not Mr. Delafield. Pet. App. 130a, 136a.

Third, the Fourth Circuit held that despite the absence of notice in advance, due process may be deemed sufficient so long as the attorney is given an

opportunity to respond in post-trial briefing. Pet. App. 11a.

The decision below illustrates the devastating consequences to sanctioned parties who do not receive the procedural protections that are designed to constrain a court's inherent powers. This Court should accept certiorari and reverse the holding of the bankruptcy court.

VII. Opinions Below

US Trustee v. Darren Thomas Delafield, No. 21-1632, Fourth Circuit Court of Appeals, Entered March 15, 2023

US Trustee vs. Darren Thomas Delafield, No. 21-1632, Fourth Circuit Court of Appeals, Entered January 11, 2023

Darren Delafield v. John P. Fitzgerald, III, No. 7:20-cv-714, United States District Court for the Western District of Virginia, Entered April 28, 2021

Judy Robbins v. Darren Delafield, Upright Law LLC, Law Solutions Chicago LLC, Jason Royce Allen, Kevin W. Chern, Edmund Scanlan, and Sperro LLC, No. 16-07024, United States Bankruptcy Court for the Western District of Virginia, Entered November 13, 2020

Jason Royce Allen et al. v. John P. Fitzgerald, III, No. 18-cv-00134, United States District Court for the

Western District of Virginia, Entered December 11, 2019

Judy Robbins v. Darren Delafield, Upright Law LLC, Law Solutions Chicago LLC, Jason Royce Allen, Kevin W. Chern, Edmund Scanlan, and Sperro LLC, No. 16-07024, United States Bankruptcy Court for the Western District of Virginia, Entered February 12, 2018

The decision by the Fourth Circuit Court of Appeals affirming the opinion of the Bankruptcy Court appears at App. 1a to the petition and is reported at 57 F.4th 414 (4th Cir. 2023). The decisions of the district court are not reported and are reprinted at App. 15a and 35a. The decisions of the bankruptcy court are not reported and are reprinted at App. 21a and 64a.

VIII. JURISDICTION

Mr. Delafield's petition for rehearing to the Fourth Circuit Court of Appeals was denied on March 15, 2023. Mr. Delafield invokes this court's jurisdiction under 28 U.S.C. § 1254(1), having timely filed this petition for a writ of certiorari within ninety days of the Fourth Circuit Court of Appeals denial. The court of appeals issued its decision on January 11, 2023, App. 119a, and denied rehearing on March 15, 2023, App. 132a.

IX. CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Article I, Section 9, Clause 3 of the U.S. Constitution which states, "No Bill of Attainder or ex post facto Law shall be passed." The First, Fifth, Sixth, Eighth and Fourteenth Amendments of the Unites States Constitution are reprinted in the appendix.

X. STATEMENT OF THE CASE

A. Jurisdiction in the court of first instance

The Bankruptcy Court had jurisdiction over the adversary proceeding under 28 U.S.C. § 1334(a) and (b), as a result of a referral by the United States District Court pursuant to 28 U.S.C. § 157(a). The Bankruptcy Court entered a Memorandum Opinion and a companion Order on February 12, 2018 [Bankruptcy Court Docket No. 231 and 232 case number 16-07024]. On February 26, 2018, Appellant timely filed a motion to alter or amend judgment, pursuant to Federal Rule of Civil Procedure 59(e) and Federal Rule of Bankruptcy Procedure 9023, which tolled the time to appeal. Federal Rule of Bankruptcy Procedure 8002(b)(1)(B). The Bankruptcy Court decided the Rule 59(e) motion on March 12, 2018 [Bankruptcy Docket No. 250], and Appellant timely filed a notice of appeal on March 26, 2018.

On appeal, the District Court for the Western District of Virginia (District Court) issued a Memorandum Opinion which was entered December 11, 2019 [District Court Docket No. 142 case number 7:18-cv-134], and the District Court entered a

companion Order affirming in part, remanding in part, and vacating in part on December 11, 2019 [District Court Docket No. 143]. The sanction against co-defendant Ed Scanlan was reversed for lack of evidence. The sanction against several co-defendants was remanded for lack of due process.

On remand, on November 13, 2020, the Bankruptcy Court entered a final order [Bankruptcy Docket No. 315] which amended its prior order and approved certain payment terms. Appellant timely filed a notice of appeal on November 25, 2020 [Bankruptcy Docket No. 317].

Delafield asserted the bankruptcy court abused its discretion by ignoring the colorable basis for asserting attorney-client privilege, and the attorney's duty to assert attorney-client privilege. Delafield further asserted the bankruptcy court exceeded its limited authority, violated due process, and violated the constitutional prohibition against *ex post facto* laws. The District Court again exercised jurisdiction under 28 U.S.C. § 158(a)(1). The District Court entered a final order in this action on April 28, 2021 [District Court Docket No. 17 case number 7:20-cv-714] which affirms the prior District Court Order, affirms the Bankruptcy Court Order, and dismisses the appeal from the Bankruptcy Court. Appellant timely filed a notice of appeal on May 26, 2021.

The Fourth Circuit exercised jurisdiction under 28 U.S.C. § 158(d) and it issued its decision on January 11, 2023, App. 132a, and denied rehearing on March 15, 2023, App. 134a.

B. Summary

Attorney Darren Delafield successfully assisted the debtors in their pursuit of a Chapter 7 Bankruptcy discharge. Attorney fees charged by the law firm were subsidized by a third party vendor pursuant to a program allegedly reviewed in detail by outside ethics counsel. Delafield was advised of the ethics review and Delafield then proceeded to file the debtors' bankruptcy petition. The (UST) asserted that the ethics review and other alleged due diligence was a fraud designed by Kevin Chern, the managing partner of the firm, to "create cover" for Kevin Chern's actions. The UST further asserted at trial that attorney-client privilege was asserted in bad faith in response to a subpoena issued to the debtors by the UST. The adversary proceeding was concluded with a final order which imposed a $5,000.00 monetary fine and a license revocation. The bankruptcy court stated as part of its reasoning for the sanction, "while an injury might be initiated elsewhere – there is a real possibility the pain is going to be felt at home" when local attorneys join "multi-jurisdictional law firms." Pet. App. 137a.

C. The filing of a bankruptcy petition

In 2013, Kevin Chern (Chern) began the process of creating Upright Law ("Upright"), a multi-jurisdictional law firm with a "remote onboard process for clients." In early 2014, Upright engaged Mary Robinson ("Robinson"), the former Administrator of the Illinois Attorney Registration and Disciplinary Commission, to evaluate whether the way Upright planned to deliver legal services was compliant with the applicable rules of

professional conduct. In furtherance of its national marketing and business plan, UpRight brings on local attorneys around the country as "partners," "local partners," or "limited partners." Pet. App. 74a. The partnership agreement outlines the allocation of certain rights and responsibilities between the Chicago Office and the local partner. Pet. App 78a. The Chicago Office handles administrative matters for the entire firm, such as customer service, fee collection, fielding creditor verification calls, marketing, advertising, and software hosting. Pet. App. 78a. The Chicago Office has onsite attorneys who supervise non attorney staff in Chicago. The limited partners, by contrast, are in charge of answering legal questions, validating the client's qualification to file bankruptcy, preparing and collecting documents, preparing and filing the bankruptcy petition and ensuring that all requirements necessary for the client to receive a discharge are met. Delafield was a limited partner of Upright Law and Delafield has upon occasion availed himself of an internal procedure to report to management alleged misconduct of non-attorney personnel in Chicago. Chern responded to reported alleged misconduct.

D. The Third Party Vendor

UpRight Law initiated the New Car Custody Program (the "NCCP") also known as the Sperro Program which was described by Chern as a program to facilitate the return of collateral to lenders through a towing and storage facility and have the cost of a bankruptcy subsidized. Pet. App. 85a. The UST demonstrated that the purpose of the NCCP

was to convert collateral under the color of law if lenders refused to pay the exorbitant fees. Chern was responsible for initiating and running the NCCP.

On June 18, 2015, Chern sent an artfully crafted email to UpRight's limited partners regarding the NCCP, (The June 18 Email). Chern claimed the NCCP benefited debtors, claimed the vehicles would be stored "until such time as the finance company picks up the vehicle," and claimed that "due diligence" had been performed.

Facts claimed by Chern in the June 18 Email do not match the evidence. Pet. App 85a. The June 18 Email states "Client contacts Sperro LLC," whereas the evidence was that the Chicago Office initiated the contact. The June 18 email describes Sperro LLC as "a towing and storage company," but there was no evidence that Sperro was a licensed carrier. Chern knew fees were inflated whereas the June 18 mail states "Sperro charges customary and reasonable fees." The Chicago Office waited five days before giving notice to the finance company, whereas the June 18 Email states "UpRight notifies the finance company by certified mail return receipt requested within a couple of days." The June 18 Email states "Kevin Chern reviewed the program in detail with Felicia Burda, our UST Counsel, Mary Robinson, or (sic) Professional Responsibility Counsel and David Leibowitz, General Counsel of UpRight Law and Head of Litigation." However, Chern falsely represented to Leibowitz, Robinson, and Burda that (1) the debtor initiated contact, (2) Sperro was a towing and storage company, (3) finance companies would be contacted within a

couple of days, and (4) that Sperro charges customary and reasonable fees.

Judge Black ultimately concluded that it was apparent to Chern from the beginning that the NCCP was not offering a legitimate service. Pet. App 66a, 94a. In contrast, Judge Black used the past tense when discussing Delafield's knowledge and Judge Black writes in the past tense "That it turned out to be a scam is laid equally at [Delafield's] feet. Pet App 52.

The Williamses participated in the NCCP and were placed into the program without ever having spoken to their local attorney, Darren Delafield. Pet. App 87a. The Williamses wanted their case filed as soon as possible due to a pending judgment and collection calls; and they wanted it filed no later than December, 2015 to avoid garnishment. The notes provided to Delafield from the Chicago Office described Sperro as a program to surrender the vehicle and states Mr. Williams is "surrendering his vehicle via Sperro program."

Delafield never spoke to Sperro regarding the surrender of the Williamses' vehicle. Delafield did not advise the Williamses to participate in the NCCP. However, Delafield learned of the Williamses' participation in the NCCP and Delafield worked with the Williamses to disclose their participation on the bankruptcy schedules.

A bankruptcy petition was prepared and executed with wet signatures. The wet signature version was then translated into an electronic signature version and the electronic signature version was filed on December 22, 2015. The intent

was for the electronic version to be a mirror image of the wet signature version, but there was confusion regarding the spelling of Mrs. Williams' name. The Bankruptcy Court writes "[Delafield] met with his clients, he witnessed their signatures on the petition and schedules, and he went over the petition and schedules with them and explained things as an attorney should." Pet. App 52a. Footnote 33 of the Memorandum Opinion states "Mrs. Williams' legal name is "Andrian," not "Adrian," which caused some confusion in the proper filing of her petition." Pet App 63a n33.

On February 11, 2016, Delafield filed an amended petition to correct the spelling of Mrs. Williams' first name. The Bankruptcy Court found that Delafield filed this amendment without obtaining a wet signature and obtaining the clients' permission, but Judge Black did not cite any trial evidence supporting his finding. Pet. App. 130a. The actual evidence is that the amended petition filed by Delafield, is a photographic scan with the Williamses' wet signatures, signed on February 6, 2016, not a translation with electronic signatures, and not a forgery. Furthermore Mr. Williams testified at trial that he recalled Delafield having to file an amended petition to correct Mrs. Williams' name.

The final version of the Williamses' schedules disclosed their participation in the NCCP. The Williamses' statement of financial affairs stated that "Sperro" paid the Williamses' legal fees. The statement of financial affairs also disclosed Sperro in response to other questions, and identified Upright

as the entity that received the Williamses' legal fees. The final version of the Rule 2016(b) Disclosure, prepared with Delafield's assistance, identified the source of compensation as "Sperro."

E. The request for sanctions

After the bankruptcy petition was filed, the UST requested sanctions pursuant to 11 U.S.C. §§ 105, 329, and 526; and it cited Federal Rule of Bankruptcy Procedure 2016 and 2017, and it cited Local Rule 2090-1 and 5005-4. The complaint did not cite 28 U.S.C. § 1746. The complaint did not cite the Virginia Rules of Professional Conduct. The complaint did not allege a forgery, did not allege the unauthorized practice of law, did not allege a failure "to make reasonable efforts" by Delafield to ensure that staff conduct was compatible with the professional obligations of Delafield, did not allege a conflict of interest between Delafield and the Williamses, and did not allege attorney-client privilege was asserted in bad faith.

On or about October 9, 2016, the UST and counsel for Delafield agreed the UST would issue subpoenas to the Williamses. On April 10 and 12, 2017, the UST served subpoenas on the Williamses in connection with the litigation against Appellant. Prior to the return dates on the subpoenas, Delafield sent the Williamses a letter advising, among other things, that: (i) UpRight had a potential conflict of interest, but it could potentially be waived; (ii) that the clients were encouraged to discuss the waiver of any conflict with another attorney, and (iii) UpRight could assist them in speaking to another attorney. Mr. Williams acknowledged that when Delafield

initially presented the conflict waiver, he explained the potential conflict of interest and the waiver to the Williamses multiple times. Mr. Williams further testified that he directed Delafield to "do what he [Delafield] thought was best," and "I told him I didn't care to have all the information turned over." Ultimately, on the due date of the subpoena, the Williamses signed the waiver of potential conflict letter.

On April 27, 2017, Delafield served responses and objections to the UST's subpoenas on behalf of his clients. Counsel for the UST emailed Delafield regarding the Williamses' responses. Delafield responded with a request for a Rule 37 meeting and informed the UST that Delafield had not yet reviewed a portion of the file. The UST filed motions to compel production of documents that had been withheld on the basis of privilege, detailing the alleged impropriety of the privilege assertions, but not seeking sanctions for any discovery misconduct.

On May 9, 2017, the Bankruptcy Court held a hearing on the UST's motions to compel. At that hearing, the UST advised the Bankruptcy Court, "In this particular case, Law Solutions advised the debtor to commit - to engage and participate in a scheme which Virginia Code Annotated would criminalize being the conversion of collateral." On behalf of his clients, Delafield opposed the motion to compel and offered to test the debtors' intent to assert attorney-client privilege by having the debtors sign an affidavit. The Bankruptcy Court rejected Delafield's proposal and ruled that the privilege had been waived at the 2004 exam and granted the

motions to compel. The UST never amended the complaint to include any allegations of wrongdoing related to the subpoenas and did not seek any relief on that basis. The UST also never filed any discovery motions seeking sanctions against Appellant related to the assistance he provided to the Debtors.

Delafield complied with the Subpoena and a copy of the client's file was turned over to the UST. The file contained documents potentially damaging to the debtors.

A revised pretrial order was entered. The order said, "Absent leave of the Court, any motion to join additional parties or motion to amend the pleadings must be filed on or before August 4, 2017." The deadline passed without any such amended pleadings.

In September 2017, the Bankruptcy Court tried the adversary proceeding over several days. Counsel for Appellant objected to evidence regarding the discovery dispute as being irrelevant. The UST argued the evidence should be admitted for the purpose of rebutting any claim of reformed behavior. On cross examination, when Counsel for Appellant attempted to elicit testimony regarding the issue, Judge Black ordered defense counsel to "speed this along".

After the close of evidence, the parties were permitted to file briefs with the court. The UST argued a sanction should be imposed to vindicate the authority of the bankruptcy court.

F. The Order of the Bankruptcy Court

On February 12, 2018, the Bankruptcy Court issued its Judgment in favor of the UST on Counts I,

II, III and VI of the Complaint. The court dismissed Counts IV and V. The Bankruptcy Court imposed the sanction for asserting attorney-client privilege in bad faith and because of the Court's dislike of the business model of UpRight Law, LLC. The court concluded the opinion by writing,

> Local attorneys joining multi-jurisdictional law firms as local or limited partners cannot be both tall and short. An attorney cannot claim to be a partner in the firm and file cases with the Court as lead counsel, but yet claim no responsibility for what happens in the main office on the files the attorney decides to take. Attorneys considering joining firms with this business model should understand that, in this Court, while an injury might be initiated elsewhere – there is a real possibility the pain is going to be felt at home. An appropriate Order shall issue.

Pet. App. 137a.

On November 13, 2020, the Bankruptcy Court entered its final order upon remand. The final order approved certain payment terms including the payment of $5,000.00 to the Williamses as part of the settlement with other co-defendants. The Bankruptcy Court refused to allow this $5,000.00 payment as a credit against the sanction imposed on Delafield.

The bankruptcy court punished Delafield as "the responsible attorney before this Court" and imposed a new strict liability standard. Pet. App. 131a. The bankruptcy court applied this new ethical standard and it cited as authority *In re Balco Equities, Ltd., Inc.*, 345 B.R. 87 (Bankr. S.D. N.Y. 2006) (discussing New York Rules of Professional Responsibility). Pet. App. 131a. Virginia, on the other hand, has adopted the Rules of Professional Conduct including Rule 5.1.

IX. REASONS FOR GRANTING THE WRIT

A. The Right to Remain Silent

To avoid erroneous deprivations of the right to counsel and the right to remain silent, this Court should clarify an attorney's duty to assert attorney-client privilege on behalf of a client, clarify the privilege belongs to the client, affirm the wisdom of instructing a client to remain silent, and prohibit allegations of bad faith for advising a client to remain silent.

The Fifth Amendment states that "[n]o person...shall be compelled in any criminal case to be a witness against himself." The right to silence is among the rights that police must recite prior to a custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436 (1966). This court likewise protected the right to remain silent and held the defendant has sole discretion over whether to testify at trial, and prosecutors may not comment if the defendant decides not to do so. *Griffin v. California*, 380 U.S. 609 (1965); Harris v. New York, 401 U.S. 222 (1971). The UST is now attempting to erode the right to

remain silent by threatening an attorney with sanctions for bad faith when the attorney has advised his client to remain silent. This conflicts with *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) where this Court struck down Nevada's judicially imposed limits on attorney speech.

Seventy-four years ago, Justice Jackson wrote "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." *Watts v. Indiana*, 338 U.S. 49 (1949). This is true in part because the truly innocent person is on the continuum of those whose rights need protecting. *Seton Hall Law Review, The Privilege Against Self-Incrimination in Bankruptcy and the Plight of the Debtor*, 44 Seton Hall L.R. 47 (2014). This court has recognized that truthful responses of an innocent witness, as well as those of a wrongdoer, may provide the government with incriminating evidence from the speaker's own mouth. *Ohio v. Reiner*, 532 U.S. 17 (2001) (citing *Grunewald v. United States*, 353 U. S. 391, 421 (1957)). This court has further stated that it is universally accepted that the attorney-client privilege may be raised by the attorney. *Fisher v. United States*, 425 U.S. 391, (1976). These are important holdings because debtors filing bankruptcy and other members of the public must have confidence that if they speak with an attorney in confidence, their fundamental rights will be honored by their attorney and by the courts.

The "attorney-client privilege" belongs to the client and any adverse inference resulting from asserting that privilege is a violation of public policy.

The bankruptcy court and the Fourth Circuit declined to consider and contend with the fact that the debtors choose to assert attorney-client privilege and Delafield was duty bound to assert that privilege on their behalf. Likewise, the trial court did not contend with the fact that there was a colorable basis for asserting attorney-client privilege. Pet. App. 150a n68. Lastly, the trial court did not contend with the fact that Delafield stated he needed more time before advising his clients to waive attorney-client privilege. Federal Rule of Evidence 502 covers the intentional waiver of attorney-client privilege and it incorporates an element of "fairness" because of the potential scope of any subject matter waived. If an attorney is going to advise a client to intentionally waive the privilege, the client has the right to expect the attorney to provide assistance with making a fully informed decision.

The Fourth Circuit opinion puts the attorney in the unenviable position of either (1) advising the client to make an uninformed decision or (2) face sanctions for asserting attorney-client privilege in bad faith. Even the potential for a bad faith finding casts an ominous shadow over the right to remain silent, the right to legal counsel, and attorney-client privilege. That looming threat of sanctions, affirmed by the Fourth Circuit, is more troubling when the attorney knows audio recordings of the clients exist and the attorney has not yet reviewed those recordings. The attorney must nevertheless guess, at that moment, if there is an obligation to assert the privilege, and risk whether the assertion will be found sanctionable.

Here, the Court of Appeals accepted the trial court's findings that another attorney with the law firm lobbied the debtors to sign a waiver of a potential conflict of interest so that the law firm could assert attorney-client privilege in response to a subpoena. Pet. App. 6a, 48a, 99a, 145a n42. The bankruptcy court was silent regarding the fact that the debtor instructed Delafield to do what Delafield thought was best, was silent regarding the debtor's testimony he did not wish to turn over the file to the UST, and was silent regarding the colorable basis for asserting attorney-client privilege. Pet. App. 150a n68. Conduct 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 whose conduct is at issue. *Schlaifer Nance & Company Inc v. The Estate of Andy Warhol*, 194 F. 3d 323 (2d Cir. 1999). It should be noted that the bankruptcy court never found the debtors desired to waive attorney-client privilege. Even worse, the bankruptcy court falsely states that, "There is no assertion by the UST that [the debtors] did anything wrong, and there never has been" when in fact the UST had previously stated to the bankruptcy court on May 9, 2017 that the debtors participated in a criminal scheme. The bankruptcy court likewise cited the Virginia criminal code in footnote 68. Pet. App. 150a n68. Lastly the Court of Appeals permitted this new allegation of bad faith after the trial had commenced. The Fourth Circuit reasoned that even if Delafield was not given advance notice of a new allegation of bad faith, Delafield was not entitled to relief because Delafield

knew he was facing a sanction on other grounds. Pet. App. 9a-10a.

The decision by the Court of Appeals is plainly incorrect, as it contradicts the bright-line holding of *Ruffalo*. Absent intervention by this Court, the Fourth Circuit Court of Appeals' published decision will work to undermine the carefully-crafted procedural safeguards that this Court has spent the past 100 years developing. The charge must be known before the proceeding commences.

Likewise, absent intervention, the bankruptcy court's decision to sanction Delafield for asserting his client's privilege will undermine the right to remain silent which this Court has spent the past 200 years developing. The attorney-client privilege exists for the benefit of the client, only, and an entirely new conflict of interest will arise if attorneys may be subject to an adverse inference because they advise their clients to assert it.

Moreover, there can be no dispute that the presented questions are important. The issue of sanctions arises frequently, and the personal and professional ramifications of sanctions not only influence the conduct of litigation, but also can haunt an attorney forever. As petitioner's case illustrates, inherent power sanctions can end legal careers. This Court's review is warranted to ensure that such severe penalties are applied evenhandedly across the nation, and that Congress's objectives in enacting § 105 of the Bankruptcy Code are fulfilled.

B. The Fourth Circuit's Decision Authorizing a Sanction for Inconvenience Rather Than Actual Monetary Loss Cannot Be Reconciled

with This Court's Precedent and the Opinions of Other Circuit Courts.

The authority of federal courts to impose sanctions pursuant to their inherent powers is circumscribed by procedural protections for parties threatened with sanctions. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991). Because the court's inherent power is so potent, it must be exercised "with restraint and discretion." *Id.* at 44. Likewise, a court must be cautious in exerting its inherent power to levy sanctions and "must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees." *Id.*

The Fourth Circuit's decision stands in irreconcilable conflict with *Goodyear Tire v. Haeger*, and its progeny, and *Int'l Union v. Bagwell*, 512 U.S. 821, 836-39 (1994). Under *Bagwell*, a sanctions award may be either "civil" or "criminal." A "civil" sanction must either offer the sanctioned party "an opportunity to purge" or be "compensatory." *Id.* at 829. A punitive award, which is intended to "vindicate the authority of the court," requires that the sanctioned party be afforded due process protections of the criminal process, *Id.* at 828.

The Court of Appeals rejected Delafield's argument that the sanction in this case was criminal. Pet. App. 12a n6. It is undisputed that Delafield was not afforded criminal due process protections. There was no notice in advance, nor a presumption of innocence, nor a requirement of proof beyond a reasonable doubt.

This Court found the fines in *Bagwell* were criminal because the sanctionable conduct did not occur in the court's presence or otherwise implicate the court's ability to maintain order and noted the fines were not coercive day fines, or even suspended fines, but were more closely analogous to fixed, determinate, retrospective criminal fines with no opportunity to purge. In this case, the Fourth Circuit affirmed a fixed, determinate, retrospective Five Thousand Dollar ($5,000.00) sanction imposed under the inherent powers of the bankruptcy court. The Fourth Circuit held that it was not persuaded the sanction was criminal even though (1) the conduct did not occur in the court's presence, (2) the conduct did not implicate the court's ability to maintain order, (3) the sanction was for "inconvenience" to the debtors, Pet. App. 155a n85, 63a n11, (4) the sanction was fixed and could not be avoided, (5) the sanction was substantial, (6) the sanction was to vindicate the authority of the court, and (7) the debtors were compensated for their inconvenience by a co-defendant when the bankruptcy court approved a settlement with a co-defendant without giving credit to Delafield who was originally ordered to tender the $5,000.00 to the debtors. Pet. App. 29a, 12a n6.

The Court of Appeals was largely silent regarding the punitive nature of the sanction. The Court of Appeals disregarded the well established principle that a sanction can be deemed compensatory only if it compensates the injured party for losses sustained. In this case the sanction was for "inconvenience", not "losses sustained." Pet. App. 155a n85, 63a n11. The Court of Appeals did

not consider and contend with the fact that the sanction was not compensatory following the payment of $5,000.00 to the debtors by a co-defendant. Pet. App. 29a, 12a n6. It did not contend with the fact that there was no opportunity to purge. It did not contend with the fact the UST argued the sanction was for the purpose of vindicating the authority of the court. It did not contend with the fact that all references to deterrence were directed at co-defendants and not to Delafield. Pet. App. 130a, 136a. The Court of Appeals ignores controlling United States Supreme Court case law, including *Goodyear*, *Bagwell*, and *NASCO*.

The bankruptcy court and the Fourth Circuit declined to require a causal connection between the sanctioned conduct and the monetary sanction imposed. The Fourth Circuit did so despite this Court's holding that a finding of direct causation is essential to sustain an award of compensatory sanctions under a court's inherent authority. There is no assertion the sanction was measured by monetary harm to the debtors. Furthermore, the bankruptcy court lacks inherent or statutory authority to impose serious non-compensatory sanctions, yet the $5,000.00 sanction against Delafield is a serious non-compensatory sanction. The allegations against Delafield were prosecuted by the U.S. Trustee, an official of the Department of Justice and appointed by the Attorney General. The UST asserted criminal theories at trial and cited criminal code sections. The scope of inherent authority sanctions has increasingly become an issue

of great concern, gravity, and importance to the public.

The Fourth Circuit in this case declined to limit the authority of the bankruptcy court to impose a sanction under its inherent authority and under § 105(a) of the Bankruptcy Code. The trial court found that it could impose a monetary sanction for "inconvenience." Pet. App. 155a n85, 63a n11. On remand, the punitive status of the sanction against Delafield was made more clear. It can no longer be characterized as a compensatory civil sanction, because on remand $5,000.00 was paid to the debtors as part of the settlement with other co-defendants. Pet. App. 29a, 12a n6. The Bankruptcy Court refused to allow this payment as a credit against the punitive sanction imposed on Delafield. The debtors have been compensated. The sanction is a criminal sanction. There is no opportunity to purge. *In re Markus*, 619 B.R. 552 (Bankr. S.D.N.Y. 2020). Its purpose is to vindicate the authority of the court. The payment is substantial. *Mackler Productions v. Cohen*, 225 F.3d 136, 142 (2d Cir. 2000) (holding $2,000 contempt sanction to require criminal procedure protections).

This Court has held on multiple occasions that a sanction crosses into the sphere of a criminal sanction when it exceeds that which is necessary to cure the alleged misconduct. *See Int'l Union v. Bagwell*, 512 U.S. 821 (1994) (discussing contempt orders); *Goodyear Tire & Rubber Co. v. Haeger*, 581 US 101 (2017) (applying the same approach to excessive fee awards). This Court has explained that sanctions that punish conduct rather than coerce

compliance are, by definition, criminal. *See Bagwell*, 512 U.S. at 829; *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994) (stating that punitive awards raise the "acute danger of arbitrary deprivation of property"). To "level that kind of separate penalty, a court must provide procedural guarantees applicable in criminal cases, such as a 'beyond a reasonable doubt' standard of proof." *Goodyear Tire & Rubber Co. v. Haeger*, 581 US 101 (2017).

Likewise, the opinion of the Fourth Circuit cannot be reconciled with the opinions of its sister courts. Civil penalties imposed by a bankruptcy court "must either be compensatory or designed to coerce compliance." *Gowdy v. Mitchell (In re Ocean Warrior, Inc.)*, 835 F.3d 1310, 1317 (11th Cir. 2016). Bankruptcy courts lack the inherent or statutory authority to impose serious non-compensatory sanctions. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1193 (9th Cir. 2003); *Jove Engineering, Inc. v. I.R.S.*, 92 F.3d 1539 (11th Cir. 1996) (quoting *Bagwell*); *Adell v. John Richards Homes Bldg. Co., L.L.C.*, 552 F. App'x 401, 415 (6th Cir. 2013) ("§ 105(a) is prospective rather than retrospective; as such, that provision is best read not to encompass a power to award criminal-like punitive sanctions. Therefore, while § 105(a) grants bankruptcy courts the authority to award mild noncompensatory punitive damages, it does not provide a basis for awarding serious noncompensatory punitive damages.").

The Fourth Circuit's decision warrants this Court's review because it is flatly inconsistent with this Court's prior decisions and a stark departure

from "the accepted and usual course of judicial proceedings." Over 100 years ago, this Court held in *Selling v. Radford*, 243 U.S. 46 (1917) that an attorney facing disbarment had a right to notice and opportunity to be heard. More recently, this Court held in *In re Ruffalo*, 390 U.S. 544 (1968), that "[t]he charge must be known before the proceedings commence" and "[The] absence of . . . the precise nature of the charges deprived petitioner of procedural due process." In this case, the published opinion of the Court of Appeals permits a new allegation regarding a discovery dispute after the proceeding had commenced, and it permits a new allegation of forgery after the close of evidence. Pet. App. 10a.

C. The Fourth Circuit's Decision Conflicts with the Authority of this Court and Other Circuits Regarding the Limited Jurisdiction of the Bankruptcy Court.

Fifty-five years ago, this Court stated, "For '(w)here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.'" *Board of Regents v. Roth* 408 U.S. 564 (1972) (quoting *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951); *United States v. Lovett*, 328 U.S. 303 (1946); *Peters v. Hobby*, 349 U.S. 331 (1955); *See also, Willner v. Comm. On Character & Fitness*, 373 U.S. 96, 103 (1963).

In *Greene v. Elroy*, 360 U.S. 474 (1959), this Court held "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." In this case, the allegation of forgery appears for the first time in the written closing argument of the UST without any opportunity for Delafield to prove it was untrue and after the close of evidence. Pet. App. 9a-10a. Likewise, the allegation that attorney-client privilege was asserted in bad faith appears for the first time in the written closing argument, although at trial the UST stated evidence regarding the discovery dispute was for rebuttal purposes. Pet. App. 10a. The Fourth Circuit admits twice that the UST introduced other evidence in addition to evidence regarding the NCCP. Pet. App 5a-6a.

Other Circuit Courts of Appeal have held the conduct, alleged to be sanctionable, must be disclosed in advance. *Fellheimer, Eichen & Braverman, P.C. v. Charter Technologies, Inc.*, 57 F.3d 1215, 1225 (3rd Cir. 1995). It is not enough that [plaintiffs' counsel] was notified that the movants generally sought sanctions; he must be specifically apprised of the reasons he could be sanctioned. *Cf. Johnson v. Cherry*, 422 F.3d 540, 553 (7th Cir. 2005). Due process generally requires the party subject to the sanctions proceedings be given prior notice of the specific conduct which is alleged to be sanctionable.

Nuwesra v. Merrill Lynch, Fenner & Smith, Inc., 174 F.3d 87, 92 (2d Cir. 1999); *In re Deville*, 280 B.R. 483, 497 (9th Cir. BAP 2002), aff'd, 361 F.3d 539 (9th Cir.2004).

The bankruptcy court and the Fourth Circuit permitted new allegations which were not alleged in the original complaint. The complaint did not allege attorney-client privilege was asserted in bad faith, did not allege Delafield forged a signature, did not allege the unauthorized practice of law, did not allege a failure "to make reasonable efforts" by Delafield to ensure that staff conduct was compatible with the professional obligations of Delafield. The UST does not dispute these allegations are missing from the complaint, nor that the complaint was never amended. Pet. App 134-135. Likewise, the UST does not dispute that there was a pre-trial order which set a deadline to amend the complaint. These new allegations cannot be inferred from the complaint, are unrelated to the NCCP, and were not raised at trial. For example, the allegation of forgery appears for the first time in the written closing argument of the UST. The allegation Delafield was less than forthcoming at a creditors' meeting appears for the first time in the memorandum opinion of the bankruptcy court.

This Court's review is also warranted because the question of limited jurisdiction is of supreme importance to the members of the legal profession and to the administration of justice. It is uncontested that bankruptcy courts lack jurisdiction to enter criminal sanctions. Furthermore, an appellate court has a special obligation to satisfy itself not only of its

own jurisdiction, but also that of the lower court's in a cause under review. *Brickwood Contrs. v. Datanet Engineering*, 369 F.3d 385 (4th Cir. 2004). The umbrella of abuse of discretion includes actions by a bankruptcy court which ignore constitutional constraints. Bankruptcy courts are not courts of general jurisdiction; they have only the power that is authorized by the Constitution and the statutes enacted by Congress.

D. The Fourth Circuit's Decision Authorizing a Sanction For The Conduct of Another Attorney Not Directly Supervised by Delafield Cannot Be Reconciled With This Court's Precedent And The Opinions Of the Eleventh Circuit Court of Appeal.

The bankruptcy court punished Delafield as "the responsible attorney before this Court" and imposed a new strict liability standard. Pet. App. 131a. The bankruptcy court applied this new ethical standard and it cited as authority *In re Balco Equities, Ltd., Inc.*, 345 B.R. 87 (Bankr. S.D. N.Y. 2006) (discussing New York Rules of Professional Responsibility). Pet. App. 131a. Virginia, on the other hand, has adopted the Rules of Professional Conduct including Rule 5.1. The reliance on *In re Balco Equities, Ltd., Inc.* as authority is misplaced. The bankruptcy court has thus created a new standard, borrowed from a foreign jurisdiction, and applied it to the case before it in violation of the prohibition against *ex post facto* laws. Unlike the Virginia Rule, the New York Disciplinary Rule specifically refers to the liability of the firm as a whole and according to *Balco* creates liability for

"misconduct that occurs in the lawyer's office." Pet. App. 160a.

When a federal court construes a statute, it "explain[s] its understanding of what the statute has meant continuously since the date when it became law" (*Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994)). Consequently, "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto law*" (*Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964)). Article I, Section 9 of the U.S. Constitution explicitly prohibits passing *ex post facto* criminal laws.

The prohibition against judicial *ex post facto* decision-making also stems from the guarantee of due process. This Court has thus firmly held that "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997).

The new standard is also contrary to other courts of appeal. The inherent power does not permit a federal court to sanction other lawyers at the firm, or even the firm itself, on a *respondeat superior*-type theory. *JTR Enterprises, LLC v. Columbian Emeralds*, 697 F. App'x 976, 987 (11th Cir. 2017) (There is no doubt that there were red flags of fraud and that, with the benefit of hindsight, certain of them were conspicuous; however, the district court did not abuse its discretion because bad faith must be proven by clear and convincing evidence and partnership at the law firm was insufficient basis to

award sanctions); *Wolters Kluwer Fin. Services, Inc. v. Scivantage*, 564 F.3d 110, 114 (2d Cir. 2009) (lawyer's bad faith could not be "visited" upon his employer law firm); THE FEDERAL LAW OF LITIGATION ABUSE §27 (4th ed. 2012) ("Bad faith is personal to the offender. One person's bad faith may not be attributed to another by operation of legal fictions or doctrines such as *respondeat superior* or vicarious liability"). Contrary to this authority, the bankruptcy court writes, "Attorneys considering joining firms with this business model should understand that, in this Court, while an injury might be initiated elsewhere – there is a real possibility the pain is going to be felt at home." Pet. App. 137a. The Fourth Circuit states, "The bankruptcy court sanctioned Delafield for his relationship to UpRight's NCCP and its client onboarding practices." Pet. App. 6a. The Fourth Circuit thus affirms this vicarious liability and creates an irreconcilable conflict with the 11th, 3rd, and 2nd Circuit Courts.

In affirming sanctions against Delafield, the Fourth Circuit rejected the prevailing rule that inherent authority sanctions must be based on subjective bad faith of the individual party, rather than premised on the conduct of others. It also stands inconsistent with the wealth of cases that insist upon individualized findings of bad faith to support inherent authority sanctions. *See, e.g., CTC Imports & Exports v. Nigerian Petroleum Corp.*, 951 F.2d 573, 578 (3d Cir. 1991) ("Where, however, the court sanctions more than one party, it must make particularized findings and conclusions as to each

party's liability considering his or her unique circumstances.").

Likewise, the Fourth Circuit affirmed a sanction against Delafield for the actions of another attorney, David Menditto. Pet. App. 6a, 48a, 99a, 145a n42. ("Trustee introduced evidence that UpRight, through another of its attorneys, 'used heavy handed tactics, including text messages, to try and get the Williamses to sign conflict waivers.' "). The court of appeals obviated the need for an individualized finding that a party acted in bad faith.

E. The Issues Presented Are Important, and This Case Presents a Good Vehicle for Resolving Them.

This case presents an ideal vehicle for addressing several important issues. The bankruptcy court discovered its own exception to the rule that civil sanctions must compensate for "losses sustained" and expanded compensation to include "stress, anxiety, and inconvenience." Pet. App. 155a n85, 63a n11. This unwise expansion contradicts Supreme Court precedent and the law in other Circuits.

Judges and litigants are entitled to a clear answer on what restraint or standard (if any) controls a bankruptcy court's imposition of sanctions under its inherent powers. An actual "losses sustained" requirement protects litigants from judicial overreach and ensures that litigants receive appropriate procedural due process when facing criminal penalties with far- reaching professional and financial consequences. The bankruptcy court's opinion conflicts irreconcilably with *Goodyear* and

Bagwell and the authority of other Circuits on this point. This Court should intervene to remedy this conflict and establish clear standards to guide courts' discretion in imposing sanctions. If the bankruptcy court can impose a $5,000 sanction for something as trivial as inconvenience, there is no genuine restraint on its inherent power.

Similarly, there is no way to reconcile this Court's holding in *Ruffalo* with the Fourth Circuit's decision. *Ruffalo* holds the charge must be known before the disciplinary proceeding commences but the Fourth Circuit's decision allows for new charges after the trial has commenced so long as the attorney is permitted give "direct testimony" and participate in post-trial "briefing" after the close of evidence. Pet. App. 11a. The decision also creates a conflict with the holdings of the Second, Third, Seventh, Ninth, and Tenth Circuit Courts of Appeal which have held there must be notice in advance. *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078 (2nd Cir. 1987); *Ted Lapidus, S.A. v. Vann*, 112 F.3d 91 (2nd Cir. 1997); *Fellheimer, Eichen & Braverman, P.C. v. Charter Technologies, Inc.* 57 F.3d 1215 (3rd Cir. 1995); *Johnson v. Cherry*, 422 F.3d 540 (7th Cir. 2005); *In re Los Angeles County Pioneer Society*, 217 F.2d 190 (9th Cir. 1954); *In re Deville*, 280 B.R. 483, 497 (9th Cir. BAP 2002), aff'd, 361 F.3d 539 (9th Cir. 2004); *Hutchinson v. Pfeil*, 208 F.3d 1180 (10th Cir. 2000).

X. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant this petition for a writ of certiorari. In the alternative, the Court should summarily reverse the court of appeals' decision for failing to follow *Goodyear, Bagwell* and *Ruffalo*.

Respectfully submitted,

Dated: May ____, 2023 /s/ Darren Delafield

Darren Delafield (VSB No.: 35981)
4311 Williamson Rd. NW
Roanoke, VA 24012-2820
(540) 366-8665 fax (540) 366-8663
Darren@delafieldlawfirm.com
Pro se