

## **BANKRUPTCY ETHICS**

*Lou Jones Breakfast Club – November 8, 2011*

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### **I. AMERICAN BAR ASSOCIATION (ABA) MODEL RULES OF PROFESSIONAL CONDUCT**

- A. These are rules promulgated to resolve ethical problems.
  - 1. Designed to provide guidance to lawyers and a structure for regulating conduct through disciplinary proceedings.
  - 2. Maintain the integrity of the profession.
- B. Rules are not themselves binding. Most states have adopted the ABA Model Rules in whole or in part.
- C. Wisconsin has substantially adopted the ABA Model Rules in Supreme Court Rule (SCR) Chapters 20A and 20B.
  - 1. “Wisconsin Committee Comments” appear where there is a point of difference between a Model Rule and a Supreme Court Rule.
  - 2. “Wisconsin Comments” are added by the Wisconsin Supreme Court where the court considered additional comment appropriate.
- D. Not designed to provide a basis for civil liability.
  - a. Even so, courts frequently look to the Model Rules for guidance in their opinions and fashioning appropriate remedies.
  - b. *In re Pagaduan*, 429 B.R. 752, 766-767 (Bankr. D. Nev. 2010).
- E. Resources
  - 1. ABA Model Rules and Wisconsin Supreme Court Rules can be found on the ABA ([americanbar.org](http://americanbar.org)) and the State Bar of Wisconsin ([wisbar.org](http://wisbar.org)) websites, respectively.
  - 2. Wisconsin State Bar Ethics Hotline
    - a. Available to State Bar Members to informally and confidentially discuss an ethics question with ethics counsel.

- i. (608) 250-6168 or (800) 444-9404 x 6168
  3. Request a Professional Ethics Committee opinion about prospective behavior only (i.e., opinion requests must not relate to past or present conduct of a specific member of the Bar).
    - a. Send letter detailing your concern to the State Bar of Wisconsin, P.O. Box 7158, Madison, Wisconsin 53707.

#### F. Consequences of Violating Ethical Rules

1. Reflect adversely on the lawyer's reputation, honesty or fitness as a lawyer.
2. Private or public reprimand, payment of restitution/cost of proceedings, temporary suspension from the practice of law or permanent disbarment.
3. In Wisconsin, we have the Office of Lawyer Regulation (OLR), which is an agency of the Wisconsin Supreme Court. It receives lawyer misconduct complaints, conducts investigations and prosecutes violations of ethical rules.
  - a. If OLR finds clear and convincing evidence that an attorney has violated a rule, it has authority to seek sanctions against the attorney.

## II. SPECIFIC RULES

### A. Responsibilities Regarding Nonlawyer Assistants – Rule 5.3

1. A lawyer with managerial or supervisory authority in a law firm must make reasonable efforts to ensure that the firm has measures in effect giving reasonable assurance that a nonlawyer assistant's conduct is compatible with the professional obligations of the lawyer.
  - a. Means that a lawyer must give paralegals, secretaries and law clerks instructions about the ethical aspects of the law practice.
  - b. Further, this rule requires that lawyers with managerial authority make a reasonable effort to establish internal policies designed to make sure that all assistants comply with the Model Rules.

2. A lawyer is responsible for a non-lawyer assistant's conduct that would be a Rules violation if:
  - a. The lawyer orders, or with knowledge of the conduct, ratifies the conduct at issue; or
  - b. The lawyer with managerial or supervisory authority knows of the conduct at a time when its consequences could be avoided or mitigated, but fails to take remedial action.
3. Unauthorized practice of law by support staff. *See In re Nguyen*, 447 B.R. 268 (9<sup>th</sup> Cir. BAP 2011).
  - a. Bankruptcy practice includes a lot of routine matters, so having a large non-lawyer staff is common. At what point do staff's duties become the practice of law?

#### B. Meritorious Claims and Contentions - Rule 3.1

1. "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established."
  - a. The comments to this rule state: "What is required of lawyers . . . is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions."
2. In bankruptcy practice, we also have FRBP 9011 – Representations to the Court.
  - a. FRBP 9011 provides that an attorney or unrepresented person who is presenting a document to the court, is thereby certifying that the document:
    - i. Is not being presented for an improper purpose, such as to harass or cause undue delay;
    - ii. Contains claims, defenses or other legal contentions that are warranted by law or by a nonfrivolous argument for the extension, modification or reversal of existing law or for the establishment of new law;

- iii. Contains allegations that will have evidentiary support; and
  - iv. If responsive, contains denials of factual allegations that are warranted on the evidence, or reasonably based on a lack of information and belief.
- b. *See In re Snyder*, No. 10-32042-mdm, 2010 Bankr. LEXIS 630 (Bankr. E.D. Wis. Sep. 14, 2010).
- i. Court sanctioned debtor's attorney \$500 for filing a Chapter 7 petition where debtor was not eligible for a discharge and sole purpose of filing petition was to delay a garnishment creditor.
3. Other examples in bankruptcy practice that might implicate Rule 3.1 and/or FRBP 9011:
- i. Motions for relief from stay where no cause to lift the stay exists.
  - ii. Objections to motions for relief or to dismiss that provide no basis for the objection other than that counsel cannot contact client.
  - iii. Form objections that do not address the grounds for the relief requested in the motion.
  - iv. Objections stating that a debtor has made payments to a creditor or the trustee when payments really have not been made.
  - v. Motions for relief from judgment or order under Rule 9024 (FRCP 60) that do not allege sufficient grounds for such relief.
    - i. Relief under Rule 60 is "an extraordinary remedy and not a substitute for direct appeal on the judgment." *In re Design Classics, Inc.* 788 F.2d 1384 (8<sup>th</sup> Cir. 1986).
4. Safe Harbor Provision of Rule 9011
- i. Motion for sanctions under Rule 9011 may not be filed unless motion is first served and the challenged "paper,

claim, defense, contention, allegation or denial” is not withdrawn within 21 days.

- ii. Rule explicitly states that the filing of an inappropriate petition, however, is not subject to the safe harbor provision.

#### C. Duties to Prospective Client – Rule 1.18

1. When does lawyer-client relationship begin?
2. Generally, even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation.

#### D. Terminating Representation – Rule 1.16(b)

1. Adversary Proceedings
  - i. Recurring issue is whether debtor’s counsel for an underlying bankruptcy case is presumed to represent the debtor in an adversary proceeding. Answer is yes.
  - ii. In the Eastern District of Wisconsin, Local Rule 9010 states that “[a]n attorney who has appeared as attorney of record for the debtor, trustee, creditors’ committee, or a party in the case, adversary proceeding or contested matter may not withdraw, be relieved or displaced except by notice to the party represented and any adversaries and by leave of the court.”
  - iii. Formal motion to withdraw not always required.
2. *Pro se* conversion from Chapter 13 to Chapter 7
3. Substitution of counsel
  - i. Rule 1.16(d) states that “[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned

or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.”

- ii. In bankruptcy context, at least in the Seventh Circuit, must turn over entire file if no contested matters?
  - i. The Seventh Circuit Court of Appeals has described the test to be used in determining whether something is work product as “whether the materials sought to be protected from disclosure were in fact prepared in anticipation of litigation.” *Binks Mfg. Co. v. Nat’l. Presto Indus.*, 709 F.2d 1109, 1118 (7<sup>th</sup> Cir. 1983). The mere fact that litigation does eventually arise does not cover materials prepared by an attorney by the work product privilege. *Id.*
  - ii. Application of this test to bankruptcy cases:
    - a. Documents prepared by an attorney while drafting/planning to file a bankruptcy petition might not be covered by the privilege unless litigation was anticipated.
    - b. Privilege would apply within the context of an adversary proceeding
    - c. Might also apply if an examination under Federal Rule of Bankruptcy Procedure (FRBP) 2004 is ordered.

E. Candor Toward the Tribunal – Rule 3.3(a)

1. A lawyer may not knowingly:
  - a. Make a false statement to the court or fail to correct a false statement previously made;
  - b. Fail to disclose to the court legal authority in the controlling jurisdiction known to the lawyer to be adverse to the position of the client, even if not disclosed by opposing counsel; or
  - c. Offer evidence that the lawyer knows to be false. If anyone called by the lawyer offers material evidence that the lawyer later discovers is false, the lawyer must take remedial measures, which include disclosure to the tribunal.

- i. The duty to disclose adverse precedent is counterintuitive and therefore likely to be overlooked.
2. Under Rule 3.3(d), in an *ex parte* proceeding, a lawyer must inform the court of all material facts known to the lawyer that will enable the court to make an informed decision, even if the facts are adverse.
3. Rule 3.3(a) overlaps with FRBP 9011 – Representations to the Court.
  - a. FRBP 9011 is also related to Model Rule 3.1 - Meritorious Claims and Contentions.

F. Scope of Representation - Rule 1.2(d)

1. “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”
  - a. Under this rule, a lawyer may not advise a client to lie.
  - b. A lawyer may, however, provide an honest opinion about the consequences that are likely to result from a client’s conduct. A lawyer may present an analysis of the legal aspects of questionable conduct but may not recommend the means by which to commit fraud or a crime and get away with it.
2. *In re Sadorus*, 2005 Bankr. LEXIS 2459 (Bankr. C.D. Ill. Dec. 8, 2005).
3. *In re Nguyen*, 427 B.R. 805 (Bankr. N.D. Cal. 2010).

G. Communications – Rule 1.4

1. “A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required by these Rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.”
  - a. Failure to return telephone calls seems to be a common complaint.
  - b. Informing client of settlement offers.

- i. Comment to Rule 1.4 provides “a lawyer who receives from opposing counsel an offer of settlement in a civil controversy . . . must promptly inform the client of its substance *unless the client has previously indicated* that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer.” (Emphasis added).
2. *In re Taylor*, 407 B.R. 618 (Bankr. E.D. Pa. 2009), *rev’d*, 2010 U.S. Dist. LEXIS 16080 (E.D. Pa. February 18, 2010).
  - a. Bankruptcy court frustrated with mortgagee’s counsel’s communication with client via electronic “NewTrak” system. Reversed on appeal.