Ethics and Bankruptcy

Lou Jones Breakfast Club
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I. Confidentiality v. Duty to Disclose

a. Fact Pattern - concern that was posted on the BICR listserv this past October.

b. Debtor, represented by counsel, files a Chapter 7 case.

c. On Schedules, Debtor lists a vehicle valued at $20,000 with a $20,000 lien on it.

d. Debtor receives a discharge.

e. About a year after discharge, Debtor's attorney discovers that the lien was not properly perfected.

f. Does attorney have an obligation to notify the Chapter 7 trustee?

i. Wisconsin Supreme Court Rules 20:1.6 and 20:3.3(a)(3).

SCR 20:1.6 Confidentiality

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in pars. (b) and (c).

(b) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another.

(c) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably likely death or substantial bodily harm;

(2) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(3) to secure legal advice about the lawyer's conduct under these rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which

the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) to comply with other law or a court order.

SCR 20:3.3 Candor toward the tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in pars. (a) and (b) apply even if compliance requires disclosure of information otherwise protected by SCR 20:1.6.

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

ii. Rule 20:1.6 and 20:3.3 differ from the American Bar Association's (ABA) Model Rules of Professional Conduct. Therefore, if an attorney also practices in another state, outcome of this scenario may be different in that other state.

A. ABA Rule 1.6 does not have the mandatory disclosure language of (b) above.

B. Similarly, Rule 20:3.3(c) differs in that it provides that an attorney's remedial measures duty expires at "the conclusion of the proceeding." ABA 3.3(c) states: "The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

II. Unbundling of Legal Fees

a. Wisconsin Supreme Court Rule 20:1.2 allows an attorney to limit the scope of representation as long is the limitation is **reasonable under the circumstances** and **the client gives informed consent.**

SCR 20:1.2 Scope of representation and allocation of authority between lawyer and client

(a) Subject to pars. (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by SCR 20:1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case or any proceeding that could result in deprivation of liberty, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) 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.

(e) When a lawyer has been retained by an insurer to represent an insured pursuant to the terms of an agreement or policy requiring the insurer to retain counsel on the client's behalf, the representation may be limited to matters related to the defense of claims made against the insured. In such cases, the lawyer shall, within a reasonable time after being retained, inform the client in writing of the terms and scope of the representation the lawyer has been retained by the insurer to provide.

b. Certain types of limitation are common in bankruptcy court.

i. Limited representation as to only issues that arise in the main bankruptcy case and not to representation of the debtor in any adversary proceedings.

A. However, is debtor's counsel for an underlying bankruptcy case presumed to represent the debtor in an adversary proceeding? Answer is yes.

B. 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."

C. What needs to be done to withdraw from representation?

ii. One court has described providing some counsel in one part of a bankruptcy case but allowing the debtor to proceed through other parts of the case *pro se* as "misrepresentation. *In re Castorena*, 270 B.R. 501 (Bankr. D. Idaho 2001) ("To send a debtor into a bankruptcy *pro se*, on the theory that he has had 'enough' advice and counseling in the document preparation state to safely represent himself, is except in the extraordinary case so fundamentally unfair as to amount to misrepresentation.")

III. Fee Sharing

a. When representing a debtor in bankruptcy, several Bankruptcy Code sections and Bankruptcy Rules tie-in with SCR 20:1.5

SCR 20:1.5 Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b)(1) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, except when the lawyer will charge a regularly represented client on the same basis or rate as in the past. If it is reasonably foreseeable that the total cost of representation to the client, including attorney's fees, will be $1000 or less, the communication may be oral or in writing. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing to the client.

(2) If the total cost of representation to the client, including attorney's fees, is more than $1000, the purpose and effect of any retainer or advance fee that is paid to the lawyer shall be communicated in writing.

(3) A lawyer shall promptly respond to a client's request for information concerning fees and expenses.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by par. (d) or other law. A contingent fee agreement shall be in a writing signed by the client, and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee:

(1) in any action affecting the family, including but not limited to divorce, legal separation, annulment, determination of paternity, setting of support and maintenance, setting of custody and physical placement, property division, partition of marital property, termination of parental rights and adoption, provided that nothing herein shall prohibit a contingent fee for the collection of past due amounts of support or maintenance or property

division.

(2) for representing a defendant in a criminal case or any proceeding that could result in deprivation of liberty.

(e) A division of a fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and:

(1) the division is based on the services performed by each lawyer, and the client is advised of and does not object to the participation of all the lawyers involved and is informed if the fee will increase as a result of their involvement; or

(2) the lawyers formerly practiced together and the payment to one lawyer is pursuant to a separation or retirement agreement between them; or

(3) pursuant to the referral of a matter between the lawyers, each lawyer assumes the same ethical responsibility for the representation as if the lawyers were partners in the same firm, the client is informed of the terms of the referral arrangement, including the share each lawyer will receive and whether the overall fee will increase, and the client consents in a writing signed by the client.

b. Section 504 prohibits sharing of compensation, or fee splitting, among attorneys, other professionals, or trustees.

c. Section 329 discusses debtors' transactions with attorneys.

d. Rule 2016(b) provides the disclosure requirements for attorney fees.

IV. Advertising

a. The "debt relief agency" requirements of the Code relate to SCR 20:7.2.

SCR 20:7.2 Advertising

(a) Subject to the requirements of SCR 20:7.1 and SCR 20:7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may:

(1) pay the reasonable cost of advertisements or communications permitted by this rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with SCR 20:1.17; and

(4) refer clients to another lawyer or nonlawyer professional pursuant to an agreement not otherwise prohibited under these rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral arrangement is not exclusive;

(ii) the client gives informed consent;

(iii) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(iv) information relating to representation of a client is protected as required by SCR 20:1.6.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

b. Section 528 discusses advertising requirements for debt relief agencies.

V. Meritorious Claims and Contentions

a. Generally, SCR 20:3.1 requires lawyers to "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."

> **SCR 20:3.1 Meritorious claims and contentions**
>
> (a) In representing a client, a lawyer shall not:
> (1) knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law;
> (2) knowingly advance a factual position unless there is a basis for doing so that is not frivolous; or
> (3) file a suit, assert a position, conduct a defense, delay a trial or take other action on behalf of the client when the lawyer knows or when it is obvious that such an action would serve merely to harass or maliciously injure another.
> (b) A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in deprivation of liberty, may nevertheless so defend the proceeding as to require that every element of the case be established.

b. Related to this Supreme Court Rule is Federal Rule of Bankruptcy Procedure 9011. In part, Rule 9011 provides that any attorney presenting a document to the court is certifying that it:

   i. Is not being presented for an improper purpose

   ii. Contains claims, defenses or legal contentions warranted by law or by a nonfrivolous argument to modify current law;

   iii. Contains allegation that will have evidentiary support; and

   iv. If responsive, contains denials of factual allegations that are warranted on the evidence.

c. Examples in bankruptcy law practice that implicate these Rules:

   i. Motions for relief from judgment or order under Rule 9024 (FRCP 60) that do not allege sufficient grounds for such relief.

      A. *In re Dorff*, No. 12-30825-svk (Bankr. E.D. Wis. October 16, 2012) (holding that "Rule 60(b), and thus Rule 9024, is an extraordinary remedy which is to be granted only in exceptional circumstances. (citations omitted)).

   ii. Motions for relief from stay where no cause to lift the stay exists.

   iii. Objections to motions for relief or to dismiss that provide no basis for the objection other than that counsel cannot contact client.

iv. Form objections that do not address the grounds for the relief requested in the motion.

v. Objections stating that a debtor has made payments to a creditor or the trustee when payments really have not been made.

d. 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.

VI. WHAT TO DO IF YOU HAVE AN ETHICS ISSUE

a. Call Timothy Pierce at the Wisconsin State Bar Ethics Hotline – (608) 250-6168.

b. For an issue that does not relate to past or present conduct of a specific member of the Bar, can request a Professional Ethics Committee Opinion by sending a letter to the State Bar of Wisconsin.