ETHICAL DILEMMAS IN BANKRUPTCY

Lou Jones Breakfast Club – December 14, 2010

Jack N. Zaharopoulos, Esq. – Office of the Chapter 13 Trustee
Michael J. Maloney, Esq. – Watton Law Group
Valerie P. Vidal, Esq. – Quarles & Brady LLP

I. LAWYERS' PROFESSIONAL RESPONSIBILITIES ARE PRESCRIBED IN THE 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. Not designed to provide a basis for civil liability.

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. Resources
   1. ABA Model Rules and Wisconsin Supreme Court Rules can be found on the ABA (abanet.org) and the State Bar of Wisconsin (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 <u>about prospective behavior only</u> (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.

E. Consequences of Violating Ethical Rules
   1. Although violations are not a basis for civil liability, courts frequently look to the Model Rules for guidance in their opinions and fashioning appropriate remedies.

      a. *In re Pagaduan*, 429 B.R. 752, 766-767 (Bankr. D. Nev. 2010).

II. PROBLEMS ARISING FROM HIGH VOLUME FILINGS

A. Margaret A. Burks, *Ethical Issues for "Frequent Filers" and a Guide to Best Practices* 29-9 Am Bankr. Inst. J. 20 (Nov. 2010).

1. Author (Chapter 13 trustee in Cincinnati, Ohio) posed the following questions as to why certain high volume attorneys do not follow the rules:
    a. Are they overwhelmed in a chaotic office?
    b. Do they lack organizational and management skills?
    c. Are they challenged by computer technology?
    d. Do they have such pride in what they do that they cannot see the need to improve?
    e. Is there a substance abuse or psychological problem?
    f. Is the attorney's ethical compass set to a different point?
2. Examples of recent ethical violations encountered (small but still violations):
    a. Debtors faxed a letter to the trustee's office because the debtor husband had been laid off and they wanted to know if they should use his severance package to pay off the case. They had been trying to reach their attorney for weeks and could not.
    b. A creditors' attorney in a volume filer office promised that she would withdraw a motion for relief when the debtor sent in funds to the mortgage company. Funds were timely received, but she forgot to tell her staff, the order granting relief was uploaded and eventually entered by the court.

III. SPECIFIC RULES

A. Confidentiality of Information – Rule 1.6

1. "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." Subsection (b) describes information related to the representation of a client that a lawyer may reveal "to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) 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; (4) to secure legal advice about the lawyer's compliance with these Rules; (5) 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 (6) to comply with other law or a court order."

a. Essentially, Rule 1.6 requires a lawyer to not reveal any information revealed to the lawyer by the client.
b. Requirement for client confidences serves the public interest since people are more likely to seek legal advice and be aware of their legal obligations if they know that their communications will be private.

2. Work Product Evidentiary Privilege Compared with Rule 1.6
   a. Ethical duty under Rule 1.6 is broader than evidentiary privilege under Federal Rule of Civil Procedure (FRCP) 26(b)(3) (e.g., certain confidential information not within the scope of the evidentiary privilege may be discoverable by the opposing party).
   b. FRCP 26(b)(3) allows for discovery of documents and tangible things prepared in anticipation of litigation or for trial under certain circumstances, but an exception is carved out for "disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney . . . of a party concerning the litigation."
   c. 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 (7th Cir. 1983). The mere fact that litigation does eventually arise does not cover materials prepared by an attorney by the work product privilege. *Id.*
      i. Application of this test to bankruptcy cases:
         i. Documents prepared by an attorney while drafting/planning to file a bankruptcy petition might not be covered by the privilege unless litigation was anticipated.
         ii. Privilege would apply within the context of an adversary proceeding.
         iii. Might also apply if an examination under Federal Rule of Bankruptcy Procedure (FRBP) 2004 is ordered.

B. 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 includes 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).
    b. 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.
4. *In re Alexander*, 2003 Bankr. LEXIS 1297 (Bankr. N.D. Tex. Oct. 1, 2003).
5. *In re Pagaduan*, 429 B.R. 452 (Bankr. D Nev. 2010).

C. 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).

D. Competence – Rule 1.1
1. "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonable necessary for the representation."
    a. Factors to consider:
        i. Complexity and specialized natures of the matter;
        ii. The lawyer's general experience;
        iii. The lawyer's training and experience in the field in question;
        iv. The preparation and study the lawyer is able to give the matter; and
        v. Whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.
    b. Generally, the required proficiency is that of a general practitioner.

c. Also, "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice…."

2. Application of Rule 1.1 to Bankruptcy Practice
   a. Bankruptcy law is a unique field, so unwise to "dabble" in it.
      i. *In re Mattison,* 2010 Bankr. LEXIS 3447 (Bankr. N.D. Ga. 2010).
   b. It is extremely important for a lawyers practicing in this area to stay current on changes in the law.
      i. Bankruptcy practitioners are still feeling the effects of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) years later (*e.g., Hamilton v. Lanning (In re Lanning),* 130 S. Ct. 2464 (2010); *Ransom v. MBNA, N.A.,* 577 F.3d 1026 (9th Cir. 2009), *cert. granted*, No. 09-907.
   c. *In re Star*, 2010 Bankr. LEXIS (Bankr. E.D.N.Y. August 13, 2010).

E. Diligence – Rule 1.3
   1. "A lawyer shall act with reasonable diligence and promptness in representing a client."
      a. Even though a lawyer must act with zeal and dedication in representing a client, "reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."
      b. Procrastination is specifically pointed out in the comments to this rule as the most widely resented professional shortcoming of a lawyer. Lawyers should not act with unreasonable delay and control their work load to that each matter may be handled competently.
   2. Bankruptcy lawyers are under constant, short deadlines:
      a. Time period to object to confirmation of plans.
      b. Objection period in response to motions for relief from the automatic stay and to motions to dismiss.
      c. Deadlines for creditors to file proofs of claim.
      d. Time to file an appeal.

F. 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).
    1. Bankruptcy court frustrated with mortgagee's counsel's communication with client via electronic "NewTrak" system. Reversed on appeal.

G. 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 nonlawyer 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. *In re Nguyen*, 427 B.R. 805 (Bankr. N.D. Ca. 2010).
    4. Bankruptcy practice includes a lot of checklists and routine matters, so large non-lawyer staffs seem common. At what point do their duties become the practice of law?
        a. Margaret A. Burks, *Ethical Issues for "Frequent Filers" and a Guide to Best Practices* 29-9 Am Bankr. Inst. J. 20 (Nov. 2010).
            i. Trustee Burks recognized that "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.

H. Fees; Reasonableness - Rule 1.5(a)
    1. In this district, we have a Court Policy to supplement FRBP 2016 and 2017.
    2. For Chapter 13 debtors' counsel, presumed reasonable fee is now $3,500.
    3. Motion for Relief fee is now $800, plus $150 filing fee.
    4. Debtors' attorney fees and adversary complaint.

I. Terminating Representation – Rule 1.16(b)
    1. Withdrawing from representation.
    2. Is a motion to withdraw required?
    3. Termination letter.

J. Conflict of Interest– Rules 1.7 -1.8
    1. Issues related to married couples that divorce during the life of a Chapter 13 case.

K. 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."
        b. Examples in bankruptcy practice that might implicate this rule:
            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 get a hold of 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.