

Independent Counsel or Watchdog? Ethically Juggling the Multiple Roles of Consumer Counsel

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**Hon. Peter Bowie
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The Duty of Debtor's Attorney for Confidentiality

Peter W. Bowie
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Hypothetical:

Joe Flattop comes to see you about filing a Chapter 7 petition. He tells you that he has struggled for years to get by operating a single independent gas station. Gas prices from his suppliers have become prohibitive, he's gotten older, and is ready to give up. He tells you he had the property inspected in contemplation of a sale, only to be told that the oil dump and leaky underground fuel tanks have leached into the area underground water table and the costs to remediate the property are unaffordable. He also tells you the town plans to build an elementary school nearby, which would draw water by well from the water table, and the property inspector said he was concerned that decades of fossil fuel products leaching into the water supply might make the children seriously ill.

Assume your managing partner has already accepted the case, and assigned it to you. Under the rules of professional conduct of your jurisdiction, do you have any duty to warn any third persons of what you have learned?

Reading List:

- Lew, "Revised Model Rule 1.6: What effect Will the New Rule Have on Practicing Attorneys?", 18 *Georgetown Journal of Legal Ethics* 881 (2005)
- Cooper, "The Ethical Rules Lack Ethics: Tort Liability When a Lawyer Fails to Warn a Third Party of a Client's Threat to Cause Serious Physical Harm or Death", 36 *Idaho L.Rev.* 479 (2000)
- Cunningham, "How to Explain Confidentiality?", 9 *Clinical L.Rev.* 579 (2003)
- Martyn, "In Defense of Client-Lawyer Confidentiality . . . And Its Exceptions . . .", 81 *Nebraska L.Rev.* 1320 (2003)
- Pizziment: "The Lawyer's Duty to Warn Clients About Limits on Confidentiality", 39 *Catholic U.S. Rev.* 441 (1990)
- Vanie, Wallach, "Updating Confidentiality: An Overview of the Recent Changes to Model Rule 1.6", 17 *Georgetown Journal of Legal Ethics* 1003 (2004)
- Zacharias, "Rethinking Confidentiality", 74 *Iowa L.Rev.* 351 (1989)

Model Rules of Professional Conduct

Rule 1.6 Confidentiality of Information

- (a)** A lawyer shall not reveal information relating to 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 (b).
- (b)** A lawyer may reveal information relating to the representation of a client 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.

Rules of Professional Conduct – New Jersey

RPC 1.6 Confidentiality of Information

- (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b),(c), and (d).
- (b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person:
 - (1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another;
 - (2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.
- (c) If a lawyer reveals information pursuant to RPC 1.6(b), the lawyer also may reveal the information to the person threatened to the extent the lawyer reasonably believes is necessary to protect that person from death, substantial bodily harm, substantial financial injury, or substantial property loss.
- (d) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
 - (1) To rectify the consequences of a client's criminal, illegal or fraudulent act in the furtherance of which the lawyer's services had been used;
 - (2) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon the conduct in which the client was involved; or
 - (3) To comply with other law.
- (e) Reasonable belief for purposes of RPC 1.6 is the belief or conclusion of a reasonable lawyer that is based upon information that has some foundation in fact and constitutes prima facie evidence of the matters referred to in subsections (b), (c), or (d).

Current with amendments received through August 15, 2005

The Responsibilities of the Debtor's Attorney Regarding the Disclosure of the Debtor's Assets

Steven Rhodes
Chief United States Bankruptcy Judge
Eastern District of Michigan

I. Pre-BAPCPA 2005

A. Cases:

1. *In re R & R Associates of Hampton*, 402 F.3d 257, 268 (1st Cir. 2005) (Prior to informing the bankruptcy court of facts, attorneys were duty-bound to exercise reasonable care to verify those facts)
2. *In re Diaz*, 2006 WL 2474822 (Bankr. S.D. Tex. Aug. 28, 2006) (“Counsel for a debtor in a Chapter 13 case has a duty to supervise the debtor’s conduct for compliance with the Bankruptcy Code, and must instruct the debtor on appropriate conduct.”)
3. *In re McDermitt*, 2006 WL 1582390 (Bankr. D. Vt. May 30, 2006):

Depending on a debtor’s sophistication, he or she may complete a first draft of the schedules independently, but the debtor’s attorney still has the responsibility to ensure that the schedules are complete and in compliance with the Federal Bankruptcy Rules. *Id.* . . . The effective administration of a bankruptcy case depends upon the debtor’s attorney guiding his or her client toward the filing of complete and accurate schedules within the prescribed time period. Regardless of the financial or personal difficulties a debtor may be facing, the Bankruptcy Code requires a debtor and his or her attorney to guarantee the schedules that are filed are complete and accurate to the best of the debtor’s knowledge.

4. *United States v. Thomas*, 342 B.R. 758, 760 (S.D. Tex. 2005) (“Although debtors may consciously or unconsciously omit information that the law and their lawyers require, once a lawyer discovers the facts, he must notify, amend, and otherwise formally correct effects of the omission in a civil case.”)
5. *Penn. Higher Educ. Assistance Agency v. Taylor*, 334 B.R. 576, 582-83 (N.D. Ohio 2005)
6. *In re McKain*, 325 B.R. 842, 849 (Bankr. D. Neb. 2005) (“A debtor’s attorney

. . . bears a significant degree of responsibility in assuring to the best of his or her ability that the schedules are complete and accurate before they are filed.”)

7. *In re Bellows-Fairchild*, 322 B.R. 675, 681 (Bankr. D. Or. 2005) (“Neither a debtor nor his attorney is entitled to omit information or provide partial information simply because, in their view, the information provided is sufficient to allow the trustee to determine the value of a debtor’s estate.”)
8. *In re Nigeles*, 301 B.R. 321, 325 (Bankr. N.D. Iowa 2003) (same)
9. *In re Ptasinki*, 290 B.R. 16, 26-27 (Bankr. W.D.N.Y. 2003) (“[N]otwithstanding all of the financial and perhaps personal difficulties that a debtor may be experiencing, the Bankruptcy Code expects that when debtors and their attorneys are finalizing and signing their schedules, they will devote their full attention to them in order to ensure that they are complete and accurate to the best of the debtor’s knowledge and information.”)
10. *In re Burnett*, 2002 WL 32001418, *2 n.3 (Bankr. C.D. Ill. 2002) (“Both the debtors and their attorneys are responsible for making sure that the schedules are complete.”)
11. *In re Kloubeck*, 251 B.R. 861, 866 (Bankr. N.D. Iowa 2000) (“[C]ounsel for the debtor in a Chapter 13 case has a duty to supervise the debtor’s conduct for compliance with the Bankruptcy Code”)
12. *In re Robinson*, 198 B.R. at 1017, 1024 (Bankr. N.D. Ga. 1996):

The duty of reasonable inquiry imposed upon an attorney requires the attorney (1) to explain the requirement of full, complete, accurate, and honest disclosure of all information required of a debtor; (2) to ask probing and pertinent questions designed to elicit full, complete, accurate, and honest disclosure of all information required of a debtor; (3) to check the debtor’s responses in the petition and Schedules to assure they are internally and externally consistent; (4) to demand of the debtor full, complete, accurate, and honest disclosure of all information required before the attorney signs and files the petition; and (5) to seek relief from the court in the event that the attorney learns that he or she may have been misled by a debtor.

13. *In re Armwood*, 175 B.R. 779, 789 (Bankr. N.D. Ga. 1994) (same)
14. *In re Matthews*, 154 B.R. 673, 680 (Bankr. W.D. Tex. 1993) (“A debtor’s attorney of course has a duty to make reasonable inquiry into the accuracy of the Debtor’s petition before the Debtor signs the petition, statements and schedules. . . . The

attorney, as an officer of the court, owes a duty of integrity to the court system.”)

15. *In re Prudhomme*, 152 B.R. 91, 114 (Bankr. W.D. La. 1993) (When awarding fees the court should consider whether the schedules and pleadings are accurate, complete, and professional.)
16. *In re Huerta*, 137 B.R. 356, 379 n.8 (Bankr. C.D. Cal. 1992) (“In my view, one of the principal, and perhaps most neglected duties of attorneys who represent debtors, is to assist them with the “reasonable inquir[ies]” required of them before they advise or instruct debtors to “sign” their petition, statements and schedules. The client interview prior to the drafting and filing of the petition and schedules is critical to assisting the debtor’s good faith.”)
17. *In re Martinez*, 22 B.R. 419, 421 (D.N.M. 1982) (“We would also remind the debtors’ attorney that it is his duty as an officer of this court to take all possible steps to assure himself that the information listed in his clients’ petition is correct.”)

B. Other Authorities

4 Collier on Bankruptcy ¶ 521.03[3], page 521-10 (15th ed. Rev.2005):

In the preparation of the schedules nothing should be taken for granted. The attorney should carefully investigate the affairs of the debtor and make certain that the attorney has all the information needed to prepare full and complete schedules, for it is the duty of the debtor to present intelligible and true schedules. Although, depending on the sophistication of the debtor, it may be possible to have the debtor, especially a business debtor, prepare a first draft of the schedules, the attorney for the debtor has a responsibility to review [the] schedules to ensure that they are complete and in compliance with the Code and the Federal Rules of Bankruptcy Procedure.

II. Post-BAPCPA

A. The Bankruptcy Code As Amended

1. 11 U.S.C. § 707(b)(4) provides:

* * *

(C) The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has --

- (i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and
- (ii) determined that the petition, pleading, or written motion --

(I) is well grounded in fact; and
(II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).

(D) The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.

2. In addition, BAPCPA § 319 expresses the “sense of Congress” that Federal Rule of Bankruptcy Procedure 9011 should be modified to include the requirement that all documents, including schedules, whether signed or unsigned, that are submitted to the court or to a trustee by a debtor who is acting pro se or who is represented by an attorney should not be submitted until the debtor, and where represented, the debtor’s attorney, have made “reasonable inquiry to verify that the information contained in such document is--(1) well grounded in fact; and (2) warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.”

B. Case

1. *In re McKain*, 325 B.R. 842, 851 (Bankr. D. Neb. 2005) (“Both the debtor and her attorney share the responsibility for the current situation. They each had a duty to make sure the schedules and statement of financial affairs were correct, and they each dropped the ball. This issue takes on even greater significance in light of the Bankruptcy Abuse Prevention & Consumer Protection Act of 2005, most of which takes effect in October 2005. Under the provisions of the new law, counsel’s signature on a petition constitutes a certification that the attorney has no knowledge, after an inquiry, that the information in the schedules filed with the petition is incorrect. 11 U.S.C. § 707(b)(4)(D). Attorneys may be subject to assessment of a civil penalty for signing a document without conducting a reasonable inquiry into the underlying facts. § 707(b)(4)(B).”)

C. Other Authorities

1. The Ad Hoc Committee on Bankruptcy Court Structure and Insolvency Processes, Task Force on Attorney Discipline, ABA Section of Business Law, Attorney Liability Under Section 707(b)(4) of the Bankruptcy Abuse Prevention And Consumer Protection Act of 2005, 61 Bus. Law 697 (February 2006)

§ 3. § 707(b)(4)(C)§ 3.1 “Reasonable Investigation”

Recommendations

As a standard, “reasonable investigation” should be governed by the case law

interpreting and applying the “reasonable inquiry” standard under Rule 9011.

Attorneys should be able to rely on case law that allows time constraints to be taken into account.

The reasonableness of the attorney’s inquiry should not be analyzed with the benefit of hindsight; rather, the analysis should, as under Rule 9011, focus on the attorney’s inquiry at the time that the inquiry was made.

Attorneys should verify information supplied by the debtor if such verification may be accomplished with a reasonable expenditure of time and expense and, in the attorney’s professional judgment, the information provided by the client is inconsistent or contains other indications of inaccuracy.

Attorneys should be able to rely upon documents prepared by third parties in the scope of their employment, including tax returns, credit and title reports, child support enforcement agency statements, or information from the debtor’s pre-petition credit counseling agency.

Unless and until the courts articulate new standards for § 707(b)(3)’s good faith requirement, attorneys should be able to rely on case law developed under § 707(a), specifically those cases interpreting and applying the “bad faith” and “totality of the circumstances” tests.

“The duty of reasonable inquiry imposed upon an attorney by Rule 11 and by virtue of the attorney’s status as an officer of the court owing a duty to the integrity of the system requires that the attorney (1) explain the requirement of full, complete, accurate, and honest disclosure of all information required of a debtor; (2) ask probing and pertinent questions designed to elicit full, complete, accurate, and honest disclosure of all information required of a debtor; (3) check the debtor’s responses in the petition and Schedules to assure they are internally and externally consistent; (4) demand of the debtor full, complete, accurate, and honest disclosure of all information required before the attorney signs and files the petition; and (5) seek relief from the court in the event that the attorney learns that he or she may have been misled by a debtor.” *In re Robinson*, 198 B.R. 1017, 1024 (Bankr. N.D. Ga.1996); *In re Armwood*, 175 B.R. 779, 789 (Bankr. N.D. Ga. 1994); *In re Matthews*, 154 B.R. 673, 680 (Bankr. W.D. Tex. 1993). *See In re Huerta*, 137 B.R. 356, 379 n.8 (Bankr. C.D. Cal. 1992). Another court explained: Litigation lawyers have a broad responsibility under Rule 11 and the Code of Professional Responsibility (now the Model Rules of Professional Conduct): to confer with the client about the facts -- and not to accept the client’s version on faith, but to probe the client in that respect (‘reasonable inquiry’); to do the lawyers’ homework on the law; and then to counsel the client about just which claims the law reasonably supports in terms of the facts the lawyers’ proper investigation has disclosed. That often involves counseling the client -- sometimes against the tide of the client’s displeasure -- as to how best to vindicate the client’s interests without abusing another’s. In some instances that may involve advising a client not to pursue a claim or a theory of recovery that in a technical sense (of surviving a Rule 12(b)(6) motion) might perhaps go forward, but by rights should not.). *Fleming Sales Co., Inc. v. Bailey*, 611 F. Supp. 507, 519 (N.D. Ill. 1985).

**The Responsibilities of the Debtor's Attorney
Regarding the Valuation of the Debtor's Assets**

Claire Ann Resop
Attorney and Chapter 7 Panel Trustee
Brennan, Steil & Basting, S.C., Madison WI

I. Case(s)

A. *In re Cossey*, 172 B.R. 597 (E.D. AK 1994). A debtor's attorney was sanctioned for failure to reasonably inquire as to the value of the client's settlement and failure to amend the schedules upon learning of the value. The sanction was a fine of \$500 and a judicial complaint referral to the Arkansas Committee on Professional Responsibility.

Debtor's Attorney Obligations Hypothetical

Felicia S. Turner
Office of the U.S. Trustee, Regions 20 and 21

The United States Trustee (the "UST") moved to dismiss a chapter 7 case for presumed abuse under section 707(b)(2) based on a disagreement with the debtor over whether she was entitled under the IRS Local Transportation Standards to claim a \$475 deduction for motor vehicle ownership costs. The UST took the position that this deduction was not available to the debtor because the IRS guidelines limit it to taxpayers who have a car payment, and the debtor owned her vehicle free and clear. The effect of disallowing the deduction was to increase the debtor's net disposable income from a negative amount to \$201, which is \$34 more than the amount at which a presumption of abuse arose.

Just prior to the hearing on the motion, the trial attorney for the UST conferred with debtor's counsel and asked him if he was certain there were not any additional and undisputed expense deductions under the means test. Debtor's counsel responded that the debtor could indeed claim such additional deductions but that he had not included them on the Form B22A because he wanted to litigate with the UST over the issue of whether a debtor who owns a motor vehicle free and clear is precluded from claiming the IRS deduction.

During the ensuing hearing, the court advised debtor's counsel that he would rule against him on the IRS deduction issue, whereupon debtor's counsel announced that the debtor could claim additional expense deductions that she had not listed on her Form B22A – specifically, payments for the care and support of her mother. The court agreed to hear testimony on this issue, whereupon the debtor testified that she regularly spent approximately \$50 per week to purchase groceries for her elderly and chronically ill mother. The court (and the UST) found this testimony to be credible notwithstanding the debtor's failure to claim these expenses prior to the hearing, and the court denied the UST's motion. Consequently, the debtor did not suffer any adverse consequences as the result of her counsel's initial decision to litigate the vehicle ownership cost deduction issue rather than claim her payments in support of her mother as deductions.

Debtor Audits

Felicia S. Turner
Office of the U.S. Trustee, Regions 20 and 21

- I. Purpose
 - a. Determine accuracy, veracity and completeness of schedules and other information provided under § 521 and § 1322 by Debtors.
- II. Cases
 - a. Cases filed on or after October 20, 2006
 - b. At least one out of every 250 cases selected randomly
 - c. Targeted cases with income and expenses of greater than average variance for district
- III. Auditors
 - a. Independent CPAs or licensed Pas
 - b. Contracts with USTP
 - c. EOUST solicited bids
 - d. Six firms
 - e. Two auditors per region
- IV. Standards
 - a. Generally accepted auditing standards or alternative auditing standards developed by the Attorney General
 - b. USTP has developed Debtor Audit Standards
- V. Timing – First 7 Days
 - a. Case selected by Debtor Audit System
 - b. Auditor has 2 business days to notify USTP of conflict
 - c. USTP office sends audit notification letter to debtor's attorney or pro se debtor and trustee
 - d. Letter includes list of documents, form for attorney to allow direct contact by auditor with debtor, and information sheet
- VI. Timing – Total
 - a. Generally, completion no later than 70 days from petition date
 - b. Assumes schedules and statements filed with Petition
- VII. What Auditor Will Do
 - a. Use "agreed upon procedures" to determine accuracy, veracity, and completeness
 - b. Perform desk audit with automated search engines and documents requested from debtor
 - c. Auditor will give debtor opportunity to provide written explanation for apparent material misstatement before inclusion in report

VIII. Documents Requested

- a. Pay stubs
- b. Tax returns
- c. Account statements
- d. Documentation to explain source of deposits or credits, and purpose of withdrawals or debits
- e. Divorce decree and/or property settlement
- f. Current child support/alimony obligation of debtor

IX. Audit Reports

- a. Audit reports specify “material misstatements” of income, expenses, or assets
- b. Reports filed with court and transmitted to UST
- c. Clerk notices creditors of material misstatements
- d. USTP must prepare annual public reports of material misstatements with percentages by district

X. Debtor’s Responsibilities

- a. Cooperate with auditor [521(a)(3)]
- b. Provide records to auditor [521(a)(4)]
- c. Satisfactorily explain material misstatements [727(d)(4)(A)]
- d. Satisfactorily explain failure to make available for inspection all necessary documents or property [727(d)(4)(B)]

XI. USTP Possible Actions

- a. Criminal referral
- b. Denial or revocation of discharge
- c. Dismissal under 707 or 1307
- d. Objection to modify plan
- e. Revocation of confirmation
- f. Conversion to Chapter 7
- g. Turnover actions
- h. Motion to compel cooperation or to produce documents
- i. Motion for sanctions
- j. Objection to fees or motions to disgorge
- k. Motion to compel amendments