A Magical Marriage, or Is He Just a Troll? The Divorce of Boris Badenough

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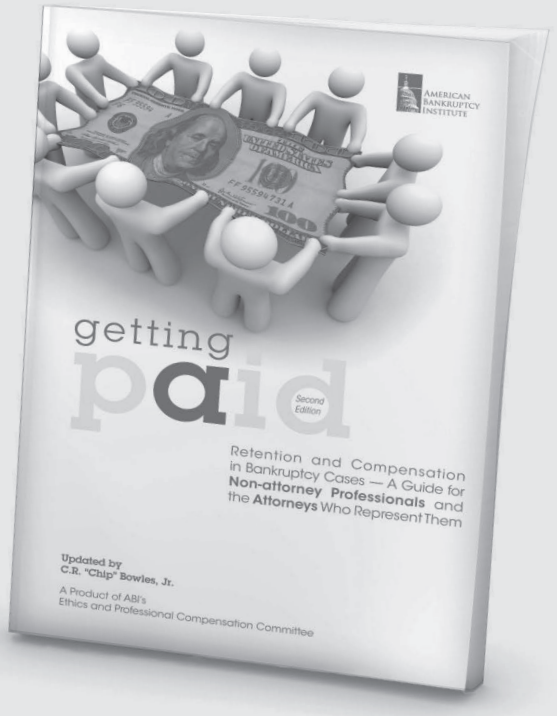

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First Act: Bankruptcy Interruptus?

Boris Badenough is once again finding himself involved in a bankruptcy case. His latest adventure into the dark reaches of Chapter 11 involves his soon to be ex-wife, Sophia "Sting" Shire, a brilliant photo artist. Like Boris' previous four **(Director's note: isn't it five former wives?)** wives, she signed the standard 500-page Antenuptial Agreement, under which she would keep her pre-marriage assets and waive all of her claims to: (1) any marital assets (unless specifically gifted to her, in writing, with the seal of the Grand Duke of Lesser Gandalforia;[1] (2) any award of alimony, maintenance support or of division of property in the event she and Boris divorced; and (3) any right to Boris' probate estate. However, unlike several of Boris' former spouses, she is as cunning and ruthless as Boris.

Boris and Sting were married two years ago, and Sting realized that Boris' loyalty and interest in his wives was as strong as his belief in higher taxes for the wealthy and deep as his support of full disclosure in business negotiations. Therefore, she found the last Grand Duke of Lesser Gandalforia (an impoverished street mime in Lubbock, Texas) and has had him placing his seal on every check Boris has written to pay for her cars, clothes, jewelry and credit cards in order to "establish" he meant to gift her these items. Her position would be stronger if she had informed Boris of the Grand Duke's activities, as the seals were placed on the checks only after Boris signed them. (More on this later).

After discovering Boris was planning to divorce her (for tax purposes), Sting decided to take matters into her own hands. She cleaned out a bank account which she had signature authority on (or at least the bank thinks Boris gave her signature authority), and netted $26,000,000. She was lucky that Boris was using the account to transfer to his offshore trusts, the sale of Magic Mountain LLC, the owner of a fantasy online game about zombie unicorns.

However, Boris is not a man easily scorned or fleeced. He has taken Sting to state court and obtained a TRO, freezing her bank accounts until she returns the $26,000,000. Sting now turns to her friend, Bill Baggins, a noted bankruptcy lawyer, for help.

Sting: Thanks for seeing me on such short notice. Boris is trying to destroy me.

Bill: Not a problem, but I am a bankruptcy lawyer, not a divorce lawyer.

Sting: The State Court is unreasonable. I had a right in that account and with Boris leaving me, I needed something.

Bill: Didn't you say you got $26,000,000 from the account?

Sting: Yes, and I immediately invested it in the National Gold Mines of Kettlementstan. I need to make sure I and my little ones are properly cared for.

[1] Lesser Gandalforia's notice house was believed to be wiped out in the First World War.

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Bill: You don't have a kid. You're not preg...

Sting: No, my two cats. Well, I am now prevented from using that small asset for their support. However, Boris can't get his hands on that money either.

Bill: Boris has lots of contacts in Europe, including the president of Pottsylvania. Why can't he get the money with the Court Order?

Sting: Kettlementstan is the arch enemy of Pottsylvania and they have an outstanding warrant for Boris' arrest.

Bill: Okay, well that explains that, but why do you need a bankruptcy lawyer?

Sting: Well, I need to have the horrible Antenuptial Agreement avoided and my rights as Boris' wife restored. Did you know he is worth over $26 billion!

Bill: Well, I guess we can do that in a bankruptcy, either through a declaratory judgment action or motion to reject the Antenuptial, as an executory contract. But, is Boris the only creditor you have? If so, we have a problem.

Sting: Oh no. Boris stopped paying my credit card bills a month ago, and I owe over $5,000,000 on those cards.

Bill: $5,000,000? How is that even possible?

Sting: Well, it is a lot less than I usually spend, but I was sick a lot that month.

Bill: Err, okay, well what assets do you have?

Sting: Well, not much, only about $2,000,000 in furniture from my photo and furniture studio. I am current on the rent, but I am otherwise destitute.

Bill: Didn't you drive up in a 1966 Rolls Royce Silver Shadow?

Sting: My best friend, Mary Took, owns it. She knew I needed reliable transportation and lets me use it on occasion.

Bill: I know her. Doesn't she work the night shift at the local Kwik E Mart?

Sting: Yes. Isn't she nice?

Bill: Okay, but what about the watch and necklace you are wearing?

Sting: You are observant. They go well with my outfit and my hairdresser, Sylvan Marillian, lets me wear them to give exposure to his shop.

Bill: I see. Well, if you become my client, you will have to disclose all of your assets and list all your creditors. As you need to file a Chapter 11, you will be a fiduciary to your creditors in bankruptcy.

Sting: Of course. I want to pay my creditors in full after I get my alimony and property settlement from Boris. My divorce lawyer says I can get at least $50,000,000 if we get rid of the Antenuptial.

Bill: Yes, but I do not think I can help you. Boris is a fighter and I can't take a Chapter 11 like this without a very large retainer and payment of pre-filing fees to prepare for the filing.

Sting: Bill, I know how you lawyers work. I can give you a $250,000 retainer for the bankruptcy and pay your bills on a weekly basis until the filing.

Bill: That's great, but you said you didn't have anything other than home furnishings. Can you sell them and raise the money? And, even if you could, wouldn't Boris simply claim he owned them in bankruptcy?

Sting: Oh! No, my sister Samantha Gamgee, will loan me the money and I will give it to you. It clearly will be her money and Boris can't object to this.

Bill: Should I ask how your sister, who you had me do her mortgage last year and is a stay-at-home mom married to a semi-professional mushroom hunter, has $250,000 in cash?

Sting: She is a good investor.

Bill: Well, I certainly like $250,000...I mean, helping people. As soon as I get the retainer, I will begin work. Anything else before we begin?

Sting: One final thing, my divorce lawyer said you could help me make sure I properly exempted my property to protect it from creditors.

Bill: Yes. This state has very liberal exemptions and we can "shift" your business assets to exempt assets.

Sting: Is there any problem with that?

Bill: We have to properly document the transfers, but you have a right to claim all exemptions allowed by law.

Sting: I will call my bank and make the transfer... err, I mean, my sister and ask for the loan.

Bill: Err...right. I will draft the loan agreement to document that. This will be an excellent adventure. Ted, my senior associate, will get you the paperwork.

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However, Sting and Bill are not the ones planning a bankruptcy. We take you to the safe room of Boris Badenough's East Coast estate where he has summoned his latest bankruptcy lawyer, Tom "Bomber" Dill, ex-Air Force pilot and JAG officer, to discuss his devious wife's latest move.

Boris: [holding up snow globe] Yes, found it.

Tom: Boris, this is no time to be playing with snow globe. You said your wife stole the zombie unicorn proceeds and you said you wanted her in bankruptcy.

Boris: Wrong on two accounts my overpaid mouthpiece. First, there is never a bad time to enjoy the beauty and mystery of a well-crafted snow globe and second, this proves Sting has been ripping me off.

Tom: How?

Boris: It is the seal of the Grand Duke of Lesser Gandalforia and it hasn't been used in years. The only way my wayward wife can show I gave her a gift is if the gift is sealed with this seal.

Tom: I get that, but I thought you had already gotten the money back in state court. Didn't Snidely Warm of Wum and Tony win that case for you?

Boris: Yes and no. We got a TRO that froze her bank accounts, but she had already moved it offshore to Kettlementstan.

Tom: Isn't that a country next to Pottsylvania, your home country? I know you're close with their government and fearless leader.

Boris: Unfortunately, Pottsylvania and Kettlementstan have been at war on and off for the last 50 years, and I am not real popular there.

Tom: Okay, but why bankruptcy?

Boris: Simple, a preemptive strike. My two private detectives have found she is moving assets around, off the grid, and has been meeting with Bill Baggins.

Tom: That Chapter 11 guy! But why would she want to file?

Boris: Sting is clever and calculating, and utterly without ethics. That, and a few other things **[likely politically incorrect comment deleted by cowardly author]**, is why I married her. She is hiding assets and wants to use the bankruptcy to launder her ill-gotten gains and try to break the Antenuptial Agreement we have, something she could not do in state court.

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Tom: Okay, so you want me to get ready to dismiss her case?

Boris: No, I just want to accelerate the process and severely disrupt her plans; therefore, file an involuntary bankruptcy against her.

Tom: Okay. Does she have more than 12 creditors?

Boris: She has at least 50 store lines of credit and has an assistant to carry her back pack of credit cards.

Tom: Alright, we will need two other creditors then. Do you think any will join in on involuntary?

Boris: Those sorry excuses for credit managers have turned me down. They seemed to be unhappy. I have sued most of them for conversion for the payments I made on those cards. They were not gifts and the cards are only in her name. Fortunately, I have secretly agreed to purchase two claims so we will have three creditors.

Tom: Not in this circuit. If you own a claim, you cannot be counted as a separate creditor, even if owned by a separate corporation or entity you own or control.

Boris: Okay. I will have two of my golf buddies buy the debt with an agreement to full reimbursement. I want Sting to be in Chapter 11.

Tom: Why Chapter 11?

Boris: She earns $10,000 a week and I want to make sure she can't use it without court permission. That court-approved post-bankruptcy is a pain really cramped my style in my Chapter 11 years ago and I want her to feel the same pain.

Tom: Well, it's unresolved whether you can involuntary an individual into Chapter 11.

Boris: What! This is outrageous. I merely want to make sure she pays me back the money she stole by devoting every penny she ever makes again to pay me. That is a simple and reasonable position.

Tom: You could have to share her assets with other creditors.

Boris: Of course, as soon as I am paid, they can share what is left.

Tom: Boris, bankruptcy doesn't work that way.

Boris: Ye of little faith. I have my ways. Get started on the involuntary petition.

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Tom: Okay, but before I go, look at your Antenuptial, the snow globe doesn't have to be used to seal the gifts. It says the "Grand Duke must place his seal on the instrument of gift." Could she have found the Grand Duke?

Boris: Impossible. My uncle Balrog's journal clearly stated he had them all executed in WWI, err, I mean, he said their line died out then.

Tom: I am really glad the statute of limitations on that is passed.

Intermission Discussion

1. Who is Bill Baggins' client in this case?

   a. Prior to filing Sting's individual Chapter 11?

   b. After the individual Chapter 11 is filed?

   c. If there is a different answer for each period, does that create a conflict?

Answer

1(a) As there is no bankruptcy estate at this time, Sting, the individual, is likely the client. However, this does not mean that attorney can act adversely to their future client's interest. See generally *In re Garcia*, 456 B.R. 361 (N.D. Ill. 2011) (attorney who represented debtor in pre-petition foreclosure actions and helped debtor find bankruptcy counsel, could be sued under 11 U.S.C. § 329 if services provided in contemplation of bankruptcy). Accord, *In re Gage*, 394 B.R. 184 (Bankr. N.D. Ill. 2008); *In re Dixon*, 143 B.R. 671 (Bankr. N.D. Tx.1992).

For authority that the debtor in possession as fiduciary is the client, see Lupica & Rapoport, Final Report of the ABI National Ethics Task Force: Duties of Counsel for a DIP as Fiduciary and Responsibilities to the Estate 11-25 (2013); *Hansen Jones & Leta P.C. v. Segal*, 220 B.R. 434 (D. Utah).

1(b) For authority that the bankruptcy estate is the client, see *Everett v. Perez*, 30 F.3D 1209 (9th Cir. 1994); *In re Cenargo International PLC*, 294 B.R. 571 (Bkrtcy. S.D.N.Y. 2003); *In re ICM Notes, Ltd.*, 278 B.R. 117 (S.D. Tx. 2002); *In re Harp*, 166 B.R. 740 (Bkrtcy. N.D. Ala. 1993); *In re Rusty Jones, Inc.*, 134 B.R. 321 (Bkrtcy. N.D. Ill. 1991); *In re Grabill, Corp.*, 113 B.R. 966 (Bkrtcy. N.D. Ill. 1990); *In re Storms*, 101 B.R. 645 (Bkrtcy. S.D. Cal. 1989). See also, Rapoport and Bowles, Has the DIP's Attorney Become the Ultimate Creditor's Lawyer in Bankruptcy Reorganization Cases?, 5 Am. Bkr. Inst. L. Rev. 47 (Spring 1997) (hereinafter "Rapoport & Bowles").

1(c) Possibly yes, see 11 U.S.C. § 327, Bankruptcy Rule 2014. See also *In re Phoenix Group Corp.*, 305 B.R. 447, 450-52 (non-individual case where Chapter 11 counsel determined it had to withdraw when officers controlling debtor demanded they take legally or ethically improper actions).

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2. Does Bill have a duty to investigate:

   a. Sting's claims about her lack of assets [i.e., "borrowed jewelry," loaned Rolls Royce, and rent-free condo owned by her sister as her residence] and investment success of her sister.

   b. The source of his retainer?

Answer

2(a) See Bankruptcy Rule of Procedure 9011 (noting that "inquiry reasonable under the circumstances is required to make factual allegations in a 'petition, pleading, written motion and other paper;' see also *In re Taylor*, 655 F.3d 274 (3rd Cir. 2011) (attorney sanctioned for failing to conduct any investigation of creditor clients' claims in stay motion); *Armstrong v. Davis*, 487 B.R. 764 (E.D. Tex. 2012) (debtor's counsel sanctioned for filing claim objections without investigation of claims); *In re Chicago Midwest Donut, Inc.*, 82 B.R. 943 (Bankr. N.D. Ill. 1988) (counsel for debtor sanctioned for failing to conduct reasonable investigation).

2(b) Yes. See Bankruptcy Rule of Procedure 2014. See also *In re Park-Helena Corp.*, 63 F.3d 877 (9th Cir. 1995) (attorney sanctioned for taking retainer from non-debtor source and failing to properly disclose source of retainer).

3. Can Bill plan exemptions for Sting prior to bankruptcy?

Answer

This is an open and very dangerous individual Chapter 11 area of practice. See *In re Bowyer*, 932 F.2d 1100 (5th Cir. 1991) (on rehearing finding exemption planning appropriate), vacating 916 F.2d 1056 (5th Cir. 1990) (denying discharge due to wholesome conversion of non-exempt assets to exempt assets. *Norwest Banks Nebraska v. Tveten*, 848 F.2d 871 (8th Cir. 1988) (exempting planning inappropriate). See also Question 1 above.

4. Can Boris and Tom ethically file an involuntary Chapter 11 against Sting?

Answer

If a Court finds that Boris and/or Tom acted in bad faith, no. See 11 U.S.C. § 303(i) and Bankruptcy Rule of Procedure 9011. See also *Adell v. John Richards Home Building Co., LLC*, 493 F.3d 248 (6th Cir. 2006) (affirming award of $6,000,000 in damages) for bad faith filing of an involuntary case and *John Richard Home Building Co. v. Adell*, 296 Fed. Appx. 837 (11th Cir. 2008) (Appeal in bankruptcy case of individual who brought involuntary against John Richards Home Building Co. discussing award of $6,000,000 and in damages under 11 U.S.C. § 303(i)

For whether 11 U.S.C. § 303(i) or Bankruptcy Rule 9011 allow for sanctions against a petitioner's attorney, see *In re Commonwealth Sec. Corp*, 2007 Bankr. LEXIS 312 (Bankr. N.D. Tx. 2007), where the Court noted:

First, what few courts that have been presented with this question have, for the most part, either held, stated in *dicta*, or implied that *Rule 9011* and *Section 303(i)* are not mutually exclusive – that *Rule 9011* is technically available and *Section 303(i)* does not supersede or supplant its availability in an involuntary petition context. See *In re Denver Community Development Credit Union*, 2004 Bankr. LEXIS 1532, 2004 WL 2274961, *5 (Bankr. D. Colo. 2004) (court considered *Section 303(i)* damages against petitioner as well as *Rule 9011* sanctions against petitioners' attorney); *In re Law Ctr.*, 304 B.R. 136 (Bankr. M.D. Pa. 2003) (court awarded reasonable attorneys' fees, expenses, and costs, "under both *Rule 9011* and 11 U.S.C. § 303(i)" without discussion of the availability of both remedies); *In re Grossinger*, 268 B.R. 386, 390 (Bankr. S.D.N.Y. 2001) (court, noting that *Section 303(i)* does not provide [*22] for damages or sanctions against a petitioning creditor's attorney, imposed *Rule 9011* sanctions against the attorney); *In re Kidwell*, 158 B.R. 203, 219 (Bankr. E.D. Ca. 1993) (*Rule 9011* sanctions permissible against a petitioning creditor who made misrepresentations, where Section 303(i) did not provide a remedy, since involuntary case had not ultimately been dismissed); *In re Kearney*, 121 B.R. 642, 646 (Bankr. M.D. Fla. 1990) (court imposed *Rule 9011* sanctions upon petitioner and his attorney jointly and severally, for their failure to reasonably investigate and determine that there were more than twelve creditors of the alleged debtor, in addition to shifting attorneys fees and costs to the petitioner pursuant to Section 303(i)); *In re International Mobile Advertising Corp.*, 117 B.R. 154, 158 (Bankr. E.D. Pa. 1990) (although dismissal of involuntary case by consent of alleged debtor and petitioning creditor precluded alleged debtor from seeking *Section 303(i)* damages, court held that this did not foreclose alleged debtor from seeking *Rule 9011* damages against petitioner and his attorney, although court declined to grant such sanctions); *In re Tarasi & Tighe*, 88 B.R. 706, 711 (Bankr. W.D. Pa. 1988) (court imposed sanctions, pursuant to *Rule 9011*, against an attorney who was a *pro se* petitioner and also imposed *Section 303(i)* damages). See also *Paradise Hotel Corp. v. Bank of Nova Scotia*, 842 F.2d 47, 52 (3d Cir. 1988) (declining to hold that *Section 303(i)* provided the exclusive remedy for pursuing claims against a petitioner who allegedly petitioned in bad faith). But see *In re Cadillac by Delorean & Delorean Cadillac, Inc.*, 265 B.R. 574, 586 (Bankr. N.D. Ohio 2011) (court declined to award sanctions under *Rule 9011*, noting that *Section 303(i)* serves an identical purpose as *Rule 9011* in the involuntary petition context, and because *Section 303(i)* – as opposed to the more general *Rule 9011* – specifically deals with inappropriate involuntary filings, it is more appropriate and effective to assess costs and attorney's fees

> under *303(i)*). The *Delorean* case suggests that *Rule 9011* and *Section 303(i)* are basically duplicative, even if technically not mutually exclusive.

See also Bowles, The Lawyer Made Me Do It! Ethical and Liability Issues For Attorneys For Petitioning Creditors in Involuntary Bankruptcies, 21 Am Bankr. Inst. 29 (Oct. 2002).

5. Can Boris and Tom constitutionally file an involuntary Individual Chapter 11 against Sting?

Answer

The issue is still somewhat uncertain. Same judges and commentators have concluded involuntary Chapter 11 cases against individuals would not be constitutionally permissible: See e.g. *Toibb v. Radloff*, 501 U.S. 157 (1991) (J. Stevens Dissenting); *In re Amburgey* 68 B.R. 768 (Bankr. S.D. Ind. 1987) (Involuntary Chapter 11 cases could only be filed against individuals with significant businesses or properties which a trustee could administer); *In re Clements*, 409 B.R. 288 (Bankr. D. N.J. 2009) (avoiding involuntary servitude/constitutional issue by allowing individual to convert to a Chapter 7 liquidation; *In re Marciano*, 459 B.R. 27 (9th Cir. BAP 2011) (J. Markell Dissenting) (Worth reading as a really unusual involuntary individual Chapter 11) Howard, *Bankruptcy Bondage*, 2009 Ill. L. Rev. 1991; Keach, *Deadman Filing Redux: Is The New Individual Chapter Eleven Unconstitutional?* 13 An Bkr. Inst. L.R. 483 (Winter 2005),

However, other courts have found involuntary individual Chapter 11 cases are not unconstitutional. See *In re Marciano*, 459 B.R. 27 (9th Cir. BAP 2011) (affirming Bankruptcy Court not dismissing individual Chapter 11 on constitutional grounds); *In re Gordon*, 465 B.R. 683 (Bankr. N.D. Ga. 2012), court converted Chapter 7 of Debtor to Chapter 11 case over objection of debtor).

Second Act: Be Careful What You Wish For!

Well, Boris has filed an involuntary against Sting, a motion to appoint a Chapter 11 trustee, a motion to prevent the use of any property to pay her expenses during the involuntary case without prior court approval of her budget and twenty-three 2004 motions against Sting, several members of her family, her accounts and other associates. Bill has opposed all the motions, and filed the schedules he prepared with Sting. We go to the besieged Bill Baggins' conference room where Sting has come for an emergency meeting.

> Bill: Thank whatever saint looks after bankruptcy attorneys. I have been reviewing Boris' involuntary and his story does not match yours.
>
> Sting: Oh, Boris is such a liar and drama queen. What is he saying?
>
> Bill: First, he says that he had no knowledge of making any gifts to you pursuant to your Antenuptial Agreement and having them sealed by the Grand Duke.
>
> Sting: Well, he signed the checks and they are sealed, see!

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Bill: Yes. The ones you gave me are sealed, but from Boris' files of outgoing mail, they were not sealed when they were placed in the mail.

Sting: So, Boris' records are false too. Maybe we should also argue that the time of sealing is irrelevant.

Bill: What are you talking about?

Sting: You are my lawyer, right, and everything I tell you is privileged, right?

Bill: Yes, but what . . .

Sting: Well, Boris' body guard, Aaron Gorne, has been helping me. He is such a dear to make sure I kept what was mine and he let me and the Grand Duke into the mail room to seal the checks and put them back in the mail. Although I have not seen in in a few days we have a special relationship.

Bill: What? Sting, that is wrong on several levels and directly contradicts what we agreed to in the reply I filed yesterday.

Sting: Okay. Just stay with the fact the checks were sealed then. No need to make waves.

Bill: Also, Boris' motion for a trustee claims that you withdrew over $3,000,000 in cash over the last three months from various bank accounts of Boris. You never told me about those funds or disclosed them in your schedules you prepared and we filed three days ago.

Sting: Well, the checks were signed by Boris and my computer and business records were stolen last week. We will just have to come up with something to explain this, but all I can say is I spent all of this. I have good taste.

Bill: Sting, that representation is never going to fly.

Sting: Actually, you need to make it fly for at least 500,000 reasons.

Bill: What are you talking about?

Sting: Your $250,000 bankruptcy retainer and the $250,000 in payments you got before the petition was filed. Where do you think that money came from?

Bill: But you said they were loans from your sister.

Sting: Still my lawyer?

Bill: (Stammering) Yes, I am.

Sting: You are really naïve. Where do you think the money came from?

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Bill: Oh, no . . .

Sting: But, remember, we have a trump card.

Bill: What is that?

Sting: The most important asset I do own, Hidden Hoard LLC. Trust me, Boris will get me out of bankruptcy to get his hands on that. Trust me.

Bill: Why do I think I don't have a choice on this?

We now go to Tom Dill's office where he and Boris are meeting.

Tom: We, Boris, we have her on the run. The Trustee's motion will be heard in two weeks. After their weak reply, we should clearly win.

Boris: Excellent news, although your assistant said they had filed a new discovery request and a sale motion. What is that about?

Tom: Yeah, rather strange. They are asking to auction a 1% interest in an entity known as Hidden Hoard LLC. The discovery is for all documents you have on this company. Any trade secrets will be filed under seal. They indicate that two other entities are interested in being the stalking horse.

Boris: What? How did she... **[looking at pleadings, dials cell phone]** "J.R., Boris. Does Sting own the "Ring" interest in Hidden Hoard? What! How? You mean that's how we got the minority contractor status? Does Hidden Hoard own the 'precious patents?' Arghhh," *[slams the phone down]*

Tom: Boris, what is wrong?

Boris: I am falling in love again. She is more unethical and devious than I imagined. She is blackmailing *me*, Boris Badenough.

Tom: What are you talking about? What is so important about Hidden Hoard?

Boris: You are my personal attorney, right?

Tom: Yes. We went over that. I am your personal counsel.

Boris: Well then, Hidden Hoard is a company I own 99% of by owning 100% of the limited non-voting units. Sting owns 1% of the company, but that one unit or the Restricted Integrated Net Governing unit -- "ring" for short, has full managerial authority over Hidden Hoard and all of its assets.

Tom: But why does Sting own it? Did she forge your name on that too?

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Boris: No. I needed a $50,000,000 government loan for R&D and the only way to get it from the U.S. Government was through a minority contractor.

Tom: So Sting became the minority contractor. Big deal! How valuable can Hidden Hoard be?

Boris: They developed a light weight battery that is 500% more efficient than current batteries -- will be the next hot tech. It is worth billions.

Tom: Whoa! That will be hard to keep quiet from the auction with this discovery request.

Boris: Maybe not. I do not know if I have any records on this and they are only asking for documents from me. Let me call my IT guy, Moray Door, and do a quick check on Hidden Hoard and Precious.

Tom: Actually, we need to set up a discovery protocol and work with you.

Boris: No. I have been around the block. Moray, this is Boris. Listen, you have access to my computer files. See if you can find any documents or e-mails about Hidden Hoard or the Precious project. I want to make sure to check and see if they exist [emphases]. Yeah, I will hold.

Tom: Boris, you cannot conduct discovery in that . . .

Boris: **[about 15 seconds later]** Okay, so the only thing I have is the incorporation documents, and the ownership structure, including the RING Agreement. I don't have anything about what it owns on any of my computers, right? How about hard copies? All destroyed last month in routine document deletion. Thanks. Well, we don't have anything that is not attached to that motion to sell.

Tom: Boris, that is not . . .

Boris: What? You do not trust your client?

Tom: I am not going to answer that question, but am not going to file questionable discovery responses. Anyway, this won't do any good, as there are two other bidders interested.

Boris: Yeah, but I can deal with these guys. They are both defense subcontractors working on Precious. They are only doing this because we are disputing how much of the deal they are going to get. I can give them some percentages and buy the Ring interest for a song.

Tom: Errrr, Boris, I do not need to remind you that collusive bidding in bankruptcy is illegal. I represented you on the two prior indictments.

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Boris: I learned my lesson. I will form a partnership with them and we will submit a joint bid of $1,000,000. Then, Sting can convert to a Chapter 7 or dismiss the case. We can also resolve all of our pleadings in her case so that won't be a problem.

Tom: Boris, you are forgetting Sting. You will be letting her get away with $26,000,000.

Boris: Yeah, but I think we have changed our mind about each other and can reconcile. God, what a woman!

Tom: Okay, but by the way, where is your body guard, Mr. Gorne?

Boris: He eloped with my secretary -- something about wanted to expand his horizons. He told me yesterday, just before Sting called, saying she loved and needed me.

Tom: I am never one to stand in the way of true love.

Curtain Call

6. Can Tom allow Boris and his "IT Guy" to do electronic discovery without supervision of counsel? See e.g. *Coquina Investments v. Rothstein and TD Bank NA*, Case No. 60786 (August 3, 2012) (Law firm sanctioned for failing to properly supervise client's discovery). Allowing your client to conduct all electronic discovery without any guidance or review of contested missing documents is not a good idea. *Sailor v. Waffle House, Inc.*, 2008 U.S. Dist. Lexis 34210 (N.D. Fla. 2008) (attorneys not sanctioned for client's false interrogatory answers even though attorney knew client had filed false answer in prior cases); see also *In re Evergreen Security Ltd.*, 384 B.R. 882 (Bankr. M.D. Fla. 2008) (attorney cannot rely on another attorney and escape Rule 9011 liability)

7. Can Boris enter into "partnerships with the three other qualified bidders to enhance "strategic acquisition opportunities"?

No, if the trustee or debtor can demonstrate: (1) an agreement exists; (2) between potential bidders; and (3) that controls the price at the bidding. 11 U.S.C. § 363(n). See e.g. *In re Sunnyside Timber, LLC*, 413 B.R. 352 (Bkrtcy W.D. La 2009)

Cases finding violation of 11 U.S.C. § 363(n): *In re New York Trap Rock Corp.*, 42 F.3d 747 (2nd Cir. 1994) ($55,000,000 payment for interest in joint venture to potential bidder for that interest and as payment to not participate in bidding on debtor assets would be violative of 363(n) and summary judgment in favor of defendants not appropriate); *Boyer v. Gildey*, 475 B.R. 647 (N.D. Ind. 2012); *In re Hat*, 310 B.R. 752 (Bankr. E.D. Calif. 2004).

Cases finding no violations of 11 U.S.C. § 363(n): *In re Gucci, 126 F.3d 380* (2nd Cir. 1997) (Aggressive litigation in connection with sale of trademarks did not violate 11 U.S.C. §363(n); *Landscape Prop. v. Vogel*, 46 F.3d 1416j (8th Cir. 1995) (jury found no conclusive agreement between bidders to control sale price).

A Magical Marriage, or Is He Just a Troll? The Divorce of Boris Badenough

8. Does Bill have to disclose Sting's failure to be "totally honest" with the Court and if so, how?

There is a lively debate on this issue. See, in order, the articles published. Alec P. Ostrow, We Don't Need the Case Law to Turn the DIP's Attorney into a Court Informant, 27 Am Bankr. Inst. J. 14 (May 2008); Rapoport & Bowles, Debtor's Counsel's Fiduciary Duty: Is There a Duty to Rat in Chapter 11, 29 Am. Bankr. Inst. J. 1 (February 2010); Richman & Nguyen, A Response: Is it really a Chapter 11 Debtor's Counsel Duty to Rat? 29 Am Bankr. J. 18 (April 2010) ("Duty to Rat Articles" which are attached hereto as Exhibit A).

9. What ethical and fee issues confront Bill Baggins relating to the $250,000 retainer in the period after an involuntary bankruptcy petition was filed but prior to the entry of an order of relief?

Answer

Likely a lot of problems. See 11 U.S.C. §§ 303(f), 327, 502(f), 507(a)(2) and 549. See also Bowles, Involuntary Fee Slaughter: The Perils of Professional Fees for Representing a Debtor During the Gap Period, 21 ABI L.J. 24 (April 2002).

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We Don't Need the Case Law to Turn the DIP's Attorney into a Court Informant

Written by:
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Editor's Note: *This article is a revised, updated and condensed version of the author's paper "Do the Bankruptcy Laws Contain a Special Requirement that Counsel for the Debtor in Possession Must Inform the Court of Misbehavior by Management?," which was originally published in the conference materials for the ABI's 1999 New York City Bankruptcy Conference and also presented at the 2002 Second Circuit Judicial Conference.*

About the Author

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In January of this year, another bankruptcy court signed on to the proposition that the attorney for the debtor in possession has a duty to inform the court of the client's misbehavior.[1] This adds to the trend of cases adopting this proposition,[2] or coming close to it.[3] To be sure, misconduct by debtors-in-possession (DIPs) is not to be indulged or tolerated. Indeed, one has to sympathize with the desires of bankruptcy judges to take steps to prevent misconduct from occurring on what some might call "their watch."


Alec P. Ostrow

Nevertheless, one has to ask whether this trend does unnecessary damage to the attorney-client relationship, a relationship generally viewed as necessary to the administration of justice.[4] That relationship is one of trust and confidence, and built on undivided loyalty to the client.[5] It depends on the client's ability to disclose its secrets and confidences to its attorney, who is bound to preserve such secrets and confidences and not reveal privileged communications.[6]

This general rule is subject to well-established limitations on the attorney's conduct. First, there is an exception to the attorney-client privilege with regard to future crimes or frauds.[7] Second, an attorney must inform on a client committing perjury or other fraud on the court.[8] Finally, there are other generally applicable rules that prevent attorneys from participating in the wrongful activities of their clients[9] or making deliberate misstatements of fact,[10] especially to a court.[11] If these rules are adequate to safeguard the integrity of the judicial system in every other area of substantive law, one ought to ask why, in the absence of a legislative enactment, another rule needs to be judicially created to deal with debtors in possession under the Bankruptcy Code.

Straight & Narrow

The imposition of the duty to inform on the client stems from a holding that the attorney for the DIP owes a fiduciary duty to the estate.[12] Indeed, some cases refer to the attorney for the DIP as the attorney for the estate.[13] Certainly, the DIP has all the rights, powers and duties of a chapter 11 trustee[14] and a DIP, like a trustee, owes a fiduciary duty to the estate.[15] The reasoning is, because the attorney for the DIP owes a fiduciary duty to the estate or is the attorney for the estate, it must inform on the misbehavior of those not acting in the estate's best interest, including the officers and directors of the DIP.[16]

There are several problems with this reasoning. First, just because the DIP owes a fiduciary duty to the estate and the attorney owes a fiduciary duty to the DIP, it does not follow that the attorney owes a fiduciary duty to the estate. The district court in *Hansen, Jones & Leta PC v. Segal*[17] rejected the syllogism employed by a majority of the courts, noting that the attorney's duty of loyalty is to the client and that duty includes the duty to maintain client confidences.[18] Relying on fiduciary principles outside of bankruptcy, the court held that the attorney for a fiduciary owes no expanded duty to the beneficiaries of a trust or estate and takes on no additional obligations beyond those owed generally to third parties.[19] Finally, the court noted the ability of creditors' committees and individual creditors to investigate abuse by management and make appropriate motions to the court to circumscribe management's control.[20] Regrettably, this approach has not been widely followed.[21]

Second, the notion equating the duties of the attorney for the DIP with that of the DIP itself is grounded in the Code's regulation of professional retention and compensation.[22] The attorney for the DIP, like the attorney for the trustee, must be "disinterested" and must not "hold or represent an adverse interest to the estate."[23] Compensation may be disallowed if the attorney for the DIP

1 *Grubin v. Rattet* (*In re Food Management Group LLC*), 380 B.R. 677, 709 (Bankr. S.D.N.Y. 2008).

2 *Zeisler & Zeisler v. Prudential Ins. Co.* (*In re JLM Inc.*), 210 B.R. 19, 26 (2d Cir. B.A.P. 1997).

3 *In re Count Liberty LLC*, 370 B.R. 259, 281 (Bankr. C.D. Cal. 2007) ("[A]n attorney for the debtor-in-possession has fiduciary obligations to the estate stemming from his fiduciary obligations to the debtor-in-possession and his responsibilities as an officer of the court."); *In re St. Stephen's*, 350 E. 116th St., 313 B.R. 161, 171 (Bankr. S.D.N.Y. 2004) ("An attorney for a chapter 11 debtor cannot simply close his or her eyes to matters having an adverse legal and practical consequence for the estate and its creditors.").

4 *See Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

5 *In re Cooperman*, 633 N.E.2d 1069, 1070 (N.Y. 1994).

6 Model Rules of Professional Conduct (hereafter RPC) 1.6(a); Model Code of Professional Responsibility Disciplinary Rules (hereafter CPR DR) 4-101.

7 *United States v. Zolin*, 491 U.S. 554, 562-63 (1989); RPC 1.6(b)(2); CPR DR 4-101(C)(3).

8 *Nix v. Whiteside*, 475 U.S. 157, 168-69 (1986); CPR DR 7-102(A)(7).

9 *See* 18 U.S.C. §2 (federal criminal liability for aiding and abetting).

10 *In re Westreich*, 629 N.Y.S.2d 417, 418 (N.Y. App. Div. 1995), leave to appeal denied, 666 N.E.2d 1059 (N.Y. 1996); RPC 4.1; CPR DR 1-102(A).

11 *In re Snyder*, 472 U.S. 634, 643 (1985). With regard to written representations, *see* Fed. R. Civ. P. 11; Fed. R. Bankr. P. 9011.

12 *Food Management Group*, 380 B.R. at 709; JLM, 210 B.R. at 26.

13 *Everett v. Perez* (*In re Perez*), 30 F.3d 1209, 1218-19 (9th Cir. 1994); *In re Rusty Jones Inc.*, 134 B.R. 321, 343 (Bankr. N.D. Ill. 1991); *see In re Sky Valley Inc.*, 135 B.R. 925, 939 (Bankr. N.D. Ga. 1992).

14 11 U.S.C. §1107(a) (except for compensation).

15 *CFTC v. Weintraub*, 471 U.S. 343, 352, 355-56 (1985); *Wolf v. Weinstein*, 372 U.S. 633, 649-52 (1963).

16 *Food Management Group*, 380 B.R. at 709; JLM, 210 B.R. at 26.

17 220 B.R. 434 (D. Utah 1998), *rev'g in relevant part In re Bonneville Pac. Corp.*, 196 B.R. 868 (Bankr. D. Utah 1996).

18 *Id.* at 454.

19 *Id.* at 460. The court quoted the ABA Comm. on Ethics and Professional Responsibility, Formal Op. 380 (1994).

20 *Id.* at 465.

21 *See Food Management Group*, 380 B.R. at 707-08; *Count Liberty*, 370 B.R. at 280-81.

22 *See, e.g., JLM*, 210 B.R. at 23-25; *Rusty Jones*, 134 B.R. at 341-47.

23 11 U.S.C. §327(a).

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does not maintain these attributes[24] or if the attorney's services are not "reasonably likely to benefit the debtor's estate."[25] But these directives, which determine whether or not an attorney's services are compensable in whole or in part, do not by their own terms, or by any necessary implication, require an attorney to report the client's misbehavior in derogation of the attorney's professional duties to the client. Every attorney recognizes, even if he or she does not appreciate, that there are required tasks that are not compensable. There is no direct equation between compensable services and services compelled, or actions forbidden, by the rules of professional responsibility.

Third and most important, whatever the rule may be with respect to the attorney for a bankruptcy trustee, a DIP is not the same as a trustee. As the Supreme Court has recognized, there is a difference between a "strict trusteeship," such as a bankruptcy trusteeship, and "one of those quasi-trusteeships in which self-interest and representative interests are combined."[26] A DIP is a quintessential example of such a quasi-trusteeship. The DIP is, first of all, the debtor[27] with additional, rights, duties and powers.[28] Not only are these comprised solely of the rights, duties and powers of a trustee,[29] but the DIP also has the duties of the debtor,[30] the rights of a party in interest[31] and—most significantly, at the outset of a chapter 11 case— the exclusive right to file a plan.[32] Consequently, there should at least be a distinction between the rights, duties and powers the DIP enjoys as a debtor, and those it enjoys as a trustee. For those it enjoys as a trustee, it has a fiduciary duty to the estate. For those it enjoys as debtor, it does not.

Concomitantly, when the attorney for the DIP advises the client with respect to rights, duties and powers the client has as a trustee, such as the right to sell property of the estate,[33] the attorney must counsel the client with regard to its fiduciary duty to the estate, such as the obligation to maximize value. But when the attorney for the DIP advises the client with respect to rights, duties and powers the client has as a self-interested litigant, no attention to fiduciary duty to the estate need be paid. Consider, for example, the filing of a plan and disclosure statement. There is no confirmation requirement that the plan be the best recovery obtainable for creditors. The only requirement on the value of distributions to nonpriority creditors is that they at least equal liquidation value.[34] Indeed, the absolute priority rule—which requires at a minimum that all debt be satisfied before any equity participates—need not be observed if all classes are unimpaired or accept their treatment.[35] A debtor, like any other party in interest entitled to file a plan, may certainly propose, and try to obtain confirmation of, a plan that allows equity to participate even though creditors are not paid in full.[36]

The attorney for the DIP represents a quasi-trustee who is both a fiduciary and a self-interested litigant. Therefore, at a minimum, the duty to inform the court of client misbehavior ought to involve a decision whether the misbehavior arises from an action taken in a fiduciary or self-interested capacity. Although some actions can be easily classified, for others the resolution is not evident. Continuing with the sale/plan dichotomy, one can ask whether the decision to sell or retain an asset is made in a fiduciary or self-interested capacity. A sale of an asset might yield a higher return for creditors, but could conceivably hamper the debtor's contemplated restructuring. A disagreement over how to deal with an asset can thus become a dispute over whether management is breaching its fiduciary duty to the estate.

An even more troubling issue arises in the defense of a motion to convert, dismiss or appoint a trustee.[37] Cause is required for such motions, and such cause may consist of misbehavior by management. Is counsel for the DIP supposed to determine the best interest of the estate before deciding whether he or she can represent management in opposing the motion? And if counsel for the DIP cannot oppose the motion, who can (and be compensated for doing so)? How can management obtain proper legal representation to oppose such a motion, if it cannot disclose its secrets and confidences to its attorney, because the attorney has a duty to inform the court? If counsel is vested with discretion to determine the severity of the misconduct, as some courts have suggested,[38] counsel is always subject to being second-guessed, and the prudent way to protect him- or herself is to make the disclosure.

The answer should be that counsel has a duty of loyalty to the client, which includes the duty to give the client zealous representation within the bounds of the law. A chapter 11 case makes every other party in interest and the U.S. Trustee a potential adversary in a matter litigated before the court. In such an adversarial process, it is unfair if one of the adversaries cannot rely on its counsel to protect secrets and confidences the same way all other attorneys for all other clients in all other forums can. If counsel for the DIP is required to be an informant, then counsel is the enemy. This is not the relationship of trust and confidence that is supported in every other aspect of the administration of justice.

As described at the beginning of this piece, there are many rules of general application that limit counsel from participating in the client's misconduct, and some well-recognized ones that require counsel to inform on the client, specifically in cases of future crimes or frauds. Bankruptcy has its special set of crimes, including concealment or embezzlement of estate assets, false oaths and claims, and fraud in connection with the case.[39] An additional requirement forced betrayal is neither necessary nor, from the standpoint of the administration of justice, desirable. ■

24 11 U.S.C. §328(c); *see In re Angelika Films 57th Inc.*, 227 B.R. 29, 40 (Bankr. S.D.N.Y. 1998), *aff'd*, 246 B.R. 176 (S.D.N.Y. 2000).

25 11 U.S.C. §330(a)(4)(A)(ii)(I).

26 *Mosser v. Darrow*, 341 U.S. 267, 271 (1951).

27 11 U.S.C. §1101(1).

28 *NLRB v. Bildisco*, 465 U.S. 513, 528 (1983).

29 11 U.S.C. §1107(a).

30 11 U.S.C. §521.

31 11 U.S.C. §1109(b) (the right to raise and be heard on any issue in the case).

32 11 U.S.C. §§1121(b), 1121(d)-(e).

33 11 U.S.C. §363(b).

34 11 U.S.C. §1129(a)(7). Even that requirement can be waived with the unanimous consent of the affected class. 11 U.S.C. §1129(a)(7)(A)(i).

35 The "fair and equitable" standard and the specific requirements of senior classes being satisfied or distribution to junior classes being eliminated are contained in 11 U.S.C. §1129(b), which is a substitute for 11 U.S.C. §1129(a)(8), the requirement that all classes accept the plan or are left impaired by it.

36 *But cf. Perez*, 30 F.3d at 1218 (suggesting that counsel for an individual DIP had a fiduciary duty in proposing a plan).

37 11 U.S.C. §§1104(a), 1112(b).

38 *See, e.g., Count Liberty*, 370 B.R. at 281-83; *St. Stephen's*, 313 B.R. at 171.

Debtor Counsel's Fiduciary Duty: Is There a Duty to Rat in Chapter 11?

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This installment of Straight & Narrow takes a different form, as it is a counterpart to **Alec Ostrow**'s excellent 2008 article[1] in the *ABI Law Review* concerning the extent of the duties of a chapter 11 debtor's counsel (DIP counsel) to a chapter 11 bankruptcy estate and its management.[2]

If a Lawyer Has the Estate for a Client, Does the Client Have a Fool for a Lawyer?

C.R. "Chip" Bowles, Jr.

Bankruptcy is not like the rest of the legal world, in which the name of the client can give the lawyer a real understanding about whom she represents. It's too facile to say that DIP counsel only represents the DIP and, therefore, she only owes a fiduciary duty to the DIP—because the DIP itself is a fiduciary for the bankruptcy estate. It's also precious little guidance to say (although we have) that DIP counsel is estate counsel, unless we also spell out what that means.

What does it mean to represent the estate? It is literally true that DIP counsel does not represent all of the various constituencies with an interest in the outcome of the case. For example, DIP counsel must have a separate role from that of counsel for the creditors' committee, because those two entities can often have interests that conflict. Creditors' committee counsel represents the unsecured creditors as a group and must take those interests into account when advising the creditors' committee. The same principle holds true for other constituencies interested in distributions from the estate, and thankfully it is not true that DIP counsel owes a duty to individual creditors (or, for that matter, individual equity securityholders).[3]

Although the constituents with a claim on estate assets—secured creditors, unsecured creditors and owners when there are sufficient assets left over—have representation already, it is not quite true to say that DIP counsel can take its marching orders from the DIP without consideration of the fiduciary needs *of the estate itself*. There is a theory missing here, and that is why there has been some real discomfort in trying to spell out exactly what DIP counsel's responsibilities are. No normal theories really fit, which is why questions like whether DIP counsel has a duty to rat on a misbehaving DIP are so confounding.

Part of the reason that DIP counsel owes something to the estate is that the estate's funds (read: money coming from the pockets of the unsecured creditors) are paying her fees and expenses. Do not get us wrong: There is an ethics rule in place that clearly states that the person who pays the bill, if that person is not the client, does not get to call the shots in the case.[4] Here, though, the estate is the *raison d'etre* of the reorganization: maximizing it, restructuring it and coming out successfully on the other side of chapter 11. The DIP is charged with the rights, powers and duties of a trustee in chapter 11 under 11 U.S.C. §1107. Of course, that statement just puts us back right where we started, in an infinite loop: The DIP itself is a fiduciary for the estate as a whole.

Prof. Nancy B. Rapoport

In a sense, being counsel for the DIP is a lot like being counsel for a corporation: Counsel takes its marching orders from management (the bankruptcy analogy would be the DIP) but is beholden to the ultimate owners (for a corporation, the shareholders; for the DIP, the "owners" to whom the DIP owes allegiance is the estate—those "owning" the estate during the case and the owners eventually emerging on the other side of a successful reorganization).[5] In "normal" (nonbankruptcy) cases, the ethics rules recognize the tensions inherent in representing an entity, providing an understanding of the difference between direction (marching orders) and role (allegiance to shareholders) in the rule that provides for "up the chain" reporting when representing an organization as the client.[6] Being counsel for the DIP is different from being counsel for the corporation though because DIP counsel's behavior as an officer of the court is a significant component of the representation as well.

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1 Ostrow, "We Don't Need the Case Law to Turn the DIP's Attorney into a Court Informant," 27 *ABI L. J.* 14 (May 2008).

2 For purposes of this article, "management" will also include an individual chapter 11 debtor who is acting as a debtor-in-possession in his or her chapter 11 case. For a discussion of the particular problems of DIP counsel's duties concerning an individual chapter 11 debtor, *see* Bowles, Schaaf and Stosberg, "Ghosts of Individual Chapter 11 Debtors (Parts I and II)," 25 *ABI L. J.* 46 (December/January 2007) & 26 *ABI L. J.* 36 (February 2007).

3 *See ICM Notes Ltd. V. Andrews & Kurth LLP,* 278 B.R. 117 (S.D. Tex. 2002), *aff'd, In re ICM Notes Ltd.,* 324 F.3d 768 (5th Cir. 2003) (holding that DIP counsel does not hold fiduciary duty to specific creditors).

4 MRPC 1.8(f), www.abanet.org/cpr/mrpc/rule_1_8.html.

5 This concept is what the Supreme Court was getting at in *Commodity Futures Trading Comm'n v. Weintraub*:

> In light of the lack of direct guidance from the Code, we turn to consider the roles played by the various actors of a corporation in bankruptcy to determine which is most analogous to the role played by the management of a solvent corporation. Because the attorney-client privilege is controlled, outside of bankruptcy, by a corporation's management, *the actor whose duties most closely resemble those of management* should control the privilege in bankruptcy, unless such a result interferes with policies underlying the bankruptcy laws.

Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 352 (1985) (citation omitted; emphasis added).

6 *See* Model Rule of Professional Conduct 1.13 (organization as client), www.abanet.org/cpr/mrpc/rule_1_13.html.

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Straight & Narrow: Debtor Counsel's Fiduciary Duty

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In part because the chapter 11 process is incredibly complex and because parties' allegiances can shift constantly during the pendency of the chapter 11 case,[7] DIP counsel is under a duty to keep the court updated as to its disinterestedness.[8] Courts care about disclosure and about playing by the rules. Because the DIP itself generally is run by people who decidedly are not disinterested,[9] it is the disinterested DIP counsel who must look beyond the wishes of the DIP's management team to the overall needs of the estate and its ultimate residual owners.

Sure, all lawyers are officers of the court in the larger sense of the concept. We are not supposed to lie to courts,[10] let our clients lie to courts[11] or engage in conduct "prejudicial to the administration of justice," even when we're not representing a client.[12] Our conduct is proscribed in all sorts of ways to keep the system looking (and acting) fair.

We think that there is more required of those lawyers who are being paid from estate funds. In all such cases it is the unsecured creditors who are ponying up the funds out of their own pockets for the greater good of moving the case forward. In exchange for this cost-shifting, estate counsel needs to be able to distinguish clearly between the direction they are getting from the people managing those constituencies who have an interest in the estate (*e.g.,* the DIP, the creditors' committee) and their role (to keep those constituencies focused on their own roles in chapter 11). With counsel for the creditors' committee, any confusion between direction and role is easy to resolve: The creditors' committee is supposed to look out for the interests of the unsecured creditors as a whole, much as the named plaintiffs in a class action must look out for all plaintiffs in that class action. Fall out of line with that role, and it's time to substitute in new players who better understand their role.

DIPs, however, often do not know who the ultimate owners will be. If the estate is hopelessly insolvent, then creditors will end up as the owners. If the estate holds out hope for equity securityholders though, the DIP has to balance the interests of the creditors and the equity securityholders, which is not an easy task. When we say that the DIP is a fiduciary for the estate, then we are saying that the DIP has this constant, guess-where-we-are-at-any-moment balancing act that it has to maintain. Therefore, DIP counsel has the role of looking over the DIP's shoulder to make sure that the DIP takes *its* role as fiduciary for the estate seriously. The DIP, in essence, acts as a placeholder for the myriad interests that the estate comprises. As a mere placeholder, and as a non-disinterested one at that, the DIP can try to look out for the interests of the estate as a whole, but it is DIP counsel who must ensure that the DIP understands its role and acts accordingly. When the DIP either does not understand (or will not perform) its role, it is DIP counsel's duty to rat on the DIP.

What Are DIP Counsel's Duties?

Although two cases have held that DIP counsel owes no fiduciary duty to the bankruptcy estate,[13] the vast majority of courts have held, for a variety of reasons, that DIP counsel owes some form of fiduciary duty to the bankruptcy estate.[14] (Personally, we think that the courts' frustration with how the DIPs in those cases behaved translated into a frustration that DIP counsel could not control their clients behavior.) Unfortunately, these cases have not clearly defined the nature and extent of those duties—probably because the idea of owing fiduciary duites to the estate conjures up the corollary idea of lawsuits by the "estate" against estate counsel. Even though courts have articulated several different aspects of DIP counsel's fiduciary duty,[15] the duty to rat and the related duty that every lawyer has as an officer of the court are the most frequently discussed fiduciary duties in bankruptcy cases. These duties overlap a bit, and we hope that a brief analysis of each of them will provide some guidance as to the scope of DIP counsel's obligations in this area.

Duty to Rat

In the nonbankruptcy world, lawyers agonize over whether they may rat on (*i.e.,* inform) their clients to reveal wrongdoing because the duty to rat conflicts directly with the duty to keep client confidences.[16] Fortunately, the duty to keep client confidences is by no means an absolute duty; nonetheless, when a lawyer concludes that she has to rat on her client, she still must agonize over how much information she is allowed to reveal. Inside the world of bankruptcy, though, it is because DIP counsel really represents the estate *qua* estate and not just the DIP itself that DIP counsel has a clear duty to rat on those running the DIP.[17] Courts have uniformly held that in cases in which management has engaged in misconduct, DIP counsel has the duty to disclose this misconduct in some manner.

The largest problem in this area is determining how serious the misconduct should be before the DIP counsel must disclose it. Although courts haven't articulated an easy, concise test, several courts have noted that DIP counsel can't "close their eyes" to matters having an adverse effect on the bankruptcy estate.[18] Nevertheless, courts have generally required the misconduct to be severe before requiring disclosure. Among the types of misconduct that courts have held must be disclosed are:

7 One of us writes obsessively about this. *See, e.g.,* Nancy B. Rapoport, "The Intractable Problem of Bankruptcy Ethics: Square Peg, Round Hole," 30 *Hofstra L. Rev.* 977 (2002); Nancy B. Rapoport, "Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics," 6 *Am. Bankr. Inst. L. Rev.* 45 (1998); Nancy B. Rapoport, "Seeing the Forest and the Trees: The Proper Role of the Bankruptcy Attorney," 70 *Ind. L.J.* 783 (1995).

8 *See, e.g.,* Fed. R. Bankr. P. 2014; *In re West Delta Oil Co.,* 432 F.3d 347, 355 & n.23 (5th Cir. 2005).

9 *See, e.g.,* Ayer, Clevert, Pelofsky Rapoport & Whyte, Ethics: "Is Distinterestedness Still a Viable Concept? A Discussion," 5 *Am. Bankr. Inst. L. Rev.* 201, 207 (1997).

10 Model Rule of Professional Conduct 3.3, www.abanet.org/cpr/mrpc/rule_3_3.html.

11 *Id.*

12 Model Rule of Professional Conduct 8.4, www.abanet.org/cpr/mrpc/rule_8_4.html.

13 *Hansen Jones & Leta PC v. Segal,* 220 B.R. 434 (D. Utah 1998), *rev'g In re Bonneville Pac. Corp.,* 196 B.R. 868 (Bankr. D. Utah 1996); *In re Sidco Inc.,* 173 B.R. 194 (E.D. Cal. 1994). *Sidco* has probably been overruled by *In re Perez,* 30 F.3d 1209 (9th Cir. 1994).

14 *See, e.g., Brown v. Gerdes,* 321 U.S. 178 (1944) (counsel in bankruptcy cases seeking compensation from court are held to fiduciary standards); *ICM Notes Ltd. v. Andrews & Kurth LLP,* 278 B.R. 117, 126 (S.D. Tex. 2002), *aff'd,* 324 F.3d 768 (5th Cir. 2003); *In re Taxman Clothing Co.,* 49 F.3d 310 (7th Cir. 1995); *In re Perez,* 30 F.3d 1209 (9th Cir. 1994); *In re JLM Inc.,* 210 B.R. 1926 (2d Cir. B.A.P. 1997) (holding both management and debtor's counsel have fiduciary duties to bankruptcy estate in chapter 11 case when debtor's counsel disobeyed new management directions and objected to attempt to dismiss case where new management was unperfected secured creditor seeking to secure its position to detriment of bankruptcy estate). *See also DIP's Attorney, supra* n. 3.

15 Various other duties that courts have stated may be part of DIP counsel's fiduciary duties include: (1) the duty to investigate the debtor and management; (2) the duty to not require debtor to make payments that would endanger a debtor's business operations; (3) the duty to review from bankruptcy estate's standpoint those critical motions filed in a debtor's case; and (4) the duty to police the debtor and its management. *See also DIP's Attorney,* supra n. 3.

16 *See* Model Rules of Professional Conduct 1.6, www.abanet.org/cpr/mrpc/rule_1_6.html.

17 As *Brown v. Gerdes* discussed above, *supra* n. 14, as management of a chapter 11, the DIP's management is clearly not DIP counsel's client, so the attorney-client privilege should rarely be an issue. *See* n. 6, *supra.* In the event there is any significant question as to whether a disclosure would violate the DIP's attorney-client privilege, DIP counsel should consider making a "noisy withdrawal." *See generally* Bowles, "Noisy Withdrawals: Urban Legend or Invaluable Ethical Tool?," 20 *Am. Bankr. Inst. J.* 26 (Oct. 2001) [hereinafter Bowles, "Noisy Withdrawals"].

18 *See In re Food Management Group LLC,* 380 B.R. 677, 708 (Bankr. S.D.N.Y. 2008); *In re St. Stephen's,* 350 East 116th St., 313 B.R. 161, 171 (Bankr. S.D.N.Y. 2004).

a. violation of court orders by insiders. *See, e.g., In re Food Management Group, LLC.,* 380 B.R. 677 (Bankr. S.D.N.Y. 2008).
b. conflicts of interest with another court-approved professional. *See, e.g., In re Sky Valley Inc.,* 135 B.R. 925 (Bankr. N.D. Ga. 1992).
c. refusal to pursue claims against insiders. *See, e.g., In re DeVlieg Inc.,* 174 B.R. 497 (N.D. Ill. 1994).
d. failure to properly market or sell estate assets. *See, e.g., In re Wilde Horse Enterprises Inc.,* 136 B.R. 830, 838 (Bankr. C.D. Cal. 1991).
e. conversion, concealment or misuse of estate property. *See, e.g., In re Ward,* 894 F.2d 771, 776 (5th Cir. 1990); *In re Brennan,* 187 B.R. 135 (Bankr. D. N.J. 1995); *In re Barrie Reed Buick-GMC,* 164 B.R. 378 (Bankr. S.D. Fla. 1994).

The basis of DIP counsel's duty to disclose improper conduct arises from the significant court involvement in both the oversight of the bankruptcy estate and the attorney-appointment process. As noted by the Supreme Court's observation in *Brown v. Gerdes,* attorneys whose retention and fees are subject to court approval are held to a fiduciary standard by that court.[19] The extent of court involvement, akin in part to class action litigation, is different from other nonbankruptcy litigation, where there is little court oversight of the affairs of the litigants outside court. Therefore, the very nature of court oversight of the retention and payment of DIP counsel requires the imposition of the duty to rat on DIP counsel. Our advice? Start off by treating the problem like a MRPC 1.13 (organization as client) problem: Go higher and higher within the DIP to persuade management to do the right thing. If nothing works, then you may have to ask the court to replace management or seek to withdraw as counsel. That should signal a problem without running the risk of over-disclosing confidences. If management opposes these actions, then you may have to disclose more information to the court or—worse yet—suggest the appointment of a trustee.[20]

Duty as an Officer of the Court

Closely related to the duty to rat is an attorney's duty as an officer of the court[21] under the "candor to a tribunal" and other related ethics rules.[22] In the leading case discussing the duties of DIP counsel as an officer of the court, the Fifth Circuit in *In re Ward,* 894 F.2d 771 (5th Cir. 1990), held that an attorney would have to disclose the existence of any concealed assets and possible criminal activity by management that the attorney knew may have taken place.[23] Although this duty to disclose is similar to the duty to rat, all attorneys owe a duty to keep the legal system honest by virtue of their role as officers of the court; this duty does not arise from DIP counsel's fiduciary duty to the bankruptcy estate. As with the duty to rat, however, and given the extent of court involvement with bankruptcy estates, it seems likely that courts will be far more sensitive to an attorney's duty as an officer of the court in the bankruptcy context.[24]

Conclusion: The Law Is the Law

To steal Dave Barry's catchphrase, we are not making this up.[25] We are not making up the fact that representing the DIP is a representation different from other types of representations, even other types of representations paid for out of estate funds. Creditors' committee counsel know that they are always representing the unsecured creditors; only counsel for the hopelessly insolvent DIP can be completely sure that she has no duties to equity as well. We are not making up the fact that management of the DIP can sometimes lose sight of the fact that maximizing and reorganizing the estate, not self-preservation of management's perks, is the point of chapter 11. We do not mean to create an automatic adversarial relationship between the DIP and DIP counsel; most of the time, we expect DIP management to do the right thing and not worry about the risk of DIP counsel's duty to rat. We do mean to say that for those for whom chapter 11 operates not as a handbreak but as a piggybank, DIP counsel must act as an extra check on the integrity of the bankruptcy process. The estate, and all constituents who expect to draw from it, deserve no less. ■

19 321 U.S. at 182.

20 One caveat: State bars often do not understand bankruptcy law. What we are suggesting about a duty to rat might not fly in your home state, even though some states allow disclosure of imminent financial fraud. The fact that your state bar may misunderstand your duty to rat puts you in a precarious position: Fail to rat, and you run the risk of angering the bankruptcy court; rat, and you run the risk of DIP management bringing you before your state bar for a breach of confidentiality. Hey, we never said that bankruptcy law was easy.

21 *See Baker v. Humphrey,* 101 U.S. 494 (1879); *In re Arlan's Dept. Stores Inc.,* 615 F.2d 925, 941 (2d Cir. 1979).

22 For a further discussion of the effect of the Rules of Professional Conduct related to an attorney's obligation of candor to a tribunal, *see generally* Bowles, "Noisy Withdrawals," *supra* n. 148; *see also supra* n. 104-26 and accompanying text.

23 894 F.2d at 776.

24 *See Food Management Group,* 380 B.R. at 709-715, where a bankruptcy court refused to dismiss a lawsuit for breach of fiduciary duty and fraud on the court against DIP counsel seeking damages far in excess of DIP counsel's fees.

25 http://en.wikipedia.org/wiki/Dave_Barry.

A Response: Is It Really a Chapter 11 Debtor Counsel's Duty to Rat?

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In this column, we continue a discussion over the extent to which the chapter 11 debtor-in-possession (DIP) counsel's fiduciary duty to the chapter 11 estate might require the disclosure of confidences or privileges, or what **Chip Bowles** and Prof. **Nancy Rapoport** recently called it in the February 2010 Straight & Narrow column: a "duty to rat."[1] Their article suggested that there were other—and perhaps better—ways to deal with the problem of debtor principals acting or intending to act against the interests of the estate, but ultimately they argued that if all other measures failed, debtor's counsel should be required to disclose. We think this conclusion is questionable.

Michael P. Richman

The current well-developed ethical structure of Rules 1.6 and 1.13 of the ABA Model Rules of Professional Conduct permits disclosures in certain circumstances (where other remedies have failed), but do not compel it. In our view, this structure sensibly protects the attorney-client privilege, whereas a mandatory disclosure rule would seriously undermine it, thereby undermining the trust and loyalty between an attorney and a client that is so essential to the representation.

Case law trends do appear to strongly support the imposition on debtor's counsel of a fiduciary duty to the estate. However, we believe that neither this fiduciary duty, nor the "exceptionalism" of bankruptcy law and practice, should result in an obligation to break the longstanding traditions and ethical imperatives of attorney-client confidentiality and privilege. Instead, we believe that when confronted with facts indicating that debtor principals are acting contrary to the interests of the estate, debtor's counsel should first exhaust all internal means of overcoming the problem, and if unsuccessful, should withdraw (unless the attorney has concluded, within the rules, that the permitted disclosures should be made). The policy and ethical interests in maintaining attorney-client confidentiality, in our view, demand such a result, and are consistent with the precedent and practice in non-bankruptcy areas.

Straight & Narrow

The Case for Strong Recognition of Attorney-Client Confidentiality

Bowles and Rapoport argue that the exceptionalism of DIP representation, among all other forms of legal representation, might justify a different approach, including the duty to rat. However, this must be balanced against the harm that a permeable attorney-client privilege would cause to the administration of bankruptcy cases. Attorney-client confidentiality is one of the oldest precepts of the legal profession, having originated in Roman law, and it found its way into English case law as early as 1577.[2] This duty of confidentiality between the attorney and client is justified by both professional ideals as well as more pragmatic considerations: In addition to upholding the grand notions of loyalty and trust that embody the very essence of professionalism, courts routinely understand that the purpose of attorney-client confidentiality is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[3] In other words, "sound legal advice or advocacy serves public ends and...such advice or advocacy depends upon the lawyer's being fully informed by the client."[4]

We acknowledge that developing law in bankruptcy has done much to muddy the lines of who "the client" is and where DIP counsel's ultimate loyalty rests (if it even rests with any single party). In a commercial case, the client is the corporate debtor and not the individual officers or directors, but the principal officers are the mouthpiece and the brain, and they provide the instructions and directions to counsel. They must expect privilege, and *they* must decide (not the lawyer) whether privilege is to be waived.[5] If the principal officers directing the DIP are not free to address every issue candidly with counsel for the DIP for fear that a disagreement may cause their communications to be disclosed (because counsel has some different duty to the estate), there would likely be severe and adverse effects on the administration of bankruptcy cases. Officers might well conceal information that counsel needs to assure appropriate action for the benefit of the estate. Ultimately, no matter the harm of the information, we believe it is better for it to be provided to counsel where counsel has the opportunity to act on it than to have it concealed for fear that if counsel disagrees it will set off a chain reaction that might lead to disclosure.

Look to the Rules

The obligation for attorney-client confidentiality is embodied by Rule 1.6 of the ABA Model Rules of Professional Conduct, Confidentiality of Information, which states:

1 C.R. "Chip" Bowles, Jr. and Prof. Nancy Rapoport, "Debtor Counsel's Fiduciary Duty: Is There a Duty to Rat in Chapter 11?" 29 *Am. Bankr. Inst. J.* 1 (February 2010).

2 Christopher B. Mueller and Laird C. Kirkpatrick, Evidence §5.8 (3d ed. 2003) (*citing Berd v. Lovelace*, (1577) 21 Eng. Rep. 33 (Ch.); *Dennis v. Codrington*, (1580) 21 Eng. Rep. 53 (Ch.)).

3 *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

4 *Id.*

5 *See In re Eddy*, 304 B.R. 591, 599 (Bankr. D. Mass. 2004) (finding that in chapter 11 case that is converted to chapter 7, chapter 7 trustee assumes powers of DIP, including power to waive attorney-client privilege with respect to communications incident to performance of DIP duties).

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Straight & Narrow: A Chapter 11 Debtor Counsel's "Duty to Rat"

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(a) 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).

(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.

Rule 1.6(b)(2) offers a limited exception and permits (but does not require) attorneys to reveal confidential information where a crime or fraud is reasonably certain to result in substantial financial injury. A handful of these situations will be fairly obvious to practitioners as they come across them, and there is little dispute over the most egregious of offenses. That aside, there is a wide range of actions that the DIP can engage in that do not clearly invoke Rule 1.6(b)(2), but may be unfair, not necessarily in the best interests of other parties, or an arguable breach of fiduciary duty to the estate.

Alec Ostrow raised several significant and thought-provoking scenarios in his original article on this subject.[6] Most compelling is his discussion of the issue of chapter 11 motions to convert, dismiss or appoint a trustee. Because such motions require a finding of cause (usually through the DIP's misdeeds or inability for the DIP to effectively govern), this directly implicates a question of the DIP counsel's fiduciary duty.

If there is a mandatory duty to disclose, scenarios like these raise the question of whether a DIP counsel may be breaching its fiduciary duty to the estate if it defends such a motion, while concealing information acquired in confidence that might tend to support the motion. However, so much of what could be within the purview of a motion like this can be said to be a "gray" area. If there were a duty to rat, attorneys would, in many situations, become caught between trying to decide between violating attorney-client confidentiality for an issue falling below the grave harm under Rule 1.6(b)(2) vs. risking liability for a breach of fiduciary duty to the estate.

Climbing the Corporate Ladder, and Withdrawal

The tensions burdening DIP counsel mirror that of the non-bankruptcy, corporate-counsel world. Both DIP and corporate counsel work closely with their respective management groups; in other words, they serve to fulfill the directives set by management. However, they are not the attorneys for the individuals that they work with and receive orders from; instead, they represent a greater constituency. For corporate counsel, the true client is the corporation as a whole.[7]

Consequently, when DIP counsel is cornered with this ethical quandary, we believe that it is best to follow Rules 1.6 and 1.13 of the ABA Model Rules of Professional Conduct. The ethical issues of corporate counsel have existed for a considerable amount of time, and Rule 1.13 reflects a matured compromise over the need to respect attorney-client confidentiality, an attorney's obligation to a greater constituency, and an attorney's own personal ethical obligations. Significantly, Rule 1.13, like Rule 1.6, authorizes (but does not require) disclosure of confidential information in limited circumstances when other efforts to reverse the corporation's intentions and actions have failed. A duty to rat, which would make the disclosure required, seems to go too far, especially where the attorney may withdraw while continuing to protect the important policies of the privilege. Here is the Rule 1.13 Organization as Client:

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can

6 Alec P. Ostrow, "We Don't Need the Case Law to Turn the DIP's Attorney into a Court Informant," 27 *Am. Bankr. Inst. J.* 14 (May 2008).

7 *See* Orly Lobel, "Lawyering Loyalties: Speech Rights and Duties within Twenty-First Century New Governance," 77 *Fordham L. Rev.* 1245 (March 2009).

act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

The guidance from Rule 1.13 counsels attorneys to internally exhaust all of their advisory options before taking any drastic actions (and on this point Bowles and Rapoport agree). DIP counsel should undertake every opportunity to elevate concerns up the corporate ladder of the DIP in order to dissuade the DIP from engaging in any activity it considers to be objectionable. A lack of responsiveness from managers should be reported even further up the ladder, including approaching the board of directors (or other highest authority).

Should these efforts not succeed, and the highest level of management still insists on a course of action that is objectionable, the best way to balance the competing concerns of attorney-client confidentiality, the fiduciary duties of the estate and an attorney's own personal ethical obligations is through withdrawal. Withdrawal, as provided by Rule 1.16 of the ABA Model Rules of Professional Conduct, allows the troubled attorney to extricate himself from a situation he considers to be objectionable (or that will incur a risk of liability).[8] In this way, DIP counsel can accomplish multiple ethical goals. First, counsel serves its obligation to the relevant stakeholders by not participating in the activity. In addition, such an action sends a strong signal to the DIP that they are entering dangerous territory with their actions. Lastly, such a withdrawal may provide a signal to the court or U.S. Trustee that something is amiss, and that further investigation is necessary—all while still preserving attorney-client confidentiality.[9] ■

[8] Rule 1.16 of the ABA Model Rules of Professional Conduct: Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon 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.

[9] *See also* Bowles, "Noisy Withdrawals: Urban Legend or Invaluable Ethical Tool?," 20 *Am. Bankr. Inst. J.* 26 (October 2001).