

**“Ethical Issues in Bankruptcy: A Real World Discussion”**

Hon. Paul M. Black  
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Western District of Virginia

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**HYPOTHETICAL NO. 1**

Attorney Bill Gambini (having been inspired to study law by his Uncle Vinnie and now practicing law in Blacksburg, Virginia) was retained by Bubba B. Slick to file a Chapter 7 Bankruptcy. Bubba was heavily in debt and his primary asset was his 15 year old pickup truck with a Virginia Tech decal. Clearly, this was a no asset bankruptcy. Gambini represented Bubba at the 341 meeting without event and both Gambini and Bubba expected the debts to be discharged in due course.

Approximately 30 days after the 341 meeting Bubba appeared (without appointment) at Gambini’s office to “just ask one question.” Bubba then asked Gambini if it would affect his bankruptcy if he (Bubba) were to win the lottery. Gambini properly reminded Bubba of the admonition that he was given after the 341 meeting, that being that if he came into any money within 180 days of the filing of the petition he would be required to report it and the case would be re-opened. Bubba then asked what would happen if he gave his lottery ticket to his cousin to collect his winnings and then split the money, noting that he would rather have family get the money than those (expletive deleted) creditors who had been hounding him. Gambini properly informed Bubba that he could not avoid reporting the matter by simply giving away his ticket. At the time, Gambini did not think much of the conversation since, earlier that week, he had read in the newspaper that the Virginia Lotto lottery worth \$1,000,000 (before taxes) had been won by somebody who had purchased a ticket at a gas station in Christiansburg. (The proprietor had noted that he normally knew most of the locals who bought lottery tickets, but since the prior weekend had been a Virginia Tech football weekend, a lot of non-locals bought tickets.)

The following week, Gambini hears on the radio that his client's cousin, I. B. Slick, was identified as the holder of the winning lottery ticket. Gambini feels sure that his client had a hand in this. He called his client several times to ask him, but Bubba never returned the calls.

Questions:

- A. Does Gambini have an obligation to report this incident to the Bankruptcy Court?
- B. Is Gambini permitted, but not obliged, to report the matter?

Variation 1: Given the same basic fact situation, suppose Bubba had actually informed Gambini that he had won the lottery and, after learning that the bankruptcy case would be re-opened, informed Gambini that he was going to give the ticket to Bubba to collect the winnings.

Questions:

- A. Does Gambini now have an obligation to report this incident to the Bankruptcy Court?
- B. If he does have an obligation to report it to the Court, can he fulfill his obligation to the Court and to his client by strongly reminding Bubba of his obligations and then moving to withdraw from the case, stating in his Motion to Withdraw that he had a conflict of interest?

Variation 2: Given the original basic fact situation, the following week, Gambini is approached by Louanne Sharke, the owner of a small loan company. Gambini is familiar with Sharke as their children attend the same school and they exchange pleasantries when they see each other at various school activities. Sharke was a creditor of Bubba's and lost a lot of money when he filed bankruptcy. Gambini is aware that Sharke has known Bubba and his family for years and went out on a limb to help out Bubba when no one else would. She was frustrated and hurt that Bubba would reward her by filing bankruptcy on her. (Bubba told Gambini that he felt bad about how the bankruptcy would affect Sharke, but he felt he had no alternative.) She is also suspicious since she also knows that, whereas Bubba is a Tech fan and a football fan and tries to attend all the home games, I.B. Slick is neither. She asks Gambini if he knows anything about I.B. Slick's good fortune and whether Bubba might see any of that money. She also asks

Gambini “as a friend” if there is anything he can think of that would help her recover any money from Bubba.

Questions:

- A. Can Gambini tell Sharke anything of his suspicion?
- B. Can Gambini tell Sharke that he has no reason to believe that Bubba would receive anything from I.B. Slick?
- C. Given the fact situation as provided in Variation 1, does Gambini now have an obligation to make Sharke aware of his concerns? Is there anything that he can tell her?
- D. How should Gambini’s personal familiarity with Sharke affect his answer?

## DISCUSSION

### **Relevant Rules and LEOs.**

Rule 1.6 (c)(1): Confidentiality of Information

Rule 3.3 (c)(2): Candor towards a Tribunal

Rule 4.1 (a): Truthfulness in Statements to Others

Rule 4.3 (a) and (b)

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### **Rule 1.6      Confidentiality of Information**

- (a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the 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) and (c).
- (b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:
- (1) such information to comply with law or a court order;
  - (2) such information 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;
  - (3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;
  - (4) such information reasonably necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity or incompetence;
  - (5) such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program;

- (6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential;
  - (7) such information to prevent reasonably certain death or substantial bodily harm.
- (c) A lawyer shall promptly reveal:
- (1) the intention of a client, as stated by the client, to commit a crime reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned. However, if the crime involves perjury by the client, the attorney shall take appropriate remedial measures as required by Rule 3.3; or
  - (2) information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.
- (d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule.

**Rule 3.3 Candor Toward The Tribunal**

- (a) A lawyer shall not knowingly:
- (1) make a false statement of fact or law to a tribunal;
  - (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
  - (3) fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel; or

- (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
- (b) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
- (c) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.
- (d) A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon the tribunal in a proceeding in which the lawyer is representing a client shall promptly reveal the fraud to the tribunal.
- (e) The duties stated in paragraphs (a) and (d) continue until the conclusion of the proceeding, and apply even if compliance requires disclosure of information protected by Rule 1.6.

**Rule 4.1 Truthfulness In Statements To Others**

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of fact or law; or
- (b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

**Rule 4.3 Dealing With Unrepresented Persons**

- (a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
- (b) A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client.

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In this Legal Ethics Opinion, the committee was faced with the hypothetical question whether an attorney should inform the court of an inheritance that his client received 167 days after the filing of the petition or whether he should keep the client information confidential. After the debtor received a discharge and the attorney terminated his relationship with the client, the lawyer learned from a third party that his former client received this inheritance. The attorney called his former client and asked if he wanted to disclose the inheritance; he did not. The attorney then explained the risk of being charged with and convicted of bankruptcy fraud; the client was still not persuaded to make the disclosure. The client also stated that he did not remember when he first learned of the duty to disclose the inheritance, but that it may not have been until the recent telephone call from the attorney – well after the close of the 180-day disclosure period.

The committee focused on Rules 1.6 and 3.3(a)(4) noting that the crux of this conundrum is that the client did not admit he knowingly failed to disclose the inheritance. Therefore, the attorney did not have information clearly establishing client fraud and this failure to disclose should then be treated as a client mistake. The committee then posed this question: What is the attorney's duty when faced with information provided to a court that turns out to be false?

The committee opined that under the ethics rules the attorney had no duty to disclose the new information regarding his former client to the court and that the attorney was prohibited from doing so.

**“Solution” and brief discussion:**

Virginia Rule of Professional Conduct 1.6(c)(1) requires an attorney to report to the court the intention of his client to commit future crimes that are “reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another.” Rule 3.3(a)(2) also provides that an attorney has an obligation to disclose facts to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client. So if Bubba has advised Gambini that he intends to try to avoid his obligation to the creditors and to the bankruptcy court by surreptitiously giving his ticket to his cousin, Gambini has an obligation to notify the Court of this fact as long as he remains counsel of record. But Gambini’s obligation continues only so long as he remains engaged in the proceeding. Recent amendments to Rule 1.6(c)(1) removed the requirement that a lawyer report to the tribunal the client’s intent to commit perjury if the attorney has withdrawn from the case. Under Rule 3.3, the lawyer’s withdrawal as counsel before the client testifies is a sufficient “remedial measure.” The attorney must still inform the court if the lawyer knows that the client has given false testimony, but that duty is terminated once the proceeding is concluded, final order entered and the time for an appeal has expired. Therefore, if Gambini advises Bubba of his duty to report the windfall and is then permitted to withdraw, he does not have an obligation to report the matter to the court. If Gambini learned of the skullduggery, well after the debts were discharged and the case was closed, he would have no duty to report it to the court, and would not be permitted to disclose the matter, absent permission from his client.

Gambini would not be permitted to give any information to Louanne Sharke. Rule 4.1(a) provides that, in the course of representing a client, a lawyer shall not knowingly make a false statement of law or fact. Gambini therefore cannot lie to Sharke, but may not reveal any confidences or client secrets. Gambini must simply inform her that she surely knows that he cannot discuss Bubba’s case with her.

Gambini should not assume that Sharke, a lay person, understands that he is not disinterested and that his duty to his client must supersede any bonds of friendship that have been formed by attending school activities. Gambini needs to be careful in his response, however. In reminding Sharke that he is Bubba’s lawyer, he may be tipping her off to the fact that he knows more than he is allowed to tell her, thereby causing her to dig further.

## HYPOTHETICAL NO. 2

June Carter was born and raised in Pennington Gap. After completion of her law studies at the Appalachian School of Law, she set up a small law office in Abingdon. While June's law practice initially struggled, she developed expertise in representing persons who needed to file Chapter 13 or Chapter 11 bankruptcy. Word of her expertise, especially in individual Chapter 11 bankruptcy cases, spread and now June has bankruptcy clients from Lee County to Winchester. June is noted for her attention to detail, her low fees, and her zealous and effective representation.

With cases spread over more than 400 miles of the Western District of Virginia, June has had to develop an efficient system to process her cases. She emails her clients forms to obtain information necessary to complete the Schedules, Statement of Affairs, and other forms needed for the bankruptcy filing. Once June has this information, her staff organizes the information into the Schedules, Statement of Affairs, and other filing forms and emails these to the client.

Because June is frequently on the road with a staff member going to and from hearings, she reviews the Schedules and Statement of Affairs in detail with her clients by phone while the staff member is driving. After she is satisfied that the Schedules and Statement of Affairs are correct and that her clients have informed her of all of their assets and liabilities, she will have the clients sign the necessary forms while they tell her over the phone that they are signing. She then has the clients mail the signed forms to her. In instances where the client can come into her office in Abingdon, June will have a staff member in the room with the clients when June talks with them while travelling to and from hearings.

### Questions:

- A. Has June satisfied her obligations to her client?
- B. Has June satisfied her obligations to the Bankruptcy Court?
- C. Are there any other actions June should be taking?

## DISCUSSION

### **Relevant Rules and LEOs.**

Rule 1.1: Competence

Rule 1.4: Communication

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### **Rule 1.1 Competence**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

### **Rule 1.4 Communication**

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
- (c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

**Pertinent Comment:** [1] This continuing duty to keep the client informed includes a duty to advise the client about the availability of dispute resolution processes that might be more appropriate to the client's goals than the initial process chosen. For example, information obtained during a lawyer-to-lawyer negotiation may give rise to consideration of a process, such as mediation, where the parties themselves could be more directly involved in resolving the dispute.

## **Legal Ethics Opinion 1791**

In this Legal Ethics Opinion, the committee opined that the ethics rules did not preclude an attorney from dealing with a client via electronic communication (phone or email) on the preparation of bankruptcy filing documents so long as the content and caliber of the services comported with the duties of competence and communication.

Note that this LEO was issued on December 22, 2003.

The committee focused on the duty of Competence, Rule 1.1, and the duty of Communication, Rule 1.4.

The committee noted that the focus of Rule 1.1 is on the content of the lawyer's efforts and whether the lawyer has sufficiently reviewed and analyzed the information and become sufficiently familiar with the pertinent law so as to be able to pursue the legal objectives of the client.

As to Rule 1.4, the committee noted that the Rule requires that the attorney must ensure that the client has sufficient information to participate intelligently in decisions concerning the objectives of representation and the means by which they are to be implemented. See Comment 1. However, the committee also noted that the Rule does not dictate whether the lawyer should provide the information in a meeting, in writing, in a phone call, or in any particular form of communication.

## **Judge Black's Position on Communicating with a Client**

In a footnote to Judge Black's recent decision in *Williams v. Robbins (In re Williams)*, No. 15-71767, A.P. No. 16-07024, 2018 Bankr. LEXIS 382 (Bankr. W.D. Va. Feb. 12, 2018), Judge Black stated:

The Court has no qualms about [an attorney] meeting with clients or witnessing signatures over **Skype**. This district is approximately 400 miles long from Winchester to the Cumberland Gap. Appropriate accommodations can be made with the proper use of technology. However, simple telephone calls are unacceptable.

## **Other Cases Dealing with Meeting with Clients**

1. *In re Ruebling*, No. 15-71627, 2016 Bankr. LEXIS 4011 (Bankr. D.C. Ill. Nov. 21, 2016)

In this case, a petition was filed without counsel having wet signatures on the petition, schedules, and statement of affairs. The attorney's own time records revealed that he did not meet with his clients on the date that the documents were purportedly signed. It was later discovered that the wet signatures were obtained after the case was filed.

The attorney's argument that the debtors authorized the filing was quickly rebuffed by the Court. In addition to being denied any compensation in this case, the attorney was required to be personally present and witness the signing of any document by a debtor within one year following entry of the Order and to file an affidavit that he complied with the Court's Order for every document bearing a debtor's signature filed during that period.

2. *In re Smith*, No. 13-31565, 2014 WL 128385 (Bankr. E.D. Va. Jan. 14, 2014)

The sister of the receptionist for the attorney, came to the attorney for assistance in stopping an eviction. The attorney filed a petition, but failed to file any of the other required documents and the case was subsequently dismissed. Less than 2 hours after the case was dismissed, the attorney filed the other required documents which included the electronic signature of the debtor and the case was reinstated.

Later the attorney advised the debtor that she should dismiss her current case and file a new case to address her post-petition defaults. The attorney did not advise the client of the effect of filing multiple bankruptcy cases.

The debtor testified that neither the attorney nor any staff member assisted her with the preparation of the documents she was required to file with the bankruptcy court.

The attorney testified that he was not directly involved in the review and execution of the documents, but that the debtor's relationship with his receptionist made this an unusual case. The attorney could not produce any filed documents that were signed by the debtor.

An attorney has an affirmative duty to meet with and counsel his clients, answer any questions the client may have, and explain the legal significance of their actions.

That the debtor was related to a member of the attorney's staff is irrelevant. Even if certain tasks are delegated to a subordinate, the attorney retained the ultimate responsibility for the conduct of the case. See Rule 5.3(b).

3. *In re Tran*, No. 14-11837, 2014 WL 5421575 (Bankr. E.D. Va. Oct. 17, 2014)

The attorney accessed the voluntary petition signed by the debtor from the Cloud and filed the petition to stop a foreclosure. The attorney did not meet with the debtor before filing the petition. The attorney did not have a wet signature on the petition before he filed it. The attorney never met with the client.

Despite advances in technology that allow parties to communicate remotely and to file papers electronically with the Court, there is a fundamental duty to meet with the client and to obtain the client's original signature on the petition.

Even though a debtor has been through bankruptcy before, the attorney must still meet with the client and explain the risks and rewards of a second bankruptcy filing.

4. *In re T.H.*, 529 B.R. 112 (Bankr. E.D. Va. 2015)

An attorney got a call from a third party requesting that he file a bankruptcy for a couple. The third party was working on a loan modification and a short sale.

T.H. had a brief meeting with the attorney at his office.

The attorney made no efforts to confirm his belief as to the identities of the borrowers on the mortgage note.

T.H. gave the attorney only her name, social security number, and whether she was seeing him about a certain piece of real property.

Unbeknownst to T.H., the attorney filed a bankruptcy petition for her. The attorney did not get her wet signature on the petition.

As it turns out, T.H. did not want to file bankruptcy. Her financial condition was good. She was not living at the property that was subject to foreclosure. And she was seeking to assist her estranged husband who was on active duty.

It is imperative that an attorney ensure, prior to filing a bankruptcy petition, that a potential debtor understands all of the consequences of filing bankruptcy and the responsibilities of being a debtor in a bankruptcy case. An attorney must also ensure that a potential debtor,

knowing and appreciating the consequences of filing a bankruptcy petition, has the present intention of filing bankruptcy.

### HYPOTHETICAL NO. 3

Jackson “Rooster” Stewart is a disbarred attorney, long having tried cases across western Virginia, primarily in state court. Rooster was known for his flamboyant arguments and withering cross-exams, and he had many successes in the courtroom over the years. Rooster never practiced in bankruptcy court. Unfortunately, Rooster developed a drug problem, and one thing led to another, which resulted in a felony conviction. The Virginia Supreme Court authorized Rooster to have his license back, but he has not been able to pay the substantial fees related to his reinstatement petition, a condition to reinstatement, so he remains unlicensed.

Due to Rooster’s inability to practice law, he runs into cash flow problems and decides to file Chapter 13 bankruptcy “to save his house,” on which he is delinquent several months on the mortgage payment. Rooster is confident he can go it alone and files his petition *pro se*. He has modest equity in the house and has income from working as a paralegal at a well-known plaintiff’s firm in Roanoke. Bank of Natural Bridge, represented by Snidely Whiplash, Rooster’s former law school classmate, files a motion for relief from stay and the bankruptcy court enters its standard pre-hearing order. Rooster calls Snidely about ten days later and leaves a message on his voice mail that says “Dude, what do I need to do to keep my house? Can’t we just work this out?” Rooster is persistent in calling, asking his old law school buddy to help him out and tell him what needs to do. In the meantime, Rooster doesn’t read the pre-hearing order, and the time runs for him to file a response. Snidely ignores him, still frosted because Rooster beat him in Moot Court competition 30 years ago, and submits a default order to the Court.

#### Questions:

- A. Has Snidely taken improper advantage of Rooster?
- B. What obligations, if any, does Snidely have to his *pro se* opponent?
- C. Assume Snidely told Rooster his time to reply is about to run and that he really needs to go back and read the pre-hearing Order, that’s ok, right?
- D. If Snidely takes action to send Rooster down a helpful path, has he violated any duties to his own client?
- E. Is there a difference between legal *information* and legal *advice*?
- F. Assume Snidely and Rooster engage in settlement negotiations, should Snidely take any special precautions in putting terms forward to Rooster?

## DISCUSSION

### **Relevant Rules.**

Rule 4.3: Dealing With Unrepresented Persons

Rule 1.7: Conflict of Interest: General Rule

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### **Rule 4.3 Dealing With Unrepresented Persons**

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

(b) A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client.

**Comment:** [1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

### **Rule 1.7 Conflict of Interest: General Rule.**

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph(a), a lawyer may represent a client if each affected client consents after consultation, and:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) the consent from the client is memorialized in writing.

**Comment: *Loyalty to a Client***

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined.

Other Resources:

Frederic, Paula J., *Learning to Live with Pro Se Opponents*,  
[https://www.americanbar.org/newsletter/publications/gp\\_solo\\_magazine\\_home/gp\\_solo\\_magazine\\_index/proseopponents.html](https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/proseopponents.html)

#### HYPOTHETICAL NO. 4

Debtor Matilda Jones is in a Chapter 13 case. Her case was confirmed without issue, and eighteen months post-confirmation, she goes into payment default. Being several months past due, the Chapter 13 Trustee files a motion to dismiss. Debtor's counsel has difficulty reaching Matilda, but she shows up in Court for the hearing on the Trustee's motion to dismiss. Matilda is adamant that she is not in default, and that she has been making her payments by ePay. In fact, she has a print out of her on-line banking statement to prove it. Upon review of the bank statement, Debtor's counsel has serious concern that the bank statement has been falsified or manipulated by the Debtor. However, the Debtor is insistent the statement is accurate, and wants to testify that the payments were made and that the Trustee's records are simply wrong. What should counsel do?

Questions:

- A. Assume Debtor's counsel failed to examine the bank statement, but simply takes Matilda at her word, and puts her on the stand when the motion to dismiss is called. Upon cross-examination by the Chapter 13 Trustee, it becomes readily apparent to Debtor's counsel that the payments were never sent, much less received, and that the bank statements, which were offered into evidence, were falsified by Matilda. What is counsel's role at this point?
- B. What are the ramifications to Matilda if she did in fact falsify the bank statements and testify as to their accuracy?

## DISCUSSION

### **Relevant Rules.**

Rule 1.2: Scope of Representation

Rule 3.3: Candor Toward the Tribunal

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### **Rule 1.2      *Scope of Representation***

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer may limit the objectives of the representation if the client consents after consultation.

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

(d) A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

### ***Comments to Rule 1.2: Criminal, Fraudulent and Prohibited Transactions***

[9] A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted or required by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer

shall not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. *See Rule 1.16.*

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (c) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (c) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (c) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities. *See also Rule 3.4(d).*

### **Rule 3.3 Candor Toward The Tribunal**

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

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

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

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

(d) A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon the tribunal in a proceeding in which the lawyer is representing a client shall promptly reveal the fraud to the tribunal.

(e) The duties stated in paragraphs (a) and (d) continue until the conclusion of the proceeding, and apply even if compliance requires disclosure of information protected by Rule 1.6.

## **Pertinent Rule 3.3 Comments:**

### **False Evidence**

[5] When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

[6] When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce evidence that is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

[7] ABA Model Rule Comment not adopted.

[8] The prohibition against offering false evidence only applies if the lawyer knows the evidence is false. A lawyer's reasonable belief or suspicion that evidence is false does not preclude its presentation to the trier of fact. A lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, but the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(4) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify.

### **Remedial Measures**

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness, offers testimony during that proceeding that the lawyer knows to be false. In such situation or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate

must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done.

[11] Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperates in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(c). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

### **18 U.S.C. § 152 - Concealment of assets; false oaths and claims; bribery**

A person who—

- (1) knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;
- (2) knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11;
- (3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11;
- (4) knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, in a personal capacity or as or through an agent, proxy, or attorney;
- (5) knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11;
- (6) knowingly and fraudulently gives, offers, receives, or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in any case under title 11;
- (7) in a personal capacity or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against the person or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation;
- (8) after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any recorded

information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor; or

(9) after the filing of a case under title 11, knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer of the court or a United States Trustee entitled to its possession, any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor,

shall be fined under this title, imprisoned not more than 5 years, or both.

### HYPOTHETICAL NO. 5

Attorney Calvin Megatron has a general practice with a modest volume of Chapter 13 debtor cases. However, Calvin has always yearned to be a prosecutor. He thinks it is his true calling in life. The local Commonwealth's attorney has recently been appointed a state court judge, and Calvin decides he will throw his hat in the ring for the vacant full-time prosecutor's job. A special election is held, and lo and behold, Calvin wins. Calvin files motions with the Bankruptcy Court advising he is withdrawing from all of his pending bankruptcy cases. He tells the Court he has mailed letters to all of his clients, informing them that he has taken his new dream job as a public servant, and wishing them best of luck in their future endeavors. None of the motions are set for hearing, and Calvin submits orders granting the motions with each of his motions to withdraw. None of the Orders are endorsed by his clients. Two days after Calvin takes the oath of office, and before he is granted leave to withdraw, the Chapter 13 Trustee files motions to dismiss several of Calvin's cases for Chapter 13 plan defaults, and Bank of Natural Bridge files a motion for relief from stay against one Calvin's clients for non-payment of the mortgage loan on his house.

Question:

- A. What obligations, if any, does Calvin have to his clients and/or the Court in the above circumstances? Calvin points to *Va. Code* §15.2-1628(A), which provides that “[i]n counties having a population of more than 35,000, attorneys for the Commonwealth and all assistant attorneys for the Commonwealth shall devote full time to their duties, and shall not engage in the private practice of law.” So, what's the big deal?

## DISCUSSION

### **Relevant Rules.**

Local Rule 2091-1: Withdrawal of Appearance

Rule 1.16: Declining or Termination Representation

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### **LOCAL RULE 2091-1 Withdrawal of Appearance**

No attorney of record shall withdraw from any matter pending in this Court, except with the consent of his client stated in writing and by order of the Court or for good cause shown after notice to the client. Any withdrawing attorney shall forthwith give written notice thereof to the Clerk of the Court at such place as said matter is pending. Any attorney entering an action at any time after its inception shall promptly give written notice thereof to the Clerk requesting to be entered as attorney of record.

### **Rule 1.16 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 withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

- (1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is illegal or unjust;
- (2) the client has used the lawyer's services to perpetrate a crime or fraud;
- (3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
- (4) 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;
- (5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (6) other good cause for withdrawal exists.

(c) In any court proceeding, counsel of record shall not withdraw except by leave of court after compliance with notice requirements pursuant to applicable Rules of Court. In any other matter, a lawyer shall continue representation notwithstanding good cause for terminating the representation, when ordered to do so by a tribunal.

(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, refunding any advance payment of fee that has not been earned and handling records as indicated in paragraph (e).

(e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.