Ethical Dilemmas in Domestic Relations and Bankruptcy or "Opposites that Don't Always Attract"

The Honorable Paul M. Black
Judge, U.S. Bankruptcy Court for the Western District of Virginia

The Honorable David B. Carson
Judge, Roanoke City Circuit Court

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Hypothetical No. 1 – State Court Contempt Issues and the Automatic Stay

Jack and Jill Jones, residents of Roanoke City, Virginia, were involved in divorce proceedings that started in 2015. In 2017, a divorce was granted and property settlement was entered in Jill's favor. In 2018, the Roanoke City Circuit Court ordered Jack to pay $40,000.00 to Jill for her share of the marital estate. He was directed to do so within 30 days. After months of subsequent court hearings, the state court found Jack in contempt for failure to pay the property settlement amount. The court gave Jack until February 1, 2019 to purge his contempt by paying the property settlement in full. A sentencing hearing as described by the state court was set for February 8, 2019 in the event he did not pay the property settlement. Jack filed for Chapter 13 relief on February 6, 2019 without having paid the debt.

Prior to the sentencing hearing, Judge Emmitt Wisdom met with counsel in chambers. He told them his judicial extern had done extensive research and convinced him that the automatic stay did not apply. On the record at the sentencing hearing, Judge Wisdom acknowledged the bankruptcy filing and restated his belief that the automatic stay did not apply. He gave Jack's attorney, Tom Gentle, the opportunity to present case law to the contrary, and the attorney offered none. Jill's attorney, Nan Crusher, was silent. Judge Wisdom sentenced Jack to 30 days in jail. The attorneys and judge agreed that Jack's jail sentence included "a provision that he be released upon payment of the property settlement which is the basis for the contempt." Jack is released from the hoosegow after nine days when the parties agreed to hold the contempt proceedings in abeyance pending conclusion of the bankruptcy case.

The day after his release Jack's bankruptcy attorney files an adversary proceeding against Jill, her attorney Nan, Judge Wisdom, and the Roanoke City Circuit Court seeking monetary damages for violation of the automatic stay. The bankruptcy court dismisses the claim against Judge Wisdom and the circuit court, *sua sponte,* on the basis of sovereign immunity. Prior to trial, the parties stipulate to the general timeline above, and Jack presents his evidence on liability, the court having reserved damages as a later issue once liability is determined. Jack argues that Jill and Nan should have withdrawn the contempt motion immediately upon the

bankruptcy filing. The defendants argue that Judge Wisdom was acting on his own initiative, and that there was nothing they could do to stop the contempt hearing short of saying Jill was waiving the debtor's payment obligation. The defendants move for judgment in their favor because Jack failed to prove the defendants "affirmatively attempted to collect the debt." Without any analysis, the bankruptcy court finds the contempt order violated the stay. However, the court also ruled the defendants were not responsible for the stay violation because there was never a time when they "could have or should have taken action that would have alerted the judge to the fact that this action was a violation of the automatic stay or that they didn't want to proceed." The bankruptcy court agreed with Jill and Nan that they were powerless to withdraw the contempt hearing because Judge Wisdom was the one enforcing his prior order.

Jack appeals to the District Court.

I. Was the bankruptcy court correct in dismissing the adversary proceeding against Judge Wisdom and the Roanoke City Circuit Court?

Yes. Judge Wisdom is immune from suit for monetary damages arising out of his actions taken in his judicial capacity. *Mireles v. Waco*, 502 U.S. 9, 9 (1991). Jack does not allege that Judge Wisdom took any actions either in a non-judicial capacity or in complete absence of all jurisdiction. *Id*. at 11-12. Therefore, Judge Wisdom is entitled to judicial immunity and was rightfully dismissed from the suit.

The Roanoke City Circuit Court is also rightfully dismissed because it is entitled to Eleventh Amendment immunity. The Eleventh Amendment states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. As such, the Amendment "is a jurisdictional bar which deprives federal courts of subject matter jurisdiction." *Blanciak v. Allegheny Ludlum Corp*., 77 F.3d 690, 694 n.2 (3d Cir. 1996). "The Supreme Court has made clear that, under that Amendment, 'an unconsenting State is immune from suits brought in federal courts by [its] own citizens as well as by citizens of another State.'" *Christ the King Manor, Inc. v. Sec'y U.S. Dep't of Health & Human Servs.,* 730 F.3d 291, 318 (3d Cir. 2013) (quoting *Edelman v. Jordan*, 415 U.S. 651, 663 (1974)). There are two exceptions to this bar: (1) if the state consents to suit, or (2) if Congress abrogates the state's immunity. *Id.* (citing *Blanciak*, 77 F.3d at 694). *See Hutchinson v. Carco Group, Inc*., 2015 WL 5698283 (E.D. Pa. Sept. 29, 2015).

Article VI of the constitution of Virginia established the Supreme Court and "such other courts of original or appellate jurisdiction subordinate to the Supreme Court as the General Assembly may from time to time establish." Va. Code § 17.1-500 established the Circuit Court for the City of Roanoke. Thus, as an entity of the state established by the General Assembly, a suit against the Circuit Court for the City of Roanoke is the same as against the state itself. *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425 (1997). The Commonwealth of Virginia enjoys sovereign immunity as the Eleventh Amendment bars suits brought by private individuals against states. *See Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997). *See generally Tucker v. Beneficial Finance I, Inc. et al.,* 2015 WL 225466 (W.D. Va. Jan. 16, 2015)(Urbanski, J.).

II. ***Jill and Nan contend 11 U.S.C. § 362(b)(1), which applies to criminal actions, provides an exception to the automatic stay for the sentencing hearing in the state court contempt proceeding. Are they right?***

No, they are wrong in this case. The filing of a bankruptcy petition "operates as a stay, applicable to all entities, of the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor . . . to recover a claim against the debtor that arose before the commencement of the case under this title . . . ." 11 U.S.C. § 362(a)(1). Section 362(b)(1) of the Bankruptcy Code provides as follows: "The filing of a petition under section 301, 302, or 303 of this title, … does not operate as a stay— (1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor . . . ." 11 U.S.C. § 362(b)(1). This was not a criminal proceeding. Despite the reference to a "sentencing," this involved a civil proceeding because it was about collection of the property settlement. A property division awarded in a domestic relations case prior to the filing of a bankruptcy petition is a debt of the debtor. *Towne v. Towne* (*In re Towne*), Adv. No. 08–5106, 2009 WL 248429, at *2, 2009 Bankr. LEXIS 278, at *5 (Bankr. D. Kan. Feb. 3, 2009); *Cantor v. Lever* (*In re Lever*), 137 B.R. 243, 246 (Bankr. N.D. Ohio 1992). Thus, absent an applicable exception to the automatic stay, the commencement or continuation of a proceeding to collect a property division award of a domestic relations court is stayed. *See In re Jones*, 556 B.R. 219, 223 (Bankr. E.D.N.C. 2016) ("the only exceptions to the stay with regard to collection [of domestic relation debts] involve domestic support obligations"); and *In re Coats*, 509 B.R. 836, 841 (Bankr. W.D. Mich. 2014) ("nothing in that exception authorizes any entity to 'determine the division of property that is property of the estate' or provide for the collection of any claim . . . that does not fall within the federal definition of 'domestic support obligation.'").

The state court allowed Jack to purge his contempt at any time before or after the "sentencing" hearing. Nothing in the record established that the court was punishing Jack, nor did any facts reflect that the court terminated Jack's ability to purge his contempt by paying the property settlement. Thus, the contempt proceeding was civil in nature and an attempt to coerce Jack into making a payment to Jill, one not calculated to punish Jack for failing to comply with the contempt order. As such, the contempt proceeding was not excepted from the automatic stay by Section 362(b)(1).

III. *Jill and Nan argue that it was up to Jack and his attorney Tom to convince Judge Wisdom that he was wrong and that the stay applied. Are they right?*

Probably not. It is generally up to creditors to see that the stay is not violated. In *Wohleber v. Skurko, et al. (In re Wohleber),* 596 B.R. 554, 572 (6th Cir. B.A.P. March 4, 2019). The court stated "the responsibility to enforce the automatic stay is placed on creditors because '[t]o place the onus on the debtor, . . . to take affirmative legal steps to recover property seized in violation of the stay would subject the debtor to the financial pressures the automatic stay was designed to temporarily abate, and render the contemplated breathing spell from his creditors illusory.' *Ledford v. Tiedge* (*In re Sams*), 106 B.R. 485, 490 (Bankr. S.D. Ohio 1989) (alterations in original) (quoting *Miller v. Sav. Bank of Balt.* (*In re Miller*), 22 B.R. 479, 481 (D. Md. 1982)) (internal quotation marks omitted)."

Here, Jill and Nan tried to flip this burden onto Jack and his attorney by arguing that it was up to them to convince Judge Wisdom he was wrong about the automatic stay. In fact, Nan argued that she had no duty prevent the state court from seeking to enforce a violation of its prior contempt order. Jill and Nan argued that their involvement in the state court proceeding ended when the Jack was found to be in contempt. The "sentencing" hearing was between Jack and the Court, and when that was over, they were done. The 6th Circuit BAP said "not so fast." The Court said that Jack and Nan could not stand by and watch while the stay was being violated for their benefit. The defendants, the ex-spouse and her attorney had a duty to take affirmative action to prevent the use of the sentencing hearing and the debtor's confinement to coerce payment of the dischargeable property settlement. *See Wohleber* 596 B.R. at 575-76. What could they have done? *Wohleber* suggests they could have moved for relief from stay or, if time was of the essence, ask the state court to stay the contempt proceeding until the stay issue could be decided. *Id.*

IV. *Would the result have been any different if the order of the state court was a domestic support obligation as opposed to one based on a property settlement? Why or why not?*

Probably not in a Chapter 13 case. First, Section 362(b)(2) provides that enforcement of child support and spousal support are not stayed by the automatic stay unless the collection is sought from property of the estate. 11 U.S.C. § 362(b)(2). *Wohleber*, 596 B.R. at 573-574. *See also, In re Bezoza*, 271 B.R. 46 (Bankr. S.D. N.Y. 2002)(use of contempt proceeding to collect support obligations from non-estate property is permissible). If the property from which the moving party seeks to collect is estate property, the stay applies. If the movant is going after post-petition earnings of the debtor, those earnings are property of the estate. 11 U.S.C. § 1306(a)(2). Relief from stay would be required. But what if Jack has a confirmed plan? Doesn't that revest the property of the estate back in the debtor? 11 U.S.C. § 1327(b)(2). Would that take it out of the exception? Note that Section 362(b)(2)(C) further provides that the stay does not apply "with respect to the withholding of income that is property of the estate of the debtor for payment of a domestic support obligation *under a judicial order or administrative order or statute*." 11 U.S C. § 362(b)(2)(C) (emphasis added). Was there such an such an order?

Moreover, Section 523(a)(5) provides that a "domestic support obligation" or "DSO" is excepted from discharge. 11 U.S.C. § 523(a)(5). Generally, Section 101(14A) defines a DSO as a debt that (i) arises before, on or after a debtor files for bankruptcy, (ii) is in the nature of alimony, maintenance or support for the debtor's spouse, former spouse, child, or the parent of the debtor's child (including public assistance paid on behalf of the spouse, former spouse, child, or parent of the debtor's child), (iii) is recoverable from the debtor by or on behalf of a governmental entity, the debtor's spouse, former spouse, or child, or the child's parent, legal guardian, or responsible relative, (iv) has been established or is subject to establishment by a court order, divorce decree, separation or property settlement agreement, or determination by a governmental unit in accordance with applicable non-bankruptcy law, and (v) has not been assigned to a non-governmental agency except for the purposes of collection. 11 U.S.C. § 101(14A). In addition, Section 523(a)(15) provides that a discharge does not include a debt to a spouse, former spouse, or a child of the debtor and *not* of the kind specified in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other court of record, or a determination made in accordance with State or territorial law by a governmental until.

What does all this mean, practically? Whether a particular debt is a DSO under Section 523(a)(5) or a non-DSO divorce debt under Section 523(a)(15) makes a difference in Chapter 13 cases. DSOs under Section 523(a)(5) are excepted from discharge under all chapters of the Bankruptcy Code. However, domestic debts, like property settlements, covered by Section 523(a)(15) are not excepted from discharge under Chapter 13. Section 1328(a)(2) describes which provisions of Section 523 shall apply to a chapter 13 debtor and notably absent is any reference to Section 523(a)(15). As a result, although a Chapter 7 debtor cannot discharge divorce obligations, whether they fall under sections 523(a)(5) or 523 (a)(15), a Chapter 13 debtor may, by virtue of Section 1328(a)(2), elect to hold on to assets, reorganize under Chapter 13 and still discharge debts falling under Section 523(a)(15).

The difference between a DSO under Section 523(a)(5) and other divorce debts under Section 523(a)(15) is significant for another reason. Section 1322(a)(2) provides that a chapter 13 plan must provide for the full payment, in deferred cash payments, of all claims entitled to priority under Section 507, except to the extent that the holder of a particular claim agrees to different treatment. Section 507(a)(1) provides that DSOs under Section 523(a)(5) are entitled to priority status. As a result, a chapter 13 plan must provide for full payment of DSOs. On the other hand, property settlement and equitable distribution debts, ones that fall under Section 523(a)(15), do not have priority and do not necessarily have to be paid in full in a chapter 13 plan. All chapter 13 debtors are subject to the good faith requirement pursuant to the requirements for confirmation. If the evidence reflects the debtor is trying to discharge those debts without using best efforts to repay them, confirmation of a chapter 13 plan may be denied.

At the end of the day, if in doubt, seek relief from stay before you try to haul the debtor into a state court contempt proceeding. Chances are if you do that, there is at least a possibility the debtor might see what is coming and step up to the plate.

V. *This could never really happen, could it?*

We really didn't make this one up. These facts are largely taken from *Wohleber v. Skurko, et al. (In re Wohleber),* 596 B.R. 554 (6th Cir. B.A.P. March 4, 2019). This case was appealed to the full 6th Circuit Court of Appeals on March 21, 2019.

Hypothetical No. 2 – There is no "I" in Team -- or the Interaction between Counsel for the Same Client in Domestic Relations and Bankruptcy Cases

Marshall Tucker files a Chapter 13 Plan on August 8, 2014. Marshall has a domestic support obligation to his ex-wife, Tanya, which has a modest arrearage at the time he files for relief. Marshall's plan proposes to cure the arrearage, and his plan is confirmed. He dutifully pays his plan payments for five years. The Chapter 13 Trustee files a notice of completion of plan payments, and the Clerk issues a notice for Chapter 13 discharge and opportunity to object. Pursuant to Local Rule 4004-1A, Marshall files a certification that he is current on his domestic support obligation and that he has made all the payments both provided by the plan and that came due after his plan was confirmed. Unfortunately, there was a state court domestic relations hearing in 2016 to modify and increase what Marshall was supposed to be paying Tanya. Marshall's plan shorted the domestic support obligation in the final two years of his plan under the state court order, and Tanya's attorney objects to his discharge being issued as there is now a $3,000.00 post-petition arrearage. Marshall is adamant he is current. Marshall's bankruptcy attorney, Leonard Skinner, is experienced in Chapter 13 cases, and Leonard immediately calls Marshall's domestic relations attorney, Linda Rheostat, asking why no one told him the domestic support obligation went up during the plan. Linda's response is "you never asked." Bankruptcy Judge Charles Daniels carries the objection out for two months to see if the arrearage can be caught up, which Marshall thinks is doubtful.

I. What are Leonard's and Linda's respective responsibilities to communicate with each other here?

Linda needs to know that a Chapter 13 discharge will not be granted until a debtor's domestic support obligation has been paid in full. 11 U.S.C. § 1328(a). *In re Fort,* 412 B.R. 840 (Bankr. W.D. Va. 2009). Once she is put on notice of this, and knows Marshall is in bankruptcy, she needs to keep Leonard informed of any changes that might affect his case. In the intake process, Leonard needs to ask Marshall about any existing or potential domestic relations proceedings. If Linda does not know Marshall is in bankruptcy, Leonard should then inform domestic relations counsel about the bankruptcy, with Marshall's consent to do so. *Virginia Rule of Professional Conduct 1.6* provides that "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)." Just because it is a matter of public record does not mean it is not confidential. *Cf. ABA Comm. on Ethics & Prof'l Responsibility*, Formal Op. 04-433 (2004) ("Indeed, the protection afforded by Rule 1.6 is not forfeited even when the information is available from other sources or publicly filed, such as in a malpractice action against the offending lawyer.") Better to be safe than sorry.

In so doing, Marshall should inform Linda of the necessity to keep him apprised of any changes in the DSO, or other matters that may develop in the domestic relations case that could affect Marshall's financial responsibilities. If Marshall does not want his domestic relations attorney to know he is filing or has filed bankruptcy, perhaps Leonard should rethink taking Marshall's bankruptcy case.

II. What options does the Court have in getting Marshall over the finish line?

The Bankruptcy Code provides that, "[t]he plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years." 11 U.S.C. § 1322(d). *Collier on Bankruptcy* provides that ". . . the fact that the debtor does not actually conclude the payments within the stated period does not constitute a violation of Section 1322(d). The subsection focuses on the payments *provided for* by the plan. If payments are late, but the debtor is substantially complying with the plan, the court should allow the plan to be completed within a reasonable time after the stated term." *Collier on Bankruptcy*, ¶1322.18[2] (emphasis in original). What is reasonable will have to be determined by the Court. The Third Circuit offered a list of non-exclusive factors a court should consider in deciding whether to allow a post-term grace period to cure a plan default: "(1) whether the debtor substantially complied with the plan, including the debtor's diligence in making prior payments; (2) the feasibility of completing the plan if permitted, including the length of time needed and amount of arrearage due; (3) whether allowing a cure would prejudice any creditors; (4) whether the debtor's conduct is excusable or culpable, taking into account the cause of the shortfall and the timeliness of notice to the debtor; and (5) the availability and relative equities of other remedies, including conversion and hardship discharge." *In re Klaas*, 858 F.3d 820, 832 (3d Cir. 2017). Be aware though, there are cases that

go the other way. *See In re Humes,* 579 B.R. 557 (Bankr. D. Colo. 2018)(Even if a bankruptcy court could exercise its discretion to allow a debtor to cure plan defaults within a reasonable period of time following the end of a five-year plan period, Chapter 13 debtors were not entitled to cure plan default seven months after the end of their plan, given that the length of time debtors needed to make the payments was not a brief period of time, debtors had more than sufficient time to modify the plan, and they had another remedy available to them in the form of conversion to Chapter 7, which would permit them to achieve a discharge.). In other words, as a former Judge of this Court used to say, "pigs get fed, hogs get slaughtered."

Hypothetical No. 3 - Joint Representation of Divorcing Spouses in a Bankruptcy Case

John and Jane Doe were married in 1993. John, an accountant, operates a small bookkeeping practice. In 2015, Jane left her job as a textile company sales manager to work with a friend to create a Pump Me Up, Inc., a start-up that had designed a web application that helps customers organize fitness plans at their local gym. While Jane was confident that the app would take off, the results never seemed to quite meet the expectations – or the funds Jane had invested in getting the development off the ground. Jane had invested nearly all of the couple's available cash into the company, and Jane and John had turned to credit card debts to "get them through" until the app started generating a profit. Jane's partner continued to fund the company with her own investments, in a sufficient amount to pay a moderate salary to Jane. Jane's income from Pump Me Up, and John's income from his bookkeeping business, permitted them to continue to pay the mortgage on their home, and their regular monthly expenses, but didn't provide enough to make much of a dent in the debt they had built up.

The stress of keeping up with the payments, and the mounting interest, had taken a toll on John and Jane's marriage. In early 2017, Jane decided to separate. After a few months, Jane and John attempted to prepare a separation agreement, but they were unable to come together on a plan for dividing their assets, splitting their debts, and which spouse owed the other spousal support. Jane's income from her company exceeded John's income from his practice, but Jane insisted she did not make enough to fund her new life and John's, as well.

The considerable credit card debt continued to hang over their heads, as well. In late 2017, one of John's friends suggested that they might explore a bankruptcy filing to seek to discharge their liability for the accounts. Jane and John talked it through, and thought it might make sense to discharge their debts together before finalizing their divorce. They decided to meet with Terry Mason, a local bankruptcy attorney, about their options for filing a bankruptcy petition. Mason met with them, gathered information about their financial situation, and their likely divorce. Despite their legal separation, Mason advised them that they should still be eligible for a joint chapter 7 case.

1. Can Mason represent both Jane and John in a pre-divorce joint chapter 7 case?

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 a 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.

Under Rule 1.7(a), Mason has a duty not to represent one client if that representation would be directly adverse to the interests of another client of that attorney. Are Jane and John's interests directly adverse at the time they meet with Mason? It is not at all unusual – in fact, very common – for an attorney to represent a couple in a joint bankruptcy filing. In joint cases where a couple have financial problems, but no marital issues, the concerns raised by Rule 1.7(a)'s adversity conditions are presumably not present. Both spouses share the same goal – discharge of their debts.

When the married partners separate, or even contemplate a separation, however, it is not difficult to see how their interests start to diverge. As soon as the interests separate, it is difficult to see how a single attorney can satisfy Rule 1.7(a)'s prohibition on a concurrent conflicts of interest between clients. At the very least, bankruptcy counsel must carefully consider Rule 1.7(a)'s duty if asked to represent a separating or divorcing couple in a joint case.

Rule 1.7(b)'s "material limitation" duty is potentially even broader. Mason is also prohibited from representing a client if the representation of that client would be materially limited by an attorney's responsibility to another client. Even if the attorney can be satisfied that the interests of a separating or divorcing couple are not actually adverse with respect to seeking a discharge in a chapter 7 case, the material limitation duty requires him to explore whether his representation of either the husband or the wife will be limited by his professional duties to the other party.

Beyond Rule 1.7(a) and (b)'s adversity and material limitation duties, the attorney must also consider the client confidence requirements of Rule 1.6.

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 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 paragraph (b) and (c).

Under Rule 1.6, Mason has a duty not to reveal confidences and secrets of a client to other parties, including other clients. Much of the information either spouse will provide to an attorney in a potential joint case will end up being a matter of public record, but with spouses who are already in conflict, there is a great likelihood that the attorney could gain confidences that he could still need to protect.

2. Can Mason explain all of these issues to John and Jane and obtain a waiver to represent them both?

While the potential joint representation of divorcing or separated spouses creates multiple problems for bankruptcy counsel under Rules 1.6 and 1.7, Rule 1.7(b) can provide a method to allow the representation to proceed.

Rule 1.7(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.

In the context of adverse spouses, Rule 1.7(b)(3) requires the most careful consideration of potential conflicts, disclosure to clients, and consent. Bankruptcy counsel may easily resolve the potential conflict scenarios that are present as the couple prepares schedules and other bankruptcy disclosures, but anticipating the effect these disclosures could have on potential litigation in the divorce court can be much more difficult.

* * * *

Despite Mason's best efforts to obtain signed, informed waivers, Jane decided that she couldn't go through with a bankruptcy filing, due to concerns that having a bankruptcy case on her record could affect Pump Me Up's attractiveness to other potential investors. This decision turned into the proverbial last straw for John. Jane and John's mostly amicable separation and divorce negotiations broke down. John engaged a prominent divorce attorney, Mitch McDoe, to file a complaint seeking a divorce in the circuit court. Jane hired McDoe's chief nemesis, Vincent Gambino, to represent her in the divorce case.

Shortly after the filing, McDoe suggested that John may still benefit from seeking to discharge his own liability for the joint debt in a chapter 7 case.

1. Can John go back to Mason to file an individual chapter 7 case?

With Jane and John no longer even attempting to cooperate, any prior resolution of Rules 1.6 and 1.7 with disclosures and consents would evaporate. In addition, Mason may also have to consider Rule 1.9, if he must consider Jane to be a former client.

Rule 1.9 Conflict of Interest: Former Client

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless both the present and former client consent after consultation.
>
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) Use information relating to or gained in the course of the representation to the disadvantage of the former client except as rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
> (2) Reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Mason may conclude that his representation of John in a prospective individual chapter 7 case does not involve any of Jane's confidential information about assets, debts, income, and expenses. Rule 1.9(a), though, is not specific to only confidential information. Its prohibition of conflicts of interests is more general – an attorney may not represent a current client if the new matter is substantially related to a prior matter for a former client, and the current and former clients' interests are "materially adverse."

Rules 1.7 and 1.9 both provide a mechanism where the two clients can receive full disclosure of the conflicts of interests issues, and consent. It is perhaps a theoretical possibility that both John and Jane could still consider all of the conflicts and consent, but with the marriage deteriorated far enough that both spouses have engaged divorce counsel, such prospects would be highly unlikely. Mason would almost certainly be prevented from representing either party.

* * * *

After concluding that Mason could not represent John in a bankruptcy case, McDoe called Daniel Coffey, another bankruptcy attorney Mason knew well. Coffey agreed to take on the case and file a chapter 7 petition for John. In the course of preparing John's schedules, Coffey learned from McDoe and John that one of the core disputes in the divorce case was the value of Pump Me Up. Jane and Gambino insisted that Pump Me Up was nearly worthless, and took the position that there was nothing to allocate to John in the way of any property settlement value to account for Jane's interest in her company. John, though, had developed a sneaky

feeling that Jane was intentionally depressing the value of Pump Me Up, to avoid having to provide value to him in their marital property settlement.

1. How should Coffey identify John's interest in Pump Me Up on the bankruptcy schedules?

As Coffey's representation of John in his bankruptcy case intersects with John's divorce and property settlement litigation, Coffey and John's divorce counsel have to balance several strategic and ethical considerations. On the one hand, John describing his corporate interest as significant suggests that interest may be a valuable asset in the eyes of John's chapter 7 trustee. However, describing that value as minimal may contradict John's arguments in the divorce case that Jane is hiding the value to avoid payment to him. Do Coffey and McDoe have any duty to disclose to the divorce court the position Coffey takes regarding the value of the interest in Pump Me Up provided in John's schedules?

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 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 if its falsity, the lawyer shall take reasonable remedial measures.

Rule 3.3(a) addresses facts, known controlling legal authority, and false/fraudulent evidence. John's valuation of his interest in Jane's company is almost certainly to be viewed as only an estimate, and does not amount to a factual statement. Thus, Rule 3.3 does not require explaining the potential competing valuations in the two courts. The concerns are instead strategic – i.e., what should Coffey and McDoe anticipate with regard to how the possible competing statements of value can be used against John?

Hypothetical No. 4

Henry and Shirley are in divorce proceedings. During the marriage, Henry drew a winning "scratch" lottery ticket worth one million dollars. Henry decided at the time that it made more sense to choose the annuity option rather than a complete payout, and thus Henry was to receive an annuity of approximately $40,000 per year (after taxes) for the rest of his life. Since Henry drew the winning ticket while the parties were still married, the winnings were marital property, and Shirley was entitled to receive half the value of the annuity payment that Henry received each year. Shirley's attorney drafted a Post-Nuptial Stipulation Agreement (PSA) memorializing the terms of the parties' agreement, including a provision which provided that Henry would pay Shirley her half of the annuity proceeds each year within thirty days of receiving the proceeds from the Virginia Lottery. The PSA was then signed by both parties and incorporated into the parties' final decree of divorce, thus making any violation of a provision of the PSA punishable by the divorce court as contempt because violations of the PSA provisions would necessarily be violations of the divorce decree.

Henry dutifully paid Shirley her share of the annual lottery annuity for a few years after the divorce was final. However, about four years post-divorce, Henry decided that he could use the full lottery proceeds quickly and then pay Shirley half of the annual annuity as it became due each year and no one would be the wiser. So he notified the Virginia Lottery that he wanted to cash out the balance of his account, and he received approximately $460,000 after taxes. He pocketed the money. Shirley got mad after waiting a full year for her half of the annual annuity payment and called her lawyer, Bruiser Good. Bruiser subpoenaed the records from the Virginia Lottery and discovered that Henry had cashed out the entire remaining lottery winnings several months before. Consequently, Bruiser initiated show cause proceedings against Henry in Roanoke City Circuit Court alleging a violation of the final decree.

Henry, who by now had moved to California to be as far away from Shirley as he could get, realized that he might be in a bit of trouble. He went and hired a new attorney (different from the attorney who had represented him in the divorce proceedings), Gloria Allgreen. Henry told Gloria that he had thought he could string Shirley along until he raised enough money back to pay Shirley her 50% share of the annual annuity before she discovered what he had done but that he had spent all of the money on bad business deals and could not come up with even the money to make one half of the annual payment, much less the $230,000 that he ultimately owed Shirley.

As expected, when the parties went to court on Shirley's show cause motion against Henry in the Roanoke City Circuit Court, Judge Chamberlain Haller was not amused by Henry's blatant money grab, and he found Henry in contempt of the court's previous order. Judge Haller sentenced Henry to one year in jail but set the purge amount on the contempt at $230,000. Henry, while in the holding cell immediately after the hearing, told Gloria again that he had spent all of the funds that he had obtained and that he had no money with which to pay the purge amount. Gloria told him that, unless Henry could come up with the purge amount, she doubted she could do anything to spring him out of jail.

However, Gloria, who was not used to having her clients wind up in jail, began thinking about what had happened, and decided that maybe Henry's situation was such that he would qualify for CH 7 bankruptcy relief-primarily because Henry said he had no hard assets, no cash left and this huge debt of lottery funds he owed to Shirley. So, after some research confirmed Gloria's belief regarding Henry's eligibility for CH 7 relief, she contacted Jimmy Dettor, a top rated bankruptcy attorney in California where Henry currently resided, about representing Henry in a CH 7 bankruptcy filing in that state. Jimmy, after hearing Gloria's description of Henry's contempt case in Virginia and after calling and talking with Henry, was able to prepare and file a CH 7 bankruptcy petition on Henry's behalf in the appropriate U.S. Bankruptcy Court in California. Gloria then took a verified copy of the bankruptcy petition, which petition listed Shirley as his main unsecured creditor, to the Roanoke City Circuit Court, and argued to Judge Haller that Judge Haller had to release Henry from jail because continued incarceration was a violation of the automatic stay. Judge Haller begrudgingly admitted that it appeared that Gloria's reasoning was sound, and he entered an order requiring Henry's immediate release from incarceration.

I. As Henry and Gloria triumphantly walk out of the local jail, Henry tells Gloria that, contrary to what he had previously told her, he had buried a substantial part of the lottery cash proceeds in a coffee can in the backyard of his California residence.

1. ***Does Gloria have an ethical duty to report Henry's disclosure to Judge Haller and the Roanoke City Circuit Court?***

Yes, probably. Gloria has a duty of candor to the tribunal, which in this case is the Roanoke City Circuit Court, to, among other things, correct a false statement of material fact or law previously made to the tribunal. In this case, Gloria had presented Henry's testimony at the contempt hearing that he no longer had the lottery proceeds in his possession as he had spent all of the funds on other bills prior to the contempt hearing. Now that she knows from Henry that he kept a substantial portion of the lottery proceeds, she needs to correct that material misstatement of fact.

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

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

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

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

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

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

2. ***Does Gloria have an ethical duty to report Henry's disclosure to Jimmy Dettor?***

No, probably not. *See* Rule 1.6(b)(2) or (3) versus Rule 4.1(b).

Rule 1.6: Confidentiality of Information

(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 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 material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

3. ***If your answer to #2 above is no, can Gloria ethically disclose Henry's statement to Jimmy?***

Rule 4.1(b) would seem to permit Gloria to disclose Henry's statement about the hidden money to Jimmy because the statement is one that materially affects Jimmy's representation of Henry in a related matter such that Henry would be deemed to have given implied consent pursuant to Rule 1.6(a).

4. ***Does Gloria have an ethical duty to report Henry's disclosure to the California bankruptcy judge?***

Probably not, but if the facts were a bit different, and Jimmy was aware of Henry's misstatements and instructed him to remain silent, there may be a duty to report to the California bar. *See* Virginia Ethics Opinion 1093 (1988) which involved two lawyers, each licensed to practice in a different state, who jointly represented a client charged with a felony crime. After the trial, the client told one of the lawyers that the other lawyer (who is a member of an out-of-state bar) had instructed the client to commit perjury. **The lawyer must disclose this information to the tribunal and, if it raises a substantial question of the other lawyer's fitness to practice law, to the Virginia Bar and the bar of the state in which the other lawyer practices**. ["If the information about the ethics violation is a client confidence, a lawyer may report the other lawyer's misconduct only if the client consents under Rule 1.6(c)(3); the lawyer considering whether to report must consult with the client under that Rule."]

Virginia Ethics Opinions on related matters:

0341	17-Fraud on the Tribunal	A lawyer learning that a non-client has perpetrated a fraud upon a tribunal must reveal the fraud.
0699	17-Fraud on the Tribunal	A lawyer must advise a client to reveal fraud upon a bankruptcy court (not including certain assets on the bankruptcy petition), and must inform the court of the fraud if the client refuses -- even though the fraud occurred two years earlier in a bankruptcy case.

1643	8-Bills and Fees 17-Fraud on the Tribunal 31-Protecting and Disclosing Confidences and Secrets 56-Duty to Advise the Court 73-Family Law Lawyers	A lawyer represented a client in a divorce. After the representation ended, the former client filed for bankruptcy. The former client listed the lawyer's bill as a debt, but failed to list assets that were included in the publicly filed divorce property settlement agreement. The Bar held that the existence of these assets could still be a secret "despite the fact that others share the same information or the information is a matter of public record." The lawyer may therefore only reveal the fraud on the bankruptcy court if the lawyer's duty of confidentiality was outweighed by some other duty. The lawyer had no such other duty here, because the fraud: (1) did not occur during the course of the attorney-client relationship; and (2) did not relate to the subject matter of the representation. Furthermore, the lawyer may not reveal the confidences "to establish the reasonableness of his fees" because the client did not dispute the fees. The lawyer therefore may not reveal the fraud on the bankruptcy court. As the Bar explained it, "the protection of client confidences and secrets is so fundamental to the attorney-client relationship that any exceptions to the bedrock principle must be strictly limited."
1140	17-Fraud on the Tribunal	It has "come to the attention" of a lawyer that the lawyer's clients may not have advised the bankruptcy trustee of potential assets. Whether this amounts to fraud on the tribunal is a question of law beyond the Bar's jurisdiction. If it is fraud on the tribunal, the lawyer would have an ethical obligation to reveal the fraud or an intent to commit a crime. [The Bar did not analyze the "clearly establishes" component of the test under Rule 1.6, and it seems that the client did not acknowledge the fraud.]
1622	17-Fraud on the Tribunal 27-Litigation Tactics (Including Misrepresentations, Tape Recordings) 56-Duty to Advise the Court	Two lawyers represent a defendant in circuit court felony charges and in connection with district court capiases for failure to appear. The lawyers appear before the district court on the capias matter, and do not advise the court of the simultaneous felony charges in circuit court. One of the lawyers later obtains dismissal of the felony charges in circuit court on double jeopardy grounds. It is not per se improper for the defendant's lawyers to have failed to reveal to the district court that their client was also the subject of felony charges in the circuit court. However, a lawyer may not make an "affirmative representation which is untrue." The lawyers violated this rule by telling the district court judge that the capiases were matters "between defendant and the Court." Furthermore, the lawyer's conduct "falls short of the aspirational exhortations contained in EC 7-33, in that they failed to be aboveboard with the judges in both district court and circuit court."
1154	21-Reporting Another Lawyer's Unethical	A foreign state bar would have jurisdiction over a foreign lawyer's actions in that state. [Rule 8.5 determines which state's disciplinary rule would apply to violations.]

Conduct

41-Non-Virginia
Lawyers

II. Shortly after Henry is released from the jail, he called Gloria and told her that he is paying the balance of her bill using some of the lottery money he had hidden in his backyard. Can Gloria ethically accept Henry's payment if she knows that it is from money Henry obtained by cashing out the balance of lottery winnings in violation of an order entered by the Roanoke City Circuit Court?

Yes. Nothing in the Rules explicitly addresses this issue. Henry is before the circuit court for civil contempt, a violation of the court's order regarding paying his ex-wife Shirley a portion of the lottery proceeds Henry was otherwise entitled to. Gloria's acceptance of a payment made with these funds does not further a criminal act.

III. Henry called Gloria a few weeks later. Henry tells Gloria that he doesn't trust Jimmy and that the US Trustee on his bankruptcy case, Dudley Doright, is "asking a lot of questions" about the lottery money. Henry shares his fear with Gloria that the lottery proceeds he has kept in his backyard will be discovered, and Henry concludes by asking Gloria if she will help him "get rid of the rest of the lottery money."

1. ***What, if any, ethical responsibilities does Gloria have towards Henry at this point?***

Henry has now made it clear that he intends to continue to mislead the bankruptcy court in California as well as arguably the Roanoke City Circuit Court and he is also asking Gloria to assist him in perpetuating this fraud. Gloria must try to get Henry to correct the testimony to reflect the truth or, if Henry will not, disclose the material misstatements to Judge Haller.

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

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

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the

lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

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

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

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

***See* also**

Rule 1.6(b)(2) & (3) exception to confidentiality requirement- to prevent crime or fraud.

Rule 1.2(d) Scope Of Representation And Allocation Of Authority Between Client And Lawyer- 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.

Rule 8.4(c) Misconduct- It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation

2. ***Are there any circumstances under which Gloria would <u>have</u> to move the court to withdraw from her representation of Henry?***

Assuming that Gloria's attempts to counsel Henry to stop engaging in the fraudulent pursuit of bankruptcy relief and payment to Shirley of so much of the lottery proceeds as Henry has remaining in his possession are unsuccessful, Gloria will have to move Judge Haller to be allowed to withdraw from representing Henry in the contempt proceedings.

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:

(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.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

***See* also Comment 9 of Va. Rule 1.6**: If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

3. ***Does Gloria <u>have</u> to advise Jimmy and/or Dudley what Henry has told her?***

Gloria has no ethical duty to disclose Henry's intent to use Gloria to get rid of the rest of the money to either Jimmy or Dudley. But she *can* disclose.

a. Crime-Fraud Exception to attorney client privilege.
No attorney-client privilege exists if a client seeks assistance with a crime or fraud. Requests for advice about whether a certain act is permitted under the law are privileged as is a communication regarding past criminal/fraudulent conduct. In the instant example, Henry is requesting assistance with an ongoing crime, and his communication to Gloria is thus not protected by attorney-client privilege.

b. **Rule 4.1(b) Truthfulness In Statements To Others** provides that, in the course of representing a client, a lawyer shall not knowingly fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

c. Under **Rule 1.6(b)(2)** an attorney may disclose client confidences 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 (can only reveal if your services have been used);