

Ethical Alliteration: Due Diligence, Difficult Clients and Divorce

Hon. Margaret Dee McGarity, Moderator

U.S. Bankruptcy Court (E.D. Wis.); Milwaukee

Deborah K. Ebner

Law Office of Deborah K. Ebner; Chicago

Berton J. Maley

Codilis & Associates, P.C.; Burr Ridge, Ill.

Mary Robinson

Robinson Law Group, LLC; Chicago

American Bankruptcy Institute -
Hon. Eugene R. Wedoff 7th Circuit Consumer Bankruptcy Conference

Ethical Alliteration:

Due Diligence, Difficult Clients, and Divorce

Presented by:

Hon. Margaret Dee McGarity, Moderator
U.S. Bankruptcy Court for the Eastern District of Wisconsin (Retired)

Deborah K. Ebner
Law Office of Deborah K. Ebner; Chicago, Ill.

Berton J. Maley
Codilis & Associates, P.C.; Burr Ridge, Ill.

Mary Robinson
Robinson Law Group, LLC;

1 Ethical Alliteration

Hypothetical Scenario 1: The Divorced Debtor

Jane and Larry were married June 15, 1997 and divorced in September 2011. Jane is awarded her real estate appraisal business, and Larry is awarded his car repair business. Neither business generates significant dollars. The parties jointly own a residence in Chicago, and are directed to list the house for sale. Larry is given exclusive possession of the home until it is sold. The parties cannot agree on the market value of the residence, but liens and encumbrances against the parcel aggregate \$350,000.00. Both Larry and Jane are obligated on all residential promissory notes, and are each awarded 50% of net proceeds. Jane and Larry each sign the MSA, which contains the above.

Larry files a chapter 7 bankruptcy and schedules the real estate with a fair market value of \$380,000.00, and, as the date of his bankruptcy filing, the parties have been unable to agree on a realtor with whom to list the house.

Jane asks you to represent her interests in Larry's bankruptcy case. Debtor has retained an attorney who has a reputation of "gaming" the system, and it appears as if the Debtor has specific instructions to maintain the house in disrepair, and to avoid contact with a realtor. During the consultation, Jane tells you what must be done, insists that the house is worth \$450,000.00 and not a penny less, and, is enraged at her ex-husband. She gives you a written appraisal of the real estate that she prepared. Her objective is to have the house sold so that she can have her portion of the equity in the house and escape liability on the mortgage notes. You agree to the engagement, and file an appearance in the bankruptcy for creditor Jane.

Discussion Question(s):

- (1) What should you explain to Jane about the objectives of the representation and the means by which you will pursue those objectives on the way to agreeing to represent her?
- (2) How do you obtain “informed” consent from this client, and why might it be difficult to obtain “informed consent?”
- (3) What are your obligations to this client after you forward the appraisal to the Trustee and file a proof of interest?

Hypothetical Scenario 2: The Subsequent Servicer

Van Winkle Mortgage refers a motion for relief in Chapter 13 to your office. Prior to this time, your firm has not been handling the bankruptcy for Van Winkle or any party and had not previously review the confirmed Chapter 13 plan.

In its motion referral, the client indicates there is a seven month post-petition default, but Van Winkle provides screen shots/post-petition payment history going back only 4 months. When questioned, Van Winkle indicates that the loan was transferred to them from Ichabod Mortgage at that time and the loan was already three months in default, and that those records “are on another system and difficult to retrieve”.

The supporting documentation did include a copy of the note (endorsed in blank), a copy of the properly recorded mortgage, and an assignment from Ichabod Mortgage (the original lender) to Van Winkle Mortgage.

Discussion Question(s):

- (1) What steps, if any, are necessary to meet your due diligence requirements prior to proceeding with the motion?
- (2) Can you rely on the statement that the loan was already in default when they received it from the prior lender?

Hypothetical Scenario 3: The Plastic PreNup

You receive a call requesting a consultation for a bankruptcy matter. No other details are provided at the time the appointment is made.

A well dressed, highly articulate plastic surgeon arrives for the appointment. He seeks to retain you on behalf of his ex-wife. His ex-wife is not with him, but she has already filed a chapter 7 bankruptcy.

The relevant backstory can be summed up in the following provisions:

1. Husband and Wife entered into a prenup prior to their March 2009 marriage. The 2009 marriage was a first marriage for the Wife and the 6th marriage for the Husband. The prenup for the 2009 marriage barred Wife from any maintenance or support payments of any kind.

2. Husband filed for a divorce 2/2/2012. Relevant provisions of the MSA are as follows:

REAL PROPERTY:

Condominium: Husband shall purchase a condominium for Wife's benefit with a purchase price not to exceed \$300,000.00. The parties agree and acknowledge that title to this property shall be held in a land trust, of which Husband will be the Trustee, and their child, Sammy, shall be beneficiary. Sammy shall live with Wife in the Condominium.

Husband shall pay for and be solely responsible (100%) for any and all real estate taxes, condominium assessments, homeowner's insurance, and special assessments. There is no mortgage on the property.

Wife shall pay for and be solely responsible (100%) for all utilities and routine upkeep and maintenance for the Condominium.

CASH PAYMENTS:

The first day of the first month following entry of Judgment, Husband shall pay to Wife the lump sum of \$108,000.00 as a non-taxable property settlement. Said sum shall be paid at the rate of \$3,000 per month for 36 months, on the first day of each month.

3. Husband retained firm 1 ("Firm 1") for Wife for a no money down, chapter 7 bankruptcy. Firm 1 filed the bankruptcy and listed the above awards as exempt support. The Trustee filed an objection to the claim of exemption, and, the Husband wants you to represent his wife in the bankruptcy, hereafter.

Discussion Question(s):

- (1) Can you accept the engagement? Must you speak with Wife first?
 - a. Any disclosures you should make to Husband or Wife before accepting?
 - b. Any waivers needed?
- (2) If you accept, what are your obligations to Husband? To Wife?
 - a. Who can give you direction?
 - b. What information can you share with each?
- (3) Can you receive payment from Husband?

Hypothetical Scenario 4: The Cross Creditor

A small corporate client has a mortgage loan account in which they have extended several work out opportunities for the borrower and borrower has misrepresented his situation to the client on many occasions in past. As a consequence, borrower fell way behind and went into foreclosure. On the eve of foreclosure sale, borrower files Chapter 13 bankruptcy. It is borrower's first bankruptcy. Borrower is more than two years delinquent on the loan, and your office has been handling the foreclosure, and you handle several foreclosures and bankruptcies for this client each year.

The manager at Personal Touch, who we will call "Antagonized Alice", has been dealing with the account personally for years and is much outraged by what she perceives as the borrower's blatant abuse of the system.

Alice first asks you to proceed with the foreclosure and bring motion to annul afterwards. Then client asks you to do immediate motion for relief from the automatic stay and object to the plan which provides for 40 month cure which they say is too long. Client threatens not to send you any more work if you do not comply.

Discussion Question(s):

- (1) What can do with respect to client's instruction regarding the foreclosure sale and what should you tell your client about that course of action?
- (2) Should you bring an immediate motion for relief and objection to plan? Why or Why not?

The Relevant Rules

ABA Model Rule 1.2. Scope Of Representation And Allocation Of Authority Between Client And Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle 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's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) 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.

ABA Model Rule 1.4. Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

ABA Model 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;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

ABA Model Rule 1.7: Conflict of Interest: Current Clients

(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.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(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) each affected client gives informed consent, confirmed in writing.

ABA Model 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.

ABA Model Rule 2.1: Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

ABA Model Rule 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

ABA Model Rule 5.4: Professional Independence of a Lawyer

* * *

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

* * *

FRBP 9011 Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers

(Excerpt Only)

(b) Representations to the Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.