Ethics: What Can the "Real Housewives of New Jersey" Teach Us About Professional Responsibility?

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Ethics: What is a Reasonable Investigation? A Lawyer's Ethical and Statutory Obligations.

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I. THE RELEVANT MODEL RULES & STATUTORY FRAMEWORK

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. (Mass. R. Prof. C. 1.1; see also ABA Model Code of Prof. Conduct R.1.1)

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client. The lawyer should represent a client zealously within the bounds of the law. (Mass. R. Prof. C. 1.3; see also ABA Model Code of Prof. Conduct R.1.3)

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.

(Mass. R. Prof. C. 1.4; see also ABA Model Code of Prof. Conduct R. 1.4)

Rule 1.6 Confidentiality

(a) A lawyer shall not reveal confidential information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal, and to the extent required by Rule 3.3, Rule 4.1(b), or Rule 8.3 * must reveal, such information:

(1) to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another, or to prevent the wrongful execution or incarceration of another;

(2) to the extent the lawyer reasonably believes necessary 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) to the extent the lawyer reasonably believes necessary to rectify client fraud in which the lawyer's services have been used, subject to Rule 3.3(e); and

(4) when permitted under these rules or required by law or court order.

(Mass. R. Prof. C. 1.6; see also ABA Model Code of Prof. Conduct R. 1.6)

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 to substantially 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 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 reasonably 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.

(Mass. R. Prof. C. 1.16; see also ABA Model Code of Prof. Conduct R. 1.16)

Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

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

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, except as provided in Rule 3.3(e);

(3) fail to disclose 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

(4) offer evidence that the lawyer knows to be false, except as provided in Rule 3.3(e). If a lawyer has offered, or the lawyer's client or witnesses testifying on behalf of the client have given, material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures.

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

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believe is false.

(Mass. R. Prof. C. 3.3; see also ABA Model Code of Prof. Conduct R. 3.3)

11 U.S.C. § 707(b)(4)(C)

The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has—

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

(ii) determined that the petition, pleading, or written motion—

(I) is well grounded in fact; and

(II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph 91).

11 U.S.C. § 707(b)(4)(D)

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

Rule 9011 of the Federal Rules of Bankruptcy Procedure

(a) Signature.

Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representation 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 improperly 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.

II. WHAT IS A REASONABLE INVESTIGATION?

Debtors' counsel has both ethical and statutory obligations to conduct a reasonable investigation of a debtor's financial affairs and the circumstances surrounding the filing of the debtor's bankruptcy case. This includes an affirmative duty to conduct a reasonable inquiry as to the completeness and accuracy of each of the facts set forth on the debtor's bankruptcy documents. See In re Withrow, 405 B.R. 505, 512 (B.A.P. 1st Cir. 2009). The First Circuit held that the standard is "an objective standard of reasonableness under the circumstances." Cruz v. Savage, 896 F.2d 626, 631 (1st Cir. 1990). The test is whether "a reasonable attorney in like circumstances could believe his actions to be factually and legally justified." Nosek v. Ameriquest Mortg. Co. (In re Nosek), 386 B.R. 374, 381 (Bankr. D. Mass. 2008) (quoting Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987)). This duty extends to all aspects of a debtor's bankruptcy filings including the disclosure of assets, liabilities, income, and expenses and any other representations to the Court.

The primary ethical rules implicated in connection with an attorney's duty to reasonably investigate a debtor's financial affairs are competence, diligence, communication, and candor. Often these ethical obligations are intertwined. Equally often, violations of these ethical rules coincide with violations of § 707(b)(4)(C) and Rule 9011 of the Federal Rules of Bankruptcy Procedure. Unfortunately, one, even innocent, mistake can create a host of problems. The issue is what is the scope of the investigation that a lawyer is obligated to undertake to determine the accuracy of the information provided by the client?

A. Assets

A bankruptcy lawyer has an affirmative duty to reasonably investigate a debtor's financial affairs. The most common problems arise in connection with a failure to disclose all of a debtor's assets. In addition to other potential issues arising as a result to this failure, several ethical rules may be implicated as well.

In re Saylor, 339 B.R. 190 (Bankr. N.D. Ind. 2006)

Facts: Debtors' bankruptcy schedules and statement of financial affairs were "materially false." The Debtors failed to disclose the sale of their business for $8,000.00, a Cadillac, and a motorcycle one month before the filing of the bankruptcy. None of the assets received, nor the sale, were disclosed on the Debtors' bankruptcy schedules or statements. The only occasion on which the Debtors met with their Lawyer was to pay the fee. To the extent the Debtors received assistance from the Lawyer's office, it was from counsel's staff. In response to the commencement of an Adversary Proceeding seeking to revoke the Debtors' discharge, the Debtors unsuccessfully argued that their bankruptcy attorney was ineffective and that this should excuse their inaccurate filings.

Holding:

(1) An attorney's conduct must be imputed to his client in *any* context.

(2) Further, the debtors, at best, were recklessly indifferent to the truth of the information they provided.

Disciplinary Counsel v. Harmon, No. 2013-1983, 2014 WL 5369379 (Ohio 2014)

Facts: Debtor, an attorney, failed to disclose: (1) a pending defamation action for $500,000.00, (2) his interest in his wife's bank account, (3) a security deposit, (4) stocks, and (5) accounts receivable. The Debtor was represented by counsel. Debtor argued "his omissions were due to his own ignorance of bankruptcy law and the malpractice of his bankruptcy attorneys."

Holding: Debtor's conduct in connection with his bankruptcy case violated Rule 8.4, which prohibits lawyers from engaging in conduct: (1) that involves dishonesty, fraud, deceit, or

misrepresentation, (2) that is prejudicial to the administration of justice, and (3) that adversely reflects on the lawyer's fitness to practice law.

Analysis

First, a failure to identify all of a debtor's assets may constitute a failure to represent the client competently and diligently. See Rules 1.1 and 1.3. A lawyer must, at a minimum, inquire of the debtor about each of his assets. It is helpful to keep a written record of the information supplied by the client. Further, it appears from the case law that a lawyer has a duty to investigate information that is publically available and easily accessible (e.g., PACER).

The lawyer must also look for clues for assets and, in certain circumstances, press the client for more information. For example, if a client does not identify an ownership interest in any real estate or motor vehicles, but says he has a monthly homeowners or car insurance payment, then the lawyer should inquire further. In Saylor, there are no allegations that the debtor provided a "clue" to counsel that counsel failed to explore, but, rather, counsel failed to even meet with the debtor to review the schedules and statements. Arguably, had the lawyer at least met with the client to review the bankruptcy papers prior to the signing and filing of the documents, the lawyer could have, at a minimum, reviewed the questions in more detail and questioned the debtor about any recent transactions. In Harmon, it does not appear that the lawyer failed his duty; however, the debtor's lawyer still ended up having to respond to the debtor's malpractice claims in connection with the case. The debtor had argued that neither of his attorneys had prepared him for his testimony and filed a malpractice claim against both attorneys. The malpractice claims were dismissed when the bankruptcy trustee refused to investigate them. While the debtor was the attorney that was subject to discipline in Harmon, the case provides a classic example of how a client will almost certainly blame his attorney for the client's failure to disclose. The key practice point is to maintain excellent records regarding your verbal and written communications with the client in the event that there is an issue in the future.

Explaining all of the different types of potential assets of the debtor's bankruptcy estate is both another component of a lawyer's duty to perform services competently as well as an independent duty to effectively communicate with the client. See Rules 1.1 and 1.4. While many assets are easily identifiable, some are more challenging. For example, a child is not always aware that he has a remainder interest in his parents' home because neither the parent nor

child consider the legal effect of a remainder interest. Other examples include a tax refund that has accrued, in full or in part, but has not yet been paid or a potential personal injury claim that has not been formally commenced. In addition to criticism for failing to disclose the asset in the first instance, a lawyer may have been incompetent in failing to protect the asset from the reach of a bankruptcy trustee in that an undisclosed asset may not be exempt. Another potential asset that lawyers have a duty to explain to their client is any property the debtor inherits within 180 days of the petition date. See 11 U.S.C. § 541(a)(5).

B. Liabilities/Dischargeability

A debtor's goal in a bankruptcy case is generally to obtain a discharge of his debts. However, there can be obstacles to discharging certain debts. A lawyer has a duty to assist the debtor in disclosing all of his debts, to understand the nature of those claims, and to explain to the debtor the dischargeability of those debts. Counsel's failure to conduct a reasonable investigation in connection with, and explain any potential dischargeability issues related to, each claim against the debtor may be a violation of multiple rules of professional conduct as well as § 707(b)(4)(C) of the Bankruptcy Code.

Deluca v. Seare (In re Seare), 515 B.R. 599 (B.A.P. 9th Cir. 2014)

Facts: Debtor sued his former employer for employment discrimination. Subsequently, Debtor admitted to his attorney that he had "embellished" the facts underlying his harassment claims. The district court, finding that the Debtor had committed a "fraud upon the court," dismissed the lawsuit, ordered Debtor to pay former employer's attorney's fees, and entered a Judgment in the amount of $67,430.58 against the Debtor on account of said fees. The face of the Judgment did not mention "fraud" or provide any factual or legal bases for supporting the Judgment. The former employer sought, and obtained, an Order of Wage Garnishment against the Debtor to collect the Judgment. Debtor filed a bankruptcy case seeking to discharge the Judgment. Former employer filed an Adversary Proceeding, pursuant to § 523(a)(4) and (6) of the Bankruptcy Code. Lawyer, pursuant to his Retainer Agreement, sends letter saying he will not represent the Debtor in the Adversary Proceeding and referred them to another attorney. Following Order to Show Cause against Lawyer for failing to represent Debtor in the Adversary

Proceeding, the Bankruptcy Court sanctioned Lawyer for violations of ethical rules and § 707(b)(4).

Holding:

(1) The Lawyer violated Rule 1.1 by failing to properly investigate the Judgment to determine whether dischargeability may be an issue. It was not the Debtors duty to reach legal conclusion that fraud, for the purposes of § 523(a), included the fraudulent act Debtor committed in the district court.

(2) The Lawyer violated Rule 1.1 by "unbundling his representation in any adversary proceeding in Debtors' case." The Court found that the Lawyer "should have known at the time of the initial consultation . . . representing Debtors at an adversary proceeding was not only reasonably necessary to achieve their goal of stopping the garnishment, but likely the only way to stop it."

(3) Lawyer violated Rule 1.4 "by failing to properly communicate with Debtors." The Lawyer violated his ethical obligations by failing to understand the Debtor's goal to discharge the debt on account of the Judgment in that the Lawyer "could not determine which legal services were reasonably necessary to attain those goals or explain to Debtors the challenges they were likely to face in trying to achieve those goals by filing for bankruptcy." Further, the Lawyer failed "to reasonably consult Debtors about the means to achieve their objectives." The Bankruptcy Court also found that the Lawyer failed to communicate a settlement offer to the Debtor or adequately respond to the Debtor's requests for information related to his case. The Court found that a lawyer has a duty to discuss the dischargeability of his debts and adversary proceedings.

(4) Lawyer violated his duty under § 707(b)(4)(C) because he had taken no steps to investigate independently or verify the circumstances underlying the Order of Wage Garnishment. The Debtor informed the Lawyer of the circumstances related to the Order; however, the Lawyer's response "fell far short of the 'reasonable investigation' requirement." The Court stated that the Lawyer's "reasonable next step should have been to investigate the Judgment supporting the garnishment, which could have been accomplished by asking questions or reviewing the district court's electronic docket."

DeLuca v. Cuomo (In re Cuomo), Ch. 7 No. 10-14813, Adv. P. 12-01124, 2014 WL 5358180 (B.A.P. 9th Cir. 2014)

Facts: Debtor borrowed $96,000 from Creditor in 2006 pursuant to a personal loan ("Loan"), but never made any payments. In April 2009, Debtor filed a Chapter 7 bankruptcy case, which listed the creditor, but without an address. The case was dismissed in June 2009 because the Debtor failed to file schedules. Debtor filed a second Chapter 7 case in July 2009, which listed the Loan. The second case was dismissed in October 2009 because Debtor failed to complete his pre-bankruptcy credit counseling requirement. In March 2010, represented by new counsel, Lawyer, Debtor filed a third Chapter 7 bankruptcy case. The Debtor's matrix and schedules failed to list the Loan. The Chapter 7 Trustee filed a No Asset Report and the case was closed. In October 2011, Creditor sued Debtor in state court to collect the Loan. In April 2012, Lawyer filed a Motion to Reopen the Chapter 7 bankruptcy case. Two weeks later, Lawyer assisted Debtor in filing an amended Schedule F to include the Loan. Creditor filed an Adversary Proceeding pursuant to Bankruptcy Code § 523(a)(2)(A) and §§ 727(a)(2)(A), (a)(2)(B), (a)(3), (a)(4)(A), and (a)(5). Debtor declined Lawyer's offer to represent Debtor in the Adversary Proceeding and defended the suit *pro se*. In a summary judgment motion, Debtor alleged that she had informed Lawyer about the existence of the Loan before filing the third bankruptcy case. Lawyer never personally met with Debtor or even talked to Debtor on the phone during course of representation.

Holding:

(1) Lawyer had a duty to review the previous bankruptcy petitions and schedules that the Debtor had filed and his failure to do so was a violation of Rule 1.1.

(2) Lawyer "went too far" in transferring all responsibility for the accuracy of the information in the schedules and statements to the Debtor. "An attorney cannot by contract limit the scope of his duties."

(3) Lawyer violated § 707(b)(4)(C) by relying solely on the information that the Debtor provided about his creditors; this did not constitute "a meaningful independent investigation into the circumstances giving rise to [Debtor's] bankruptcy petition." Lawyer had an "affirmative duty under § 707(b)(4)(C) to go beyond the information provided by [the Debtor] and, at the very least, to ask why the [Loan] was omitted."

Analysis

As indicated by the Courts in the cases above, debtors' counsel violated Rule 1.1 by failing to adequately investigate the potential claims against the debtors and communicate the possible anticipated issues with those claims. The consensus appears to be that a lawyer has a duty to explore potential issues related to creditors, which may include going beyond the information provided by the client. Specifically, courts seem willing to find that a lawyer was not competent where the lawyer failed to take affirmative steps to review readily and publically available information, such as PACER and other public records. The lawyer also appears to be obligated, at a minimum, to identify whether there may be claims of non-dischargeability and advise the client of the potential consequences of such claims pursuant to Rule 1.4. Further, the lawyer seems to have a duty to, at a minimum, discuss representation of the debtor in a possible adversary proceeding and likely cannot simply exclude such services from the scope of representation at the commencement of the case without violating his ethical duties. In most instances, anticipating a potential problem is generally straight forward. However, there are occasions where it is substantially more difficult to determine dischargeability issues. For example, what if the Debtor did not have any information related to the underlying debt and it wasn't available on-line? What seems to be left unclear is how far a lawyer must go to fulfill his ethical obligations with respect to identifying claims, evaluating their dischargeability, and providing representation in related adversary proceedings.

C. Income and Expenses

A lawyer's ethical duty to investigate a debtor's financial affairs also extends to the debtor's income and expenses. Here, the requirement seems to be primarily related to a lawyer's ethical obligations to be truthful and candid with the Court.

Lafayette v. Collins (In re Withrow), 405 B.R. 505 (B.A.P. 1st Cir. 2009)

Facts: Debtor, through Lawyer, filed skeletal Chapter 13 petition. Less than two weeks later, Debtor converted case to Chapter 7. Thereafter, Debtor filed his schedules, statement of financial affairs, and means test. He also filed a rebuttal to the presumption of abuse in an attempt to preserve his discharge due to "special circumstances." Each of these documents

contained numerous errors including, overstating the Debtor's pre-petition income, understating the Debtor's post-petition income, inaccurately stating facts related to post-petition payments in support of the Debtor's mother, and failing to list all of the Debtor's bank accounts. The schedules also failed to exempt any equity in the Debtor's home or vehicle. The Bankruptcy Court issued an Order to Show Cause against the Lawyer. Lawyer conceded that there were numerous errors in the documents he filed on behalf of the Debtor, however, he blamed the Debtor's poor "mental condition" and "personal forgetfulness." Following an evidentiary hearing, the Court found that the Lawyer violated § 707(b)(4)(C) of the Bankruptcy Code and Bankruptcy Rule 9011 in his preparation of the Debtor's Schedules and Rebuttal.

Holding:

(1) Even if the Debtor provided the Court with "inaccurate information, . . . [it does] not explain the numerous inconsistent statements in the various documents regarding the Debtor's income" and expenses. Counsel's excuses were "not sufficient to overcome the sloppy and careless actions (or inactions) of [Counsel] in this case. Therefore, the evidence shows that [Counsel] failed to conduct a reasonable investigation into the underlying facts before filing the Debtor's schedules, statement of financial affairs, and Rebuttal, and that he was careless when preparing the documents."

Analysis

In addition to violating § 707(b)(4)(C) of the Bankruptcy Code and Bankruptcy Rule 9011, it is likely that the Lawyer also violated several ethical rules. Expenses, in particular, are often estimates and may vary from month to month. Electricity may be higher in the summer and heating oil may be higher in the winter. Some expenses, such as car repairs and maintenance, are also sporadic. Similar to the cases discussed above, "sloppy and careless" preparation of schedules and statements is likely a failure to perform legal services competently or diligently. See Rules 1.1 and 1.3.

Further, inaccurate representations made regarding the Debtor's financial affairs must be remedied. A lawyer has a duty to correct misrepresentations to the court, even inadvertent misrepresentations. Rule 3.3. In several of the above-reference cases, part of the issue was the lawyer's failure to properly fix inaccuracies once they became apparent. This, of course, also implicates Rule 9011 of the Federal Rules of Bankruptcy Procedure.

III. Conclusion

Bankruptcy lawyers have a unique affirmative duty to investigate a debtor's financial affairs. Whether a lawyer conducted a reasonable investigation is a fact-based inquiry. There seem to be several conclusions that may be drawn from the recent cases discussing bankruptcy counsel's ethical obligations. First, the Court's seem more likely to find a lawyer failed to conduct a reasonable inquiry where the lawyer had access to readily and publically available information, but failed to look. There appears to be a requirement to look at online resources such as PACER, land records, and state court dockets. In many instances, debtors argue that they advised their lawyer about the undisclosed asset and the lawyer failed to include the asset on the bankruptcy papers. As a practical matter, it is a good practice to have the client prepare, in his own writing, a list of all of his assets, liabilities, income, and expenses.

Lawyers also have a duty to be candid with the Court. See Rule 3.3. Of particular importance is a lawyer's duty to "correct a false statement of material fact or law previously made to the tribunal by the lawyer." When an error in a representation to the Court has been called to counsel's attention, even if that error was innocent or based upon inaccurate information provided to the lawyer, the lawyer has a duty to correct that mistake expeditiously. The appropriate manner in which to correct a mistake—whether by a statement in open court or filing a pleading—will likely depend on the nature of the error and the representation. But, in any event, it must be corrected.

As a final matter, another potential ethical pitfall can arise where a debtor is insisting upon an omission on his schedules or statement of financial affairs. As an ethical matter, absent one of the limited exceptions, a lawyer may not violate his client's confidences; however, the lawyer may not file inaccurate papers without running afoul of other ethical obligations. See Rules 1.6 and 3.3. In this instance, the lawyer's only option is almost certainly to terminate representation. See Rule 1.16. This may be an incredibly difficult prospect depending on any immediate pressure that the debtor may be facing, such as foreclosure or wage garnishment. Any negligent or willful ignorance of the debtor's financial affairs, however, will almost certainly result in a larger ethical problem.

THE ETHICAL PITFALLS OF REPRESENTING A LESS THAN ETHICAL DEBTOR … AS SEEN ON REALITY TELEVISION.

SOME BACKGROUND ON THE STARS OF THE SHOW

Karma seemed to have it all. She was starring in a popular reality television show, sharing with millions of viewers the intimate details of her life as a hippie housewife living in Burlington, Vermont. Once a week, Karma opened up her home, her friendships, and her family life to the world. Her longtime love, soulmate, and husband - Rock, and their three children, are also prominently featured on the show. After breaking out as a star of the series, Karma began to build a lifestyle brand premised on her appearance on the Hippie Housewives of Burlington. She formed an LLC, of which she was the sole member, to operate an online hippie fashion boutique. By the end of first season, she had secured a contract to write a cookbook based on the recipes handed down to her from her mother, who developed her skills as a cook in parking lots and campsites while following the Grateful Dead around the country. Prior to appearing on the show, Karma did not have a gig outside of the home but rather focused her energies on raising her three beautiful children Meadow, Willow, and Rainbow. However, based on her popularity with viewers, Karma became the second highest paid "housewife" of all of the women who appear on the franchise.

Rock originally hails from Montreal, Canada, a well-known hot bed of the hippie culture. As seen on the Hippie Housewives, he engaged in a number of business enterprises, in which Karma appears uninvolved and seemingly unaware. Some of Rock's businesses as featured on the show include a bohemian home décor storefront, a small organic vegetarian bistro, and a real estate development company (he owned a number of buildings in and around Burlington). Rock, despite his peace and love appearance, insisted upon having the finer things in life, and showered his wife and girls with all that their hearts desired. He did not see his businesses as family enterprises. He ran them alone and Karma proudly and publicly proclaimed that she had little knowledge of the hows-and-whys of Rock's financial ventures. As far as their family finances were concerned, she was just going with the flow.

In fact, behind the scenes, to finance his many business ventures, it appears that Rock was robbing Peter to pay Paul and Mary. During the free loving days where almost anyone could score a mortgage based on little, loosely-based, or fanciful information, Rock built his real estate empire. Although Karma did not participate in the business and could not be bothered with details, she regularly signed on the dotted line when Rock asked her to do it. To Karma, it was worth it. She loved the lifestyle that Rock was providing for her and the girls.

When the bubble burst, the trip was over.

After consulting with his guru, Rock decided to seek the advice of bankruptcy counsel. Although Karma was listed as a co-debtor on many of his applications for credit related to the operation of his businesses and although she was technically a co-obligor on many of the

mortgages he had taken out over the years, Rock didn't want to bum out Karma by including her in this meeting.

HYPO NUMBER ONE

ROCK MEETS WITH ATTORNEY MAHARISHI - INITIAL INTAKE MEETING

Rock contacts Attorney Maharishi's office and tells the receptionist he needs help filing a bankruptcy case. The receptionist, Moon Beam, immediately recognizes Rock's name and his status as a celebrity. Moon Beam asks Rock why he thinks he needs to file for bankruptcy. He tells her that he needs to avoid paying his creditors who are calling his home at all hours of the day and the night, primarily because he does not want his wife … or the camera crews … to find out what kind of financial situation he's facing. He also says he's worried about losing his home, his businesses, and many of his expensive toys because he's facing some repo and foreclosure proceedings. Moon Beam assures him that his financial information will remain confidential through the bankruptcy process. Moon Beam also explains to him that he will need to prepare a list of all of his personal assets and debts, and he can discuss with Attorney Maharishi which assets get included in the bankruptcy case. Further to this effort, she tells him that she will email to him a client intake form which he should prepare prior to the meeting. Moon Beam, without any further inquiry of Rock, then schedules a meeting for Rock with Attorney Maharishi for thirty days from the date of the call.

What, if any, are the ethical issues for Attorney Maharishi arising from Moon Beam's discussion with Rock?

1. Nothing, it is not reasonable for Rock to rely on what Moon Beam told him.

2. He failed to adequately supervise his administrative staff.

3. Nothing, if Rock is unaware that Moon Beam is providing any substantive information to prospective clients calling the office.

Did Moon Beam engage in the unauthorized practice of law, and, if so, is Attorney Maharishi complicit?

1. Yes.

2. No.

Applicable Rules and Authorities

- ABA Model Rule 5.3: Responsibilities Regarding Nonlawyer Assistants.
- ABA Model Rule 5.5: Unauthorized Practice Of Law; Multijurisdictional Practice Of Law.

- *In re van Dyke,* 296 B.R. 591 (Bankr. D. Mass. 2003)(noting that Massachusetts Rules of Professional Conduct prohibit a lawyer from assisting a nonlawyer from engaging in the unauthorized practice of law and providing some general guidance on what constitutes the unauthorized practice).
- *In re Chang,* 83 A.3d 763 (D.C. 2013)(reciprocal sanctions imposed arising out of counsel's failure to supervise – false credit counseling certificates were filed under her ECF login and password).

HYPO NUMBER TWO

MAHARISHI NEEDS TO DO WHAT'S DUE.

After the call, Moon Beam runs to Attorney Maharishi's office and enthusiastically shares with him that a television personality is seeking his counsel with respect to a potential bankruptcy filing. Since she is an avid Hippie Housewives fan, she spends the better part of an hour regaling Attorney Maharishi with the public "private" details of Rock and Karma's life.

At the initial meeting, Rock shows up with a large retainer for Attorney Maharishi's services and what Rock represents to be a completed client intake form. Missing from the form, however, is any reference to any income earned by Karma during the past three years, any future income that Rock expects Karma to earn, any reference to any of Rock's vehicles, and only one business is listed (among other things). Attorney Maharishi wondered about these omissions, as Moon Beam discussed in excruciating detail Karma and Rock's occupations and assets during their conversation after Rock's initial call to the office.

Based on the information Rock did provide, and in order to accomplish Rock's stated goal of stopping creditors from collecting on the debts owed to them, Attorney Maharishi concludes and advises Rock that Karma needs to file for bankruptcy protection as well. Since Rock is "in charge" of family finances, he unilaterally agrees to this course of action.

Attorney Maharishi then advises Rock that he will take the information from the intake form and prepare a draft of Rock and Karma's bankruptcy petition, schedules, and statement of financial affairs, which he will send to Rock to review.

Based on these facts, what further due diligence, if any, is Attorney Maharishi required to do?

1. Search all available online registries of deeds;

2. Conduct a UCC search with the Vermont Secretary of State;

3. Conduct a search of the corporations database maintained by the Vermont Secretary of State;

4. Search google and facebook for additional information on Rock and Karma;

5. Watch all past episodes of the Hippie Housewives;

6. Meet with Karma;

7. All of the above;

8. None of the above; or

9. Some of the above.

Applicable Rules and Authorities

- ABA Model Rules 1.1: Competence.
- ABA Model Rule1.3: Diligence.
- *Withrow v. Collins (In re Withrow),* 405 B.R. 505 (1st Cir. BAP 2009) (Debtors' counsel has an affirmative duty to conduct a reasonable inquiry into the facts set forth in clients' schedules and statement of financial affairs before filing them.
- *DeLuca v. Cuomo (In re Cuomo)*, BAP No. NV-13-1294-PaJuHl., 2014 WL 5358180 (9th Cir. BAP Oct. 21, 2014)(sanctions imposed against bankruptcy counsel upheld for violations of Nev. R. 1.1 (failures to competently investigate) and 11 U.S.C. § 707(b)(4)(C)).
- *In re Alessandro,* No. 10-12511, 2010 WL 3522255 (Bankr. S.D.N.Y. Sept. 7, 2007).
- 11 U.S.C. § 707(b)(4)(C).
- Fed. R. Bankr. P. 9011.

HYPO NUMBER THREE

CAN AND SHOULD MAHARISHI BAG THIS CASE?

Post-intake, Attorney Maharishi spends a quiet Saturday night at home with a bottle of wine and a few seasons of Hippie Housewives. Based on what he sees on the show, it becomes clear to him that Rock failed to disclose a number of assets on the intake form and has been less than forthcoming with him. He also notes that Karma had a lot of pretty clothes and expensive jewelry, a book contract, and other assets which were not included on the original intake form.

Can Attorney Maharishi terminate his representation of Rock and Karma post-intake but pre-filing of the bankruptcy case?

1. Yes.

2. No.

Should Attorney Maharishi terminate his representation of Rock and Karma post-intake but pre-filing of the bankruptcy case?

1. Yes.

2. No.

3. Maybe.

If Attorney Maharishi terminates his representation of Rock and Karma post-intake but pre-filing of the bankruptcy case, does he have an obligation to monitor what Rock and Karma file with the Court and, further, to notify the Court of any omitted assets?

1. Yes.

2. No.

Applicable Rules and Authorities

- ABA Model Rule 1.6: Confidentiality.
- ABA Model Rule 1.16: Declining Or Terminating Representation.
- ABA Model Rule 3.3: Candor Toward The Tribunal.
- ABA Model Rule 8.4: Misconduct.
- *In re Robinson,* 198 B.R. 1017 (Bankr. N.D. Ga. 1996)(noting that once an attorney discovers a bad faith motive for filing a case, he has an obligation to attempt the client to voluntarily dismiss it. If the client refuses, the attorney can seek to withdraw from the case).
- *In re Alessandro,* No. 10-12511, 2010 WL 3522255 (Bankr. S.D.N.Y. Sept. 7, 2007).

HYPO NUMBER FOUR

THE BEAT GOES ON, AND MAHARISHI MUST SET THE TEMPO.

The following Monday, Attorney Maharishi summons Rock for a meeting and requests Karma's attendance. Only Rock shows up. At the meeting, Attorney Maharishi asks about Karma's absence. Rock responds that that he wants to keep her out of things as much as possible, and that, anyway, she is too busy filming to attend. Rock says that Karma will sign whatever he tells her to sign, so Attorney Maharishi need not worry about her missing the meeting. Attorney Maharishi also inquires about the missing assets – the ones he discovered from watching Hippie Housewives. Rock says he was not going to include them in the case because he didn't want a trustee to liquidate them. Attorney Maharishi tells him they need to be included, so Rock scribbles a few additional assets on a piece of paper and instructs Attorney Maharishi to list them as well.

What are Attorney Maharishi's obligations relating to ensuring that his clients - both of his clients – review and verify the information in the Petition, Schedules, and Statement of Financial Affairs?

What are Attorney Maharishi's obligations relating to encouraging Rock and Karma to fully disclose all of their assets and liabilities?

Applicable Rules and Authorities

- ABA Model Rule 1.4: Communication.
- ABA Model Rule 1.16: Declining Or Terminating Representation.
- ABA Model Rule 3.3: Candor Toward The Tribunal.
- ABA Model Rule 8.4: Misconduct.
- 11 U.S.C. § 707(b)(4).
- Fed. R. Civ. P. 9011.

HYPO NUMBER FIVE

IT'S ALL GROOVY, BABY.

Attorney Maharishi, mindful that there may be some important deadlines looming relating to the various foreclosure proceedings Rock and Karma are facing (although he's not sure of any exact dates, he never asked), proceeds to move forward with the commencement of their chapter 7 bankruptcy case. He prepares the Petition, Schedules, Statement of Financial Affairs, and Means Test with the information provided by Rock in the initial intake form, affixes Rock and Karma's electronic signatures to them, and files them with the Court. He then sends a copy to Rock via email and reminds him that both Rock and Karma will need to appear at the 341 meeting to testify under oath about their assets and liabilities. He also tells Rock that he will need both Rock and Karma to sign the Petition, Schedules, Statement of Financial Affairs, and Means Test in pen prior to the 341 meeting (the same day is fine, just before they testify). The day of the 341 meeting, Rock and Karma testify under oath that the information contained in the Petition, Schedules, Statement of Financial Affairs, and Means Test is true, accurate and complete.

Once again, Attorney Maharishi thinks of the omitted assets. Once again, he contemplates withdrawing from the case.

Applicable Rules and Authorities

- ABA Model Rule: 1.1 Competence.
- ABA Model Rule1.6: Confidentiality.

- ABA Model Rule3.3: Candor Toward the Tribunal.
- ECF Administrative Procedures.
- *In re Chang,* VSB Docket No. 10-042-080416, 2011 WL 3025610 (Va. St. Disp. July 6, 2011).
- *In re Robinson,* 198 B.R. 1017 (Bankr. N.D. Ga. 1996).
- *In re Alessandro,* No. 10-12511, 2010 WL 3522255 (Bankr. S.D.N.Y. Sept. 7, 2007).