

# **Ethics Session: “All I Really Need To Know I Learned In Kindergarten”: Practicing with Ethics and Civility**

## **B. Summer Chandler**

*Chandler Law Firm, LLC; Panama City Beach, Fla.*

## **Hon. James P. Smith, Chief Judge**

*U.S. Bankruptcy Court (M.D. Ga.); Macon*

## **Emily Taube**

*Burr & Forman LLP; Nashville, Tenn.*

**All I Really Need to Know I Learned in  
Kindergarten:  
Practicing with Ethics and Civility**

**B. Summer Chandler**  
Chandler Law Firm, LLC  
Panama City Beach, Florida

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## **Introduction**

In his popular essay, *All I Really Need to Know I Learned in Kindergarten*, writer Robert Fulghum proclaimed: “Most of what I really need to know about how to live and what to do and how to be, I learned in kindergarten.” Given the well-documented concerns about ethics, professionalism and civility in legal practice, this assertion may not be entirely true for those of us in the legal profession. Or, perhaps, we learned the lessons and then forgot some of them along the way.

Both attorneys and trustees may face numerous professional and ethical dilemmas during the course of a bankruptcy case and related proceedings. Although these challenges are not necessarily unique to the bankruptcy context, given the variety of issues that bankruptcy addresses and the number of parties that may be involved, some of these issues may be exacerbated or may be more likely to occur in the bankruptcy context as compared litigation cases. This paper addresses just some of the many professional and ethical challenges that attorneys may face in bankruptcy.

### **A. Candor to the Client**

Lawyers are charged with exercising “independent professional judgment and render[ing] candid advice.” Model Rules of Professional Conduct Rule 2.1.<sup>2</sup> In advising a client, a lawyer is not limited to looking to purely legal issues. Rather, [i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors

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<sup>1</sup> ROBERT FULGHUM, *ALL I REALLY NEED TO KNOW, I LEARNED IN KINDERGARTEN* 2 (15th ed. 2004).

<sup>2</sup> ABA Model Rules of Professional Conduct. The Model Rules are cited throughout these materials. Excerpts of the Models Rules are attached hereto.

that may be relevant to the client's situation.” Model Rules of Professional Conduct Rule 2.1, cmt. 2. In fact, advice that is purely technical legal advice may be inadequate. *Id.*

As one bankruptcy court explained, “the exercise of professional judgment while providing advice and counseling to one’s client is the essence of being a professional.” *In re Garrard*, 2013 WL 4009324 (Bankr. N.D. Ala. 2013). It fact, professional judgment that is offered in rendering advice and counsel, “is the very that the reason laymen seek out the services offered by professionals, whether they are lawyers, physicians, architects, public accountants, engineers, or members of the clergy.” *Id.*

A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

#### **B. Candor to the Tribunal**

A lawyer is also charged with candor to the tribunal. Model Rules of Professional Conduct Rule 3.3. In fact, lawyers have an obligation to the legal system that sometimes overrides their duty to a client who is less than truthful. Model Rule 3.3 prohibits a lawyer from offering evidence that the lawyer knows is not true. The rule requires a lawyer to refuse to offer any information into evidence that the lawyer reasonably believes is false. In addition, the lawyer is obligated to attempt to remedy an offer of evidence that the lawyer later comes to believe is false. A lawyer should first attempt to convince his client to recant false testimony. If he is unable to convince the client to do so, however, he may have to withdraw from representation, or even disclose the perjury to the tribunal. Model Rules of Professional Conduct Rule 3.3, cmt. 6 & 11.

As part of the duty of candor, a lawyer has some responsibility to affirm the accuracy of the information provided by his client. Model Rules of Professional Conduct Rule 3.3; 11 U.S.C. § 526(a)(2); 11 U.S.C. § 707(b)(4)(C). Rather than simply accepting, on faith, the debtor's version of the facts, an attorney has an obligation to probe the debtor for facts before they are presented to the court. *In re Wilson*, 234 B.R. 422, (Bankr. E.D. Ark. 1999) (finding that debtor's attorney had violated Fed. R. Bankr. P. 9011 for misrepresenting facts in letters to state criminal court officials, and for suing a state court judge in a Chapter 13 adversary proceeding). The extent of the lawyer's duty to investigate factual information provided by her client is not always clear. The investigation that is required will often be dependent on the facts of the particular case and client with which the attorney is dealing. *See e.g., In re Douglas*, 141 B.R. 252 (Bankr. N.D. Ga. 1992) (holding that an attorney who knows his client has previously filed bankruptcy must consult court records and determine the facts about those previous filings before counseling his client to file another case).

Under some circumstances, particularly in the insolvency context, matters may be time sensitive and a proper investigation of the facts may not be possible before a bankruptcy petition is filed. At least one court has stated that, if an attorney does not have time to properly investigate before filing, the attorney must conduct the investigation right away, and if, in the course of that investigation, the attorney learns the action was not filed for a proper purpose the attorney must take action to address the improper filing by informing the court and opposing parties and dismissing the unwarranted action. *Id.*

### **C. Conflicts of Interests**

Absent informed consent, a lawyer may not represent multiple clients when it is likely that the representation of one will materially and adversely affect representation of the other. Model Rules of Professional Conduct Rule 1.7. Even when a conflict of interest exists, however, if the

lawyer reasonably believes she will be able to provide competent and diligent representation to each affected client, she may accept the representation if:

- (1) the representation is not prohibited by law;
- (2) 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
- (3) each affected client gives informed consent, confirmed in writing.

Model Rules of Professional Conduct Rule 1.7 (b).

In order to safeguard against conflicts of interests, “a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved.” Model Rules of Professional Conduct Rule 1.7 cmt. 3. Ignorance that results from a failure to implement appropriate procedures will not serve as a defense to a violation of this Rule 1.7. Model Rules of Professional Conduct Rule 5.1.

At least one court has stated that, “[t]he bankruptcy disqualification rule is substantially broader than the ethics rule.” *In re McKinney Ranch Associates*, 62 B.R. 249 (Bankr. C.D. Cal. 1986). This court explains that, “Section 327 disqualifies counsel for a trustee or a debtor in possession who represents any actual adverse interest. Moreover, it also disqualifies counsel who represents a potential adverse interest in most cases.” *Id.* (internal citations omitted).

## **SELECT RULES & STATUTES**

### **Client-Lawyer Relationship**

#### **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.

**Rule 1.8 Conflict of Interest: Current Clients: Specific Rules**

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.



**Counselor**

**RULE 2.1 ADVISOR**

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. A lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

The maximum penalty for a violation of this Rule is disbarment.

**Advocate**

**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.

**FACT PATTERN**

In 1995, Jack and Johnny formed No Place Like Home LLC (No Place) and began operating what initially began as an upscale mobile home park. Jack owned about 100 acres of land and some mobile homes, which he inherited from his father. Johnny had some experience running a mobile home park and physical ability. After years of increasing costs and declining rental revenues, Jack and Johnny, in the name of No Place, borrowed money from Big Bank and encumbered all of the No Place assets. The loan proceeds were purportedly used to make several capital improvements. Over the next two years, however, the situation did not improve with revenues and Johnny was indicted in federal court on several counts of fraud. Before the bank could foreclose on its collateral, Jack and Johnny had Johnny's criminal defense attorney, Mr. Goodman, file a petition for relief under chapter 11 for No Place.

In its petition, No Place claimed an ownership interest in the 100 acres, several mobile homes, two pick-up trucks and a contract with a large local florist for the sale of rare orchids being grown on the property (one of the many endeavors Johnny has tried to get start on the property over the years).

1. Hypothetical One

After No Place's petition is filed, Jack meets with Attorney Goodman to prepare for the meeting of creditors. Jack intends to appear at the meeting as representative for the LLC. During the course of their meeting, the conversation turns to Johnny and his pending criminal charges. Jack mentions that Johnny has been using proceeds from the sale of the orchids to help pay his legal bills to Attorney Goodman. He also explains that one of the mobile homes listed in the petition has since been sold and the proceeds were used to pay for living expenses for Jack and his wife. Although Attorney Goodman is not a bankruptcy attorney, she knows that individuals cannot freely use proceeds of a debtor in bankruptcy. She explains to Jack that the use of estate assets could be a real problem. She explains that Jack and Johnny may have to return this money to the bankruptcy estate. Jack is visibly upset and apologizes for "messing everything up." Jack quickly leaves, telling Goodman that he needs some time to think things through.

Half an hour later, Jack calls Attorney Goodman and tells her that he mixed up what he believes are some very important facts. He explains that the orchid contract was really a contract between Johnny and the florist. The LLC does not in fact have any operations. He also explains that the mobile home that was sold was owned by Jack personally. It was never owned by the LLC. He states that he has the title for the mobile home that will show he owned the mobile home. He says that the contract with the florist is an oral agreement, but that he has a witness who can back up that the agreement is between Johnny and the florist and does not involve the LLC. Attorney Goodman questions the veracity of this new information.

What is an appropriate response for Attorney Goodman?

**2. Hypothetical Two**

Several weeks following the chapter 11 filing for the LLC, Jack goes to see Attorney Goodman about possibly filing a petition on his behalf. Jack explains to Goodman that he and his wife live rent and utilities free in a residence that is located in the mobile home park. He states that, in exchange for his turning the mobile home park to the LLC, he and his wife were given a life estate in the residence located in the mobile home park.

What should Goodman do?

**3. Hypothetical Three**

Goodman has serious questions about the truth of the information that Jack has now provided. She thinks about it carefully and decides that she will amend the schedules of the LLC to remove the orchid contract and several mobile homes from the list of assets of the estate of the LLC.

Is this decision appropriate?

**4. Hypothetical Four**

After looking into the new information provided by Jack, Goodman concludes that the orchids (and the contract) is actually owned by the LLC, as is the mobile home that was sold. Goodman confides in her friend, Attorney McCoy, that some of her fees were paid by the improper sale of estate assets. She explains that she has thought about it carefully, but has concluded that it is best for all involved if she keeps quiet about the use of the proceeds from the sale of the orchids. She explains that no one else would be willing to help Johnny with his criminal law case. She really believes she is Johnny's only hope. She also explains that she is confident that Johnny will be able to turn around the operations of the mobile home park if he is able to free himself from the pending criminal charges. If Johnny turns around the mobile home park, the end result will be better for everyone.

What should Attorney McCoy do?