

Consumer Track
**Professional Responsibility of
Counsel in Consumer Cases:
It Isn't Just Filling Out Forms**

Hon. Donald R. Cassling, Moderator

U.S. Bankruptcy Court (N.D. Ill.); Chicago

Adam G. Brief

Office of the U.S. Trustee; Chicago

Dean R. Nelson, Jr.

The Taunt Law Firm; Birmingham, Mich.

William E. Wallo

Weld Riley, S.C.; Eau Claire, Wis.

2016 ABI CENTRAL STATES WORKSHOP
CONSUMER ATTORNEYS ETHICS PANEL

Panel: Hon. Donald R. Cassling (Moderator), *U.S. Bankruptcy Court (N.D. Ill.); Chicago*
Adam G. Brief, *Office of the U.S. Trustee; Chicago*
Dean R. Nelson, Jr., *Taunt Law Firm; Birmingham, Mich.*
William E. Wallo, *Weld Riley, S.C.; Eau Claire, Wis.*

Topic: *“Efficient and effective preparation of petitions is a core competency for debtors’ lawyers. To that end, this panel will examine such issues as counsel’s duty to investigate a debtor’s financial affairs, best practices for doing so, appropriate use of staff, avoiding ECF misuse, and the consequences of failing to discharge these duties.”*

Time Allotment: 75 minutes –

- i. Introduction of Panel/Topic (5 Minutes)
- ii. Presentation/Audience Questions: (70 minutes)

Format: This presentation will be a panel discussion, with audience participation, based on multiple scenarios and common ethics/professional responsibility issues faced by consumer bankruptcy practitioners. The discussion will focus on attorneys’ duties under the bankruptcy code and applicable professional responsibility rules and canons. The Moderator (Judge Cassling) will present factual scenarios to the panel. The panel members will then discuss each problem and present the applicable authority that will, or may, dictate whether the proposed action is supported by the bankruptcy code or applicable canons and model rules of professional responsibility. Not every scenario will have a firm answer; in these situations, the panel will explore the boundaries of the issue in order to analyze what may or may not be authorized under the applicable authority.

The following materials will aid in the panel members’ presentation.

Canons and Model Rules

- Canon 7 of the ABA Model Code of Professional Responsibility – “A lawyer should represent a client zealously within the bounds of the law.”
- Rule 1.1 of the ABA Model Rules of Professional Conduct – “Competence.”
 - A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- Rule 1.3 of the ABA Model Rules of Professional Conduct – “Diligence.”
 - A lawyer shall act with reasonable diligence and promptness in representing a client.
- Rule 3.3 of the ABA Model Rules of Professional Conduct – “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.

- Rule 8.3 of the ABA Model Rules of Professional Conduct – “Reporting Professional Misconduct.”
 - (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
 - (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.
 - (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.
- Rule 8.4 of the ABA Model Rules of Professional Conduct – “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.

Requirements for Bankruptcy Attorney Disclosures/Representations (Statutes/Rules)

- BAPCPA disclosures--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.”)
- Fed. R. Bankr P. 9011(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 . . . 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, . . .; (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 a 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.”)
- Statement of Compensation - 11 U.S.C. §329(a) (“Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation”).
- Statement of Compensation - Fed. R. Bankr P. 2016(b) (“Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 14 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code...A supplemental statement shall be filed and transmitted to the United States trustee within 14 days after any payment or agreement not previously disclosed.

Statutory and Rule Bases for Sanctions/Remedies for Ethical and Disclosure Violations

- Fed. R. Bankr P. 9011 (sanctions against attorneys/clients);
- 28 U.S.C. § 1927 (sanctions against attorneys for improper multiplying of federal court proceedings in an unreasonable and vexatious manner)
- 11 U.S.C. §329(b) (Disgorgement of Fee paid to Debtor's Attorney)
- 11 U.S.C. §105 & Fed. Rule Bankr P. 9020 (Civil Contempt)
- Adversary Proceedings/Contested Matters:
 - Fed. R. Bankr P. 7041(b) (involuntary dismissal of an action or claim for failure to prosecute or comply with the Rules)
 - Fed. R. Bankr P. 7037(b) (sanctions, ranging from monetary sanction to dismissal of a claim or action for failure to comply with a court order related to discovery)
 - Fed. R. Bankr P. 7016(f) (sanctions for failure to comply with pretrial order, failure to appear at pretrial conference, and failure to participate in the conference)
 - Fed. R. Bankr P. 7026(g) (sanctions for a certification that violates Rule 7026, including reasonable expenses and attorney's fees)
- Judicial Disciplinary Proceedings:
 - Local Bankruptcy Rule 9029–4B (Bankr. N.D. Illinois).
 - Local District Court Rule 83.22 (E.D. Michigan)(applies to bankruptcy Court practice)
 - Local Bankruptcy Rule 9010-1 (Bankr. W.D. Michigan) incorporating Local District Court Rule 83.1(k)(W.D. Michigan)
- 18 U.S.C. § 152- Criminal proceedings resulting in fines or imprisonment for up to 5 years (or both) for, among other things, concealment property of the estate; false oaths, accounts, or declarations; presentation or use of false proof of claims; receipt of property of the estate contrary to the bankruptcy code; falsification of records; fraudulent transfer of assets.
- 18 U.S.C. § 3057 - Judges and Trustees with reasonable grounds for believing there is a violation of 18 U.S.C. § 152 (or other laws relating to insolvent debtors, receiverships, or reorganization plans) “**shall**” refer the matter to the United States Attorney.

Case Law

- *In re Himmel*, 125 Ill.2d 531, 533 N.E.2d 790 (1988)
- *In re Liou*, 503 B.R. 56 (Bankr. N.D. Ill. 2013)
- *In re Varan*, 2014 WL 2881162 (Bankr. N.D. Ill. 2014)
- *In re Seare*, 493 B.R. 158 (Bankr. D. Nev. 2013)
- *In re Jahrling*, 2016 U.S. App. LEXIS 5013 (7th Cir. 2016)
- *In re Ingram*, 2014 WL 1278160 (Bankr. E.D. Wis. March 27, 2014)
- *In re Valladares*, 415 B.R. 617 (Bankr. S.D. Fla. 2009) (law firm subject to sanction for failing to disclose fees paid by third party);
- *In re The Harris Agency LLC*, 468 B.R. 702 (delay in disclosing third-party compensation did not warrant sanction);
- *In re Sledge*, 353 B.R. 742 (Bankr. E.D. Va. 2006) (attorney violated standard of care by delegating preparation of petition and meeting with clients to paralegal)
- *Bethea v. Robert J. Adams & Assoc.*, 352 F.3d 1125 (7th Cir. 2003) (prepetition debts for legal services are subject to discharge)
- *In re Lackawanna Medical Group, P.C.*, 323 B.R. 626 (Bankr. M.D. Penn. 2004) (attorneys' unpaid claim for prepetition services made them creditors of the filing and they were per se disqualified from representation)
- *State ex rel. Okla. Bar Ass'n v. Oliver*, 2016 OK 37, 2016 Okla. LEXIS 37 (Okla. 2016) (attorney censured and ordered to pay costs for his failure to report suspension from bankruptcy Court for chronic ECF rules violations, lack of "technological proficiency," and failure to adhere to Bankruptcy Court Ordered remedial ECF "homework.")
- *In re Slabbinck*, 482 B.R. 576 (Bankr. E.D. Mich. 2012)(discussion of bankruptcy code provisions and rules of professional conduct to determine what requirements are necessary for an attorney to unbundle bankruptcy services)