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Recording Date – March 14, 2017
Recording Availability – October 18, 2017

Meeting Location	Date	Time	Topic
King County Bar Association 1200 Fifth Avenue - Suite 700 Seattle, WA	**Tuesday, March 14, 2017**	12:00 PM to 1:15 PM	Ethical Considerations for Debtor's Counsel

AGENDA

12:00 PM Introductions/Lunch

12:10 PM Presentation: 'Ethical Considerations for Debtor's Counsel', by Jeffrey Wells, Wells and Jarvis, P.S

- Duties to client
- Unbundling services
- Conflict of Interest
- Attorney/client privilege
- Attorney's fees

1:15 PM Evaluations & Adjourn

SPEAKER BIOGRAPHY:

Jeffrey Wells, Wells and Jarvis, P.S – Jeffrey practices in Seattle, Washington at the firm of Wells and Jarvis, P.S. He has concentrated his practice in commercial bankruptcy, Chapter 11, Chapter 13 wage-earners' plans, and consumer bankruptcy for the past 31 years. Mr. Wells is a frequent speaker at continuing legal education seminars relating to creditor and debtor rights and bankruptcy. He is a member of the King County (Bankruptcy Section) and Washington State Bar associations. He earned his BA cum laude with college honors in history from the University of Washington and his JD from Willamette University in 1975. He is a past member of the Mountlake Terrace City Council and Board of Adjustment.

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Ethical Considerations for Debtor's Counsel

When I joined the bar in 1975, Lexis Nexis, which was just beginning around that time, reported few cases dealing primarily with ethical considerations in bankruptcy. Since then, the number of cases dealing with ethical problems for bankruptcy practitioners has grown significantly each year to the present. I don't believe that attorneys are any less ethical now than they were in the past. Human behavior does not change that fast. However, the regulation of attorneys in bankruptcy has become both more complex and subject to heightened scrutiny. As such, ethical behavior by bankruptcy practitioners is no longer as simple as "don't steal from clients." Rather it involves compliance with a myriad of bankruptcy codes and rules together with the usual ethical considerations dealing with all clients. The following discussion presents not only the ethical considerations imposed by the bankruptcy code and bankruptcy rules, but also the complexities in representing clients in bankruptcy and the impact the ethical considerations has on the ability of the attorney to get paid his fees.

I. Duties to Prospective Clients

A. In re Wayne Seare, 493 B.R. 158 (Bankr. D. Nev. 2013)

Bruce A. Markell, a former United States Bankruptcy Judge for the District of Nevada wrote a 45-page masterpiece on the ethics of conduct for attorneys in representing consumer debtors. The opinion, *In re Wayne Seare*, 493 B.R. 158 (Bankr. D. Nev. 2013), was not merely just to render a decision, but was a primer on ethical conduct directed to the bankruptcy bar in general. It provides a roadmap for the duties and responsibility, which the debtor's bankruptcy bar needs to meet if they are to uphold the professional standards otherwise expected by the courts. (Page numbers following are from Judge Markell's opinion.)

Judge Markell starts out by stating, "Under the provisions of 11. U.S.C. § 329 and Rules 2016 and 2017…[the court] has the power and obligation to determine the services that an attorney for a debtor must perform in order to be entitled to a reasonable fee…[and] the inherent power to regulate the conduct of attorneys that practice before [it]." *Id.* 170.

It appears that debtor's attorney, Anthony DeLuca, only met with the debtors initially when he flipped through a lawsuit involving a hospital handed him by the debtors. After DeLuca indicated he believed the debt involved in the lawsuit was dischargeable (presumably because it

was merely a hospital bill) the debtors were placed in a small room to sign and initial a 19-page retainer agreement. The retainer agreement was not signed by the attorney Anthony DeLuca. In addition to a fixed fee of $2,000 for the Chapter 7, the retainer agreement indicated that representation in adversary actions would require additional payment.

After the bankruptcy was filed, the attorney for the hospital indicated at the 341 hearing that the hospital would object to debtors' discharge of the judgment the hospital obtained against the debtors. Thereafter, the debtors received a form email message congratulating them on obtaining their discharge, but unfortunately the message did not mention the adversary complaint previously filed by the hospital. The hospital, prior to filing the adversary complaint, had proposed a stipulation and order, which would have granted the hospital's debt nondischargeable status, but the attorney Anthony DeLuca rejected the proposal without consulting with the debtors. Thereafter, Anthony DeLuca informed the debtors that he did not represent clients in adversary proceedings.

Thereafter, the court after having conducted a scheduling conference, issued an order to show cause why the court should not sanction Anthony DeLuca for not representing the debtors in the adversary proceeding. In response, Anthony DeLuca filed a brief incorrectly in the main bankruptcy case, rather than the adversary proceeding. In addition, instead of submitting the retainer agreement in question that the debtors had signed, he submitted a blank boiler plate document.

1. Code Provisions

As stated previously, "The signature of an attorney on a Chapter 7 petition…shall constitute a certification that the attorney has…performed a *reasonable investigation* into the circumstances that gave rise to the petition…"11 U.S.C. § 707(b)(4)(C). Furthermore, 11 U.S.C. § 707(b)(4)(D) (2012) states, "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." Judge Markell indicated that Rule 9011 "is 'enhanced' by the BAPCPA additions of Section 707(b)(4)(C) and (D), and 'evinces a policy that a debtor's attorney exercise independent diligence and care in ensuring that there is evidentiary support for the information contained in the client's bankruptcy schedules." *Id.* 209.

"Reasonable investigation" under Rule 9011for the purposes of § 707(b)(4)(C) according to the ABA is as follows, "The duty of reasonable inquiry imposed upon an attorney by Civil

Rule 11 and by virtue of the attorney's status as an officer of the court owing a duty to the integrity of the system requires that the attorney (1) explain the requirement of full, complete, accurate, and honest disclosure of all information required of a debtor; (2) ask probing and pertinent questions designed to elicit full, complete, accurate, and honest disclosure of all information required of a debtor; (3) check the debtor's responses in the petition and Schedule to assure they are internally and externally consistent; (4) demand of the debtor full, complete, accurate, and honest disclosure of all information required before the attorney signs and files the petition; and (5) seek relief from the court in the event that the attorney learns that he or she may have been misled by a debtor." As Judge Markell stated, "Merely relying on what the debtor provides is insufficient." *Id.* 210.

Judge Markell further stated, "The attorney cannot take all of the client's assertions at face value nor rely solely upon the information provided by the client. The attorney may rely on her client's objectively reasonable assertions, but where the client-provided information is internally (or externally) inconsistent, materially incomplete, or raises "red flags," the attorney is obligated to probe further – by asking questions, obtaining additional documents, or by some other means. Again, the attorney is the expert and cannot rely upon a client's limited understanding of what constitutes the "complete" or "necessary" information that the attorney must have nor what information is or is not relevant to the client's particular situation." *Id.* 211. Judge Markell believed that attorney DeLuca should have investigated the judgment supporting the garnishment. He believed that Mr. DeLuca blaming the debtors for not providing sufficient information did not serve Mr. DeLuca's cause.

Section 526 restricts debt relief agencies: "A debt relief agency shall not (1) fail to perform any service that such agency informed an assisted person or prospective assisted person it would provide in connection with a case or proceeding under this title;…(3) misrepresent to any assisted person…, directly or indirectly, affirmatively or by material omission, with respect to…the services that such agency will provide to such person; or the benefits and risks that may result if such person becomes a debtor under this title.

Section 527 mandates that debt relief agencies provide disclosures to assisted persons that, among other things, (1) briefly describe the general purpose, benefits, and costs of proceeding under Chapters 7, 11, 12, and 13 of the Code, and the types of services available from credit counseling agencies; (2) inform them that they must make truthful and accurate

disclosures of income and assets; and (3) generally explain that litigation may be an outcome of filing for bankruptcy. *Id.* § 527.

Section 528 requires that a contract between a debt relief agency and assisted person be in writing and 'clearly and conspicuously' explain the scope of services that the agency will provide and the fees or charges for such services. *Id* § 528(a)(2)."

Judge Markell indicated that, "DeLuca's failure to accurately explain that he would not represent the debtors in adversary proceedings and the risks that the debtors could face in bankruptcy amounted to a violation of Section 526(a). As explained above, the Retainer Agreement states that representation for nondischargeability allegations and adversary proceedings would result in additional fees. DeLuca, however, flatly refused to provide these serves once the Complaint was filed. Thus, he violated Section 526(a)(1) by failing to perform a service he informed the debtors that he would provide in connection with their bankruptcy case. *Id.* § 526(a)(1). *Id*. 215.

DeLuca also violated Section 526(a)(3). He misrepresented the risks associated with an adversary proceeding that the debtors were nearly certain to face if they filed for bankruptcy. *See* 11 U.S.C. § 526(a)(3). The debtors argue that DeLuca told them the St. Rose Debt was dischargeable. The court does not find that he was so direct, but the statue nonetheless imposes liability for material omissions. Because stopping the garnishment was their primary goal, failing to address the risks of a related adversary proceeding was a material omission. *Id*. 215.

For essentially the same reasons set forth above in relation to Nevada Rule 1.5, DeLuca violated Section 528(a). He partially complied by providing a written contract on the same day as the initial consultation. 11 U.S.C. § 528(a)(1). He failed, however, to provide a 'fully executed and completed contract' because he did not sign the Retainer Agreement. *Id.* § 528(a)(2). The Retainer Agreement did not 'clearly and conspicuously' explain the scope of services and fees. *Id*. § (a)(1)." *Id.* 215.

Judge Markell held that the 19-page retainer agreement violated the ABA model rule 1.5(b) which provides that an understanding as to fees and expenses must be promptly established. As Judge Markell stated, "Simply put, the client must know what he bargained for." *Id.* 206. Judge Markell found the 19-page retainer agreement used legal jargon rather than plain English. *Id.* 206. Secondly, there was no indication either in the retainer agreement or in Mr. DeLuca's consultation with the debtors that the debtors did know the likelihood that they would

need to pay additional services. *Id.* 206. Thirdly, Mr. DeLuca changed the basis for his fees without warning to his clients. The retainer agreement did not state that he could decide not to represent the debtors in the adversary proceeding and only stated that such services would incur additional fees. *Id.* 207.

The court found that Mr. DeLuca had not kept his clients fully apprised as to developments in the case, by not forwarding a proposed stipulation he received from the hospital, by not returning all calls to the clients, and by rejecting the proposed stipulation without consulting first with his clients.

2. Unbundling Services

The court discussed Mr. DeLuca's incompetent representation of the debtors. The court noted *In re Slabbinck*, 482 B.R. 576, 590 (Bankr. E.D. Mich. 2012), which stated, "The level of competency heightens as the complexity and specialized nature of the matter increase." *Id.* 188. The court further stated, "Whether a lawyer fulfilled the duty of competence depends on the client's objectives. *See In re Egwim*, 291 B.R. 559, 569-73 (Bankr. N.D. Ga. 2003); *In re Castorena*, 270 B.R. at 526-30; *cf. In re Slabbinck*, 482 B.R. at 590-94. The lawyer's duty is to competently attain the client's goals of representation. In the absence of a valid limitation on services, a lawyer must provide the bundle of services that are reasonably necessary to achieve the client's reasonably anticipated result, unless and until grounds exist for the lawyer's withdrawal. *In re Egwim*, 291, B.R. at 570." *Id.* 188.

The court further stated, "To determine the client's objectives, a lawyer must properly communicate with the client to understand the client's expectations, learn about the client's particular legal and financial situation, and independently investigate any 'red flag' areas. *See Cal. Ethics Primer 1-2*. A bankruptcy lawyer cannot assume that a client knows what a bankruptcy will or will not do for her…The consumer bankruptcy attorney's role is to determine how bankruptcy may assist the client and whether some of the client's goals may be left unmet through bankruptcy, and effectively communicate this to the client…Put another way, the law of mutual mistake has no place in the retention of an attorney…DeLuca's first failure – the root cause of his other failings – was to not define the goals of the representation, which resulted from a lack of communication with the debtors at the initial consultation…He apparently assumed

that, because the debt was from a hospital, it was for medical services. He argues that any reasonable attorney would make the same assumption. The court disagrees. Competently attaining the debtors' goals of representation mandated an independent inquiry into the nature of the judgment…Without understanding the debtors' goals of representation, DeLuca could not determine which legal services were reasonably necessary to attain those goals. Nor could the debtors properly evaluate DeLuca's choice of means because the debtors did not understand that filing a petition would likely result in an adversary proceeding – a proceeding in which DeLuca, the lawyer they reasonably understood to represent them for the entire bankruptcy matter, refused to represent them…Consequently, DeLuca's decision to unbundle representation in adversary proceedings violated the duty of competence." *Id.* 190 and 191.

The court, in addressing its concerns to the wider audience, discussed when unbundling services is reasonable under the circumstances. The court stated, "What is reasonable generally boils down to a question of whether the lawyer's limited scope of responsibility would amount to a violation of the lawyer's ethical or legal obligations – a factual, situation-specific determination…Reasonableness is assessed at the time the client agreed to unbundled services…In short, if the limitation constitutes a breach of the duty of competence, or any other ethical duty, then the limitation is unreasonable under the circumstances…*In re Johnson* held that unbundling the service of appearing at the Section 341 meeting of creditors is per se unreasonable, even if the clients agree to, and the Rule 2016(b) statement reflects, such limitation, 291 B.R. at 466. Thus, a limitation on services is not 'reasonable under the circumstances' if, in light of the relevant information that the lawyer knew or should have known at the time the retainer agreement was formed, the unbundled service was reasonably necessary to achieve the client's reasonably anticipated result. Nev. Rule of Prof'l Conduct 1.2(c) 2011)." *Id.* 192 and 193. The court further stated, "Because bankruptcy is a complex area of law and pro se litigants in adversary proceedings face long odds, an attorney seeking to demonstrate that a limitation on services was reasonable has a high burden." *Id.* 196.

Judge Markell summarized his ruling on unbundling services as follows, "The unbundling of adversary proceedings was unreasonable in light of the debtors' circumstances and objectives. If the decision to unbundle were made prior to meeting the debtors, it is per se unreasonable because it could not have contemplated the debtors' circumstances. If the decision

were made during the initial consultation, it is also unreasonable. DeLuca knew of the debtors' goal of eliminating the St. Rose garnishment. Had he investigated the nature of the judgment, he would have known that an adversary proceeding was a near certainty and representing the debtors in the adversary was reasonably necessary to achieve their objectives. Excluding adversary proceedings was thus a violation of the duty of competence and unreasonable under the circumstances. If DeLuca decided to unbundle in early June, once the Complaint was filed, then the decision was unreasonable for the simple reason that the debtors' only chance of discharging the St. Rose Debt was to prevail in the adversary proceeding. Moreover, bankruptcy is a highly complex area of law; the debtors are at a significant disadvantage proceeding without legal representation; and the risk of facing an adversary proceeding outweighed the benefits of obtaining affordable counsel. Lastly, the unbundling was DeLuca's idea, which runs contrary to the ABA's guidance that unbundling should be client-driven. ABA Handbook 7; see Restatement (Third) of Law Governing Lawyers § 19. *Id.* 196.

3. Informed Consent

The court in *In re Wayne Seare,* summarized the question of informed consent given by the debtor in the case by stating, "Not only must the risks of proceeding pro se in a particular situation be explained, but more broadly, the attorney must advise the client of the risks inherent in unbundling legal services…Unless debtors truly understand what they bargain away, the bargain is a sham." *Id.*197. Mr. DeLuca's clients unequivocally stated that they consented to the unbundling, but that was insufficient without proof that they gave an informed consent to such unbundling. Judge Markell stated, "The terms of the boilerplate disclosure will not necessarily override other communications between the lawyer and client. In sum, a boilerplate disclosure is almost certainly ineffective to properly convey the information necessary under Nevada Rule 1.2(c), and lawyers should affirmatively communicate the particular risks of unbundling in the circumstance rather than relying on what could be an unpredictable interpretation of the terms of a boilerplate disclosure." *Id.* 200. The court further stated, "While it is impossible to subjectively ascertain with certainty that a particular client *understood* the risks of a limited scope agreement, there must be sufficient indicia of understanding for a court to objectively determine that the client's consent was based upon a competent and thorough understanding of the risks of the agreement and the client's responsibilities under the agreement." *Id.*202. Because attorney DeLuca could not demonstrate the link between the excluded services and the debtors'

understanding of how such exclusion affected their principal bankruptcy goals, the court held that the debtors could not have known that the bundle of services included in the flat fee was unlikely to meet their objectives. *Id.* 205. Judge Markell summarized his discussion of informed consent by stating, "The lawyer is the expert and has the duty to explain what a client must actually do to make up for a gap in representation. The debtors did not know what they did not know." *Id.* 205.

B. *In re Pigg*, 2015 Bankr. LEXIS 3975

The recent case of *In re Pigg*, 2015 Bankr. LEXIS 3975, provides a cautionary tale of the bankruptcy attorney's failure to adequately investigate the debtor's situation under the new bankruptcy code requirements. The court stated:

> Mr. McCrary was an experienced bankruptcy lawyer, representing consumer debtors in Chapters 7 and 13.
>
> The Office of the United States Trustee (UST) filed motions for disgorgement and sanctions against Mr. McCrary [who filed the Chapter 7 bankruptcy for the debtor.] The UST alleged that Mr. McCrary violated his duties under *11 U.S.C. § 707(b)(4)* when he certified that the [debtor's] schedules and statements were accurate, despite knowing that certain nonexempt assets and avoidable transfers had not been disclosed. The UST alleged that Mr. McCrary's knowing failure to schedule nonexempt assets and to list avoidable transfers, among other failures, not only violated his duties under *§ 707(b)(4)*, but also warranted disgorgement of his attorney fees and imposition of a monetary penalty as a sanction…
>
> … Ms. Pigg listed no payments to or for the benefit of creditors or insiders in response to SOFA Questions 3.a and b, and no transfers outside the ordinary course under SOFA Question 10.a.
>
> In reality, however, Ms. Pigg had received and deposited into her bank account federal and state tax refunds totaling $10,355 within the 90 days before she filed bankruptcy. Ms. Pigg had not only used the tax refunds to pay Mr. McCrary's attorney fees, but had also paid $3,654.53 for the benefit of one of her mother's creditors, Putnam County State Bank, and $2,000 to repay a loan to her sister… Mr. McCrary admitted that he knew about the tax refunds and the payments to the family members before he filed Ms. Pigg's bankruptcy petition, schedules and statements, and that he advised her not to disclose the transfers.
>
> [At the hearing] the Trustee asked Ms. Pigg how she had been able to pay her attorney fees. Ms. Pigg answered that the funds came from her tax refunds. That answer prompted the Trustee to ask what Ms. Pigg had done with the rest of her tax refund money. Ms. Pigg truthfully responded that she had paid her mother and sister. The Trustee then asked Ms. Pigg to amend her SOFA to disclose these

transfers. But when another three weeks passed without the SOFA amendments having been filed, the Trustee was compelled to file a motion to extend his time to object to Ms. Pigg's discharge.

The Trustee candidly acknowledged that although Ms. Pigg deserved some blame for the false schedules and testimony, he believed Ms. Pigg was an unsophisticated young woman who had relied on Mr. McCrary. The Trustee based this belief on the fact that Ms. Pigg did not attempt to evade the Trustee's questions about the refunds, and that she had been cooperative with him once she found out what information he wanted. The Trustee therefore did not believe an objection to Ms. Pigg's discharge would be appropriate under the circumstances. There was no evidence before the Court on the issue of Ms. Pigg's intent in not disclosing the transfers initially; the Court otherwise has no reason to disagree with the Trustee's decision not to object to Ms. Pigg's discharge.

The UST examined Ms. Pigg pursuant to *Fed. R. Bankr. P. 2004*, and then filed a motion for disgorgement and sanctions against Mr. McCrary. The Motion cited testimony during Ms. Pigg's *Rule 2004* examination that she told Mr. McCrary—before she filed bankruptcy—about the repayments to family members. And that she had provided Mr. McCrary copies of her bank statements showing the payments. The UST alleged that despite this knowledge, Mr. McCrary failed to properly advise Ms. Pigg about the receipt and expenditure of the tax refunds; failed to disclose the payments from the refunds to the family members and other creditors on the SOFA; failed to advise Ms. Pigg that the transfers could be recovered by the Trustee; and failed to amend the schedules until after the Trustee discovered the transfers. The UST sought disgorgement of Mr. McCrary's attorney fees under *§ 329*, in addition to sanctions in the suggested amount of $1,500 for violation of *§ 707(b)(4)*.

[Mr. McCrary] admitted that he told the Trustee after the *§ 341* meeting that Ms. Pigg had not told him about the transfers, which was a lie. He also admitted that he was not controverting Ms. Pigg's sworn testimony at her *Rule 2004* examination that he affirmatively advised her—in his office in the presence of her boyfriend—that she did not have to disclose the transfers.15 *11 U.S.C. § 707(b)(4)(B)* authorizes the Court to assess a civil penalty against a debtor's attorney, payable to the Trustee or UST, if the Court, on its own motion or the motion of a party in interest, and in accordance with *Rule 9011* procedures, finds that the attorney has violated *Rule 9011*. *Section 707(b)(4)(C)* in turn provides that the signature of an attorney on a petition shall constitute a certification that the attorney has performed a reasonable investigation into the circumstances that gave rise to the petition, and has determined that the petition is well grounded in fact, warranted by existing law, and does not constitute an abuse under *§ 707(b)(1)*. *Section 707(b)(4)(D)* states that "[t]he 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." Courts have observed that Congress intended *§ 707(b)(4)(C)* and *(D)* be read

together, such that the requirement of a reasonable investigation should apply to the information in the petition as well as the schedules and statements.17 *See Orton v. Hoffman (In re Kayne), 453 B.R. 372, 381-82 (9th Cir. B.A.P. 2011).*

The established standard for imposing sanctions is an objective determination of whether a party's conduct was reasonable under the circumstances. *See, e.g., Snyder v. Dewoskin (In re Mahendra), 131 F.3d 750, 759 (8th Cir. 1997)* (citing *In re Armwood, 175 B.R. 779, 788 (Bankr. N.D. Ga. 1994))*

No competent lawyer — let alone an experienced bankruptcy lawyer — could objectively believe that the transfers did not have to be disclosed in at least three places in the SOFA: Question 3.a (payments within 90 days aggregating more than $60019), Question 3.c (payments to or for the benefit of insiders) and Question10.a (transfers outside the ordinary course of business).

The Court conclude[d] Mr. McCrary violated *§ 707(b)(4)(D)*, and that sanctions payable to the Trustee for the benefit of the *Pigg* estate [were] warranted for his violation.

[The court in *Pigg* discussed] why the false SOFA … so trouble[d] the Court.

The bankruptcy process—and Chapter 7 in particular—is carefully designed to strike a balance between a number of competing principles. There is the policy of allowing the honest debtor a fresh start; but that policy must be balanced against the need of the trustee and creditors to have an opportunity to challenge whether the debtor deserves a fresh start. The trustee in particular has a duty to investigate the debtor's assets, liabilities, and financial affairs. If the trustee discovers assets, then the trustee has a duty to liquidate the assets of the estate for distribution to creditors, and is commanded by the Bankruptcy Code to "close such estate as expeditiously as is compatible with the best interests of parties in interest." *11 U.S.C. § 704(a)(1)*.A Chapter 7 trustee receives only $60 from the debtor's filing fee of $335 to commence that investigation, and only receives compensation to the extent nonexempt assets are collected and liquidated. *11 U.S.C. § 326*.

To that end, the proper administration of any bankruptcy case is utterly dependent upon the debtors and their counsel providing complete, accurate and truthful information about the debtor's assets, debts, and financial affairs. *In re Smith, No. 13-31565, 2014 Bankr. LEXIS 135, 2014 WL 128385, *5 (Bankr. E.D. Va. Jan. 14, 2014).*

Indeed, the Eighth Circuit, noting the sheer volume of bankruptcy cases and hearings, recently observed that "[t]he potential for mischief to be caused by an attorney who is willing to skirt ethical obligations and procedural rules is

enormous." *Young, 789 F.3d at 879 (8th Cir. 2015)* (quoting *In re Armstrong, 487 B.R. 764, 774 (E.D. Tex. 2012).*

In *Young*, the Eighth Circuit affirmed the bankruptcy court's six-month suspension from practice of a debtor's attorney who misrepresented certain facts in an effort to obtain confirmation of the debtor's plan. *Id. at 883*.

A bankruptcy attorney's obligations thus extend beyond merely "shuffling papers and charging fees." *In re Smith, 538 B.R. 867, 875 (Bankr. M.D. Ala. 2015).* It is not enough, then, that bankruptcy schedules and statements are signed by the debtor under penalty of perjury. Or that a person who knowingly and fraudulently conceals assets from a bankruptcy trustee or makes a false oath in or in relation to a case under title 11 is guilty of a bankruptcy crime. *18 U.S.C. § 152(1), (2).* Or that the same conduct may form the basis for denying a debtor a discharge. *11 U.S.C. § 727(a)(2), (a)(4).* Rather, because of the important role debtors' attorneys serve in assisting their clients in filing complete, accurate, and truthful schedules and statements, "*Rule 9011* is critical for the bankruptcy system to function." *Young, 789 F.3d at 879.* And *Rule 9011,* in addition to the Court's inherent powers, authorizes the Court to impose a number of nonmonetary sanctions. *Fed. R. Bankr. P. 9011(c)(2).*

C. *In re Diaz* 348 B.R. 752; 2006 Bankr. LEXIS 2008

The court found that the attorney for the debtor presented false schedules to the court, without adequately counseling his clients as to what the schedules represented, and without conducting any investigation into their veracity. These services violated the attorney's duty to instruct and supervise debtors, and violated his ethical duty of candor to the tribunal. The court stated:

Both Debtors testified that, prior to the filing of the case, they visited [the attorney's] office for a 30 to 40 minute initial consultation. They testified that, at the consultation, they met with [the attorney.]

Debtors testified that the initial consultation did not address Debtors' budget. Delia Diaz testified that [the attorney's office] never counseled with her on what Debtors' expenses were or what they could afford.

Delia Diaz testified that she was unaware of the changes [her attorney] had made to her schedule J. She testified that she has not regularly made charitable contributions of $ 800 per month. She testified that the amounts listed in the second amended schedule J for electricity and food did not reflect Debtors' actual expenses. She testified that no one explained to her the importance of including accurate information on Debtors' schedule J.

> On January 20, 2006, nine days after Debtors filed their second amended schedules, Trustee filed a second motion to dismiss. In the second motion, Trustee stated, *inter alia:* "The Trustee believes that the debtors did not review and approve these schedules prior to them being filed with the court. The Trustee alleges that the line item for charitable contributions is a total fabrication, inserted on Schedule J to pad the budget and justify a lower monthly plan payment." In the motion, Trustee also stated an intention to file a motion for sanctions pursuant to Bankruptcy *Rule 9011*. (Docket No. 28). Delia Diaz testified that she was unaware that Trustee had made these assertions.
>
> Counsel for a debtor in a Chapter 13 case has a duty to supervise the debtor's conduct for compliance with the Bankruptcy Code, and must instruct the debtor on appropriate conduct. *In re Nilges, 301 B.R. 321 (Bankr. N.D. Iowa. 2003).*
>
> In the instant case, [the attorney] presented false schedules to the court, without adequately counseling his clients as to what the schedules represented, and without conducting any investigation into their veracity. It appears that the schedules contain figures invented by [the attorney] or his subordinates, and filed for the improper purpose of evasion of Debtor's obligations to pay creditors. These services violated counsel's duty to instruct and supervise the Debtors, and violated [the attorney's] ethical duty of candor to the tribunal. In addition, [the attorney] has imposed considerable burdens of time and detailed attention on his clients, the Trustee, and the court system, through his inadequate client counseling, filing of false documents, and lax supervision of staff.

II. Conflict of Interest

A. *In re Securities Investor Protection Corp. v. Blinder, Robinson & Co.,* 123 B.R. 900; 1991 Bankr. LEXIS 175

This case involved a Chapter 11 bankruptcy filing in which the court appointed a liquidating trustee for the protection of the customers of the debtor. The court stated:

> …the Trustee has "wide latitude to obtain any facts pertaining to the bankrupt's conduct or property." *In re The Investment Bankers, Inc.*, 30 Bankr. 883, 886 (Bankr. D. Colo. 1983). "In seeking to maximize the value of the estate, the trustee must investigate the conduct of prior management to uncover and assert causes of action against the debtor's officers and directors." *Commodity Futures Trading Commission v.Weintraub, 471 U.S. 343, 353, 105 S. Ct. 1986, 1993, 85 L. Ed. 2d 372 (1985).*
>
> It would often be extremely difficult to conduct this inquiry if the former management were allowed to control the corporation's attorney-client privilege and therefore to control access to the corporation's legal files. To the extent that

management had wrongfully diverted or appropriated corporate assets, it could use the privilege as a shield against the trustee's efforts to identify those assets. The Code's goal of uncovering insider fraud would be substantially defeated if the debtor's directors were to retain the one management power that might effectively thwart an investigation into their own conduct. *Id. at 353-354, 105 S. Ct. at 1993*.

In order to fulfill this duty, a trustee in bankruptcy "succeeds to a debtor's right to assert or waive the attorney-client privilege." *Investment Bankers, supra at 886*; *Gekas v. Pipin*, 69 Bankr. 671, 672 (N.D. Ill. 1987).

The primary responsibility for controlling the conduct of lawyers practicing before the district court rests with that court." *Trone v. Smith, 621 F.2d 994, 999 (9th Cir. 1980)*. "The federal courts have inherent power to regulate the admission, practice and discipline of attorneys . . . . In appropriate instances this power may be used to disqualify an attorney from representing a client on the basis of a conflict of interest." *In re Ram Manufacturing,Inc.,* 49 Bankr. 53, 55 (Bankr. E.D. Pa. 1985).

However, "the preservation of public trust both in the scrupulous administration of justice and in the integrity of the bar is paramount. [Considerations of judicial economy and the right to counsel of one's own choosing] must yield . . . . to considerations of ethics which run to the very integrity of our judicial process. *Hull, supra at 572*.

The Trustee asserts that disqualification [of debtor's former counsel now representing the target of the trustee's inquiry] is mandated by Canon 4 of the Code of Professional Responsibility, "a lawyer should preserve the confidences and secrets of a client." Disciplinary Rule 4-101 reads in pertinent part as follows: *DR4-101 Preservation of Confidences & Secrets of a Client.* (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
(1) Reveal a confidence or secret of his client. (2) Use a confidence or secret of his client to the disadvantage of the client. (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure. Canon 4 prevents a lawyer from representing a client in a legal action against one of his former clients where there is a substantial relationship between the two representations. *See, e.g. Davis, supra at 165*. Included in any analysis are the following three basic determinations: (1) whether an attorney-client relationship was established in the first representation; (2) whether the subsequent position is essentially adversarial to the former; and (3) whether there is a substantial relationship between the two representations.
("Only where it is clearly discernible that the issues involved in a current case do not relate to matters in which the attorney formerly represented the adverse party

> will the attorney's present representation be treated as measuring up to the standard of legal ethics.")
> "Once a substantial relationship has been found, a presumption arises that a client has indeed revealed facts to the attorney that require his disqualification." *Smith, supra at 1100*. The presumption is irrebuttable. *Id.* 9 This presumption is intended to protect the subject confidences by not requiring that specific examples be disclosed. *Cf. T.C.Theatre, supra at 268-269*. Despite the fact that all of the information obtained by the Attorneys from the Debtor may be available to [the target company] through other sources or channels, the Attorneys must, nevertheless, be disqualified. *Fleischer, supra at 551* (because the courts are more concerned with the avoidance of the appearance of evil than with an actual unfair or unethical use of confidential information)
> For a law firm to represent one client today, and the client's adversary tomorrow in a closely related matter, creates an unsavory appearance of conflict of interest that is difficult to dispel in the eyes of the lay public -- or for that matter the bench and bar -- by the filing of affidavits, difficult to verify objectively, denying that improper communication has taken place or will take place between the lawyers in the firm handling the two sides." *Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1269 (7th Cir. 1983).*

B. In re Tomczak 283 B.R. 730; 2002 Bankr. LEXIS 1091

During the course of representing the debtors in a prepetition action against their former counsel, the law firm's attorney who represented the debtors, and subsequently the trustee, was advised that he would be called as a material adverse witness in the debtors' action. Although the attorney disclosed the law firm's pre-petition claim in his verified statement of eligibility, the attorney did not disclose the potential conflict of interest before the law firm was appointed to represent the trustee. The court stated:

> *11 U.S.C. § 327* governs the employment by the trustee of a professional person. In this case, the employment of HH&B as counsel for the chapter 7 trustee falls under *§ 327(e)* 2, which pertains to employment for a "specified special purpose." *Bankruptcy Rule 2014(a)*, which requires a verified statement by the professional to be employed, implements *§ 327*. It is intended to provide the court with information necessary to determine whether the professional's employment meets the broad tests of being in the best interest of the estate. A failure by the professional to disclose any facts which may influence the court's determination of employment of such professional may result in a later determination that the verified statement was inadequate, resulting in sanctions being imposed upon the professional. 9 *Collier on Bankruptcy* § 2014.03 (15th Ed. Rev. 2002). In 1987, *Bankruptcy Rule 2014(a)* was amended to require the proposed professional to disclose all possible conflicts. 9 *Collier on Bankruptcy* § 2014.05 (15th Ed. Rev. 2002). It is the professional's responsibility to make a full, candid, and complete disclosure. *In re Envirodyne Industries, Inc., 150 B.R. 1008, 1021 (Bankr. N.D.*

Ill. 1990); *In re B.E.S. Concrete Products, Inc., 93 B.R. 228, 237 (Bankr. E.D. Cal. 1988)*. The professional has an ethical duty to inform the court of any possible conflicts, no matter how trivial. *In re EWC Inc., 138 B.R. 276, 281 (Bankr. W.D. Okla. 1992)*. The burden rests upon the professional completing the verified statement under *Bankruptcy Rule 2014* to come forward with all facts pertinent to such applicant's eligibility to serve under *11 U.S.C. § 327*. *B.E.S. Concrete Products, Inc., 93 B.R. at 236*.

11 U.S.C. § 328(c) 3 reinforces *11 U.S.C. § 327* by authorizing the bankruptcy court to deny compensation and reimbursement of expenses if, at any time during an attorney's appointment, there is a finding that such attorney holds an interest adverse to the interest of the estate with respect to such appointment. When Bichler [attorney with HH&B] learned from Hankel [attorney for opposing party] that he would be called as an adverse witness with respect to damages and liability in the Dubis suit, he should have promptly disclosed such information to Castellani, [trustee], the U.S. Trustee, and the court before HH&B was appointed as attorney for the trustee. He did not. The fact that Bichler may have thought this notification to him by Hankel was "trivial" or "meritless" is no excuse. *Envirodyne Industries, 150 B.R. at 1021*; and *EWC Inc., 138 B.R. at 281*. Full disclosure is a continuing responsibility on the part of the professional employed by the trustee. If potential conflicts arise after the attorney has been appointed for the trustee, the attorney is under a duty to promptly notify the court. *In re Prudhomme, 152 B.R. 91, 105 (Bankr. W.D. La. 1993)*.

Bichler disclosed the existence of HH&B's pre-petition claim in his verified statement, but did not provide the court with a full disclosure. There was no mention of the concerns raised by Hankel against Bichler, and that omission was fatal. Bichler never conveyed a full and candid disclosure of an actual or possible conflict, either in connection with his application for appointment or following his appointment as attorney for the trustee.

The ultimate determination of whether there is a disqualifying conflict and whether HH&B's continued representation of the trustee is in the best interests of the estate lies within the discretion of the court, not within the discretion of HH&B or Bichler. *B.E.S. Concrete Products, Inc., 93 B.R. at 236*, declares: Defective disclosure is not a minor matter. It goes to the heart of the integrity of the bankruptcy system, of counsel, and of the courts …. Appearances count. Even conflicts more theoretical than real will be scrutinized.

Professionals are not permitted to "pick and choose" which disclosures are irrelevant or trivial. *In re C&C Demo, Inc., 273 B.R. 502, 507 (Bankr. E.D. Tex. 2001)*. Bichler, who during 1970 to 1986 first served as counsel for the Wisconsin Board of Bar Commissioners and subsequently for the Wisconsin Board of Attorneys Professional Responsibility, either knew or should have known of his duty to disclose this conflict of interest.

In order to guard against conflicts of interest, *11 U.S.C. § 328(c)* authorizes the bankruptcy court to impose a penalty for the failure of the professional to disclose any conflicts of interest. A bankruptcy court should exercise its discretion in imposing penalties after weighing all of the equities involved. *In re Crivello, 134 F.3d 831, 838 (7th Cir. 1998).*

> Courts have taken different approaches on measuring sanctions for an attorney's failure to disclose a conflict of interest. There is authority for denial of all fees and reimbursement for expenses under these circumstances. *In re Chou-Chen Chemicals, Inc., 31 B.R. 842, 853 (Bankr.W.D. Ky. 1983)*; *ICM Notes, Ltd. v. Andrews & Kurth, L.L.P., 278 B.R. 117, 123 n. 13 (Bankr. S.D. Tex. 2002)*.

C. In re Chandler v. McIntosh 2015 Bankr. LEXIS 3760

In this case, after a fee dispute arose between debtor and counsel, counsel changed his position on whether a lien was preserved for the benefit of the estate in order to protect his own economic interest in having his fees paid before any sales proceeds were distributed. The court found that counsel breached his duty of loyalty. The court stated:

> Debtor owned real property in Rutherford, California. The property was encumbered by a first deed of trust in favor of Bayview Loan Servicing, a second deed of trust in favor of PNC Bank, and a fourth deed of trust in favor of CalFHA. Debtor owed $450,000 in attorneys' fees to Carr, McClellan, Ingersol, Thompson & Horn (CMITH) for
> contesting a will on her behalf. Of this amount, $230,000 was secured by a third priority deed of trust on the property. Chandler [debtor's attorney] also argued that the transfer was not truly voluntary so that Debtor could exempt the value created by setting aside the CMITH deed of trust.
> Well, the idea is this: by virtue—3300 [California Rule of Professional Conduct] has to do with informed consent. When you make a voluntary transfer and you then avoid it, it would typically be for the benefit of the estate. But when you have a failure under 3300 then you don't have a consensual transfer because it wasn't voluntary by definition, you are not voiding it under the Bankruptcy Code, you are voiding it under the [California] Rules of Professional Conduct.
> On August 19, 2014, Debtor discharged Chandler and substituted Paul M. Jamond as her counsel. On the same day, Debtor filed a motion to dismiss her chapter 13 case. Chandler opposed the dismissal arguing that Debtor's request for dismissal was not in good faith since she was attempting to obtain the proceeds from the sale of her property for herself to the detriment of the estate. Chandler also filed his final fee application seeking $88,816 in fees and $3,384.82 in costs ($92,200.82) for work done in the bankruptcy case and the adversary proceeding. After application of the prepetition retainer, amounts paid through the chapter 13 plan, and the $10,000 received through the settlement with CMITH, Chandler sought payment of the remaining balance of $75,670.82. Chandler's time records show that approximately $19,620 in fees and $1,598.59 in costs were incurred for services relating to the adversary proceeding. After deducting the $10,000 settlement payment from CMITH, Chandler showed $11,218.59 due in connection with the adversary proceeding with the balance of the requested fees for services performed in the bankruptcy case.
> On September 15, 2014, Debtor opposed Chandler's fee application on the grounds that he had breached his duty of loyalty to her by switching his position

on the preservation of CMITH's lien—arguing no preservation when he represented her and then arguing for preservation after the fee dispute arose. Due to this ethical violation, Debtor requested the bankruptcy court to deny him all fees and order the disgorgement of fees previously received.

At the outset, it is important to note that Chandler's breach of loyalty is not in his attempt to collect fees from Debtor. An attorney must always be free to pursue his client for fees if he or she does so properly. Chandler's breach of duty arises from the fact that he is taking a position adverse to his former client on an issue on which he previously represented the client and that is separate from the fees he is seeking to collect. With respect to that separate issue, it does not matter whether the court has decided the issue, or whether the position Chandler is currently taking is legally correct. An attorney who advocates a position on behalf of a client cannot switch sides simply because the issue has not yet been decided and/or he now believes the position he previously asserted on behalf of the client is wrong.

… Chandler's reversal of course was for the purpose of collecting his fees, and sought to deprive his former client of her homestead exemption—one of the most important protections provided debtors under both state and Federal law…Chandler understood all of this. Although the question whether the CMITH lien was preserved may appear technical and confusing to an attorney who does not regularly practice bankruptcy law, Chandler specializes in bankruptcy law and understood the meaning of everything he did. Any doubt about that is dispelled when one sees the technical virtuosity with which he first argued that the lien was not preserved and then argued that it was preserved.

The duty of loyalty does not stop once the attorney-client relationship ends. *OasisW. Realty, LLC v. Goldman, 51 Cal.4th 811, 821, 124 Cal. Rptr. 3d 256, 250 P.3d 1115 (2011).* An attorney "may not do anything which will injuriously affect [the] former client in any matter in which [the attorney] formerly represented him." Id.; see also *Wutchumna Water Co. v. Bailey, 216 Cal. 564, 573-74, 15 P.2d 505 (1932).* This is so even if the action injurious to the former client does not involve the use or disclosure of confidential information. *People ex rel. Deukmejian v. Brown, 29 Cal. 3d 150, 156, 172 Cal. Rptr. 478, 624 P.2d 1206 (1981).* An attorney breaches the duty of loyalty in taking action on his or her own behalf, if that action is injurious to a former client on a matter in which the attorney represented that client. *Oasis, 51 Cal.4th at 822-24.*

Chandler's emphasis on the correctness of his position is misplaced. The duty of loyalty was implicated when Chandler changed his position on the lien preservation issue to protect his own economic interests and not because his first position was "wrong" and the second one "right." We note that Chandler did not arrive at the "right" conclusion until his fees were in jeopardy.

D. *In re Tallant v. Kaufman* 218 B.R. 58; 1998 Bankr. LEXIS 217; 98 Cal. Daily Op. Service 1751; 98 Daily Journal DAR 2490

A creditor filed an action against debtor, an attorney, seeking to have an unsecured debt declared nondischargeable under *11 U.S.C.S. § 523(a)(2)(A), (B)*. The court held that debtor's failure to disclose to creditor as required by Cal. Bar. R., Prof. Conduct R. 3-300, that their interests had become adverse and that appellee should seek independent counsel amounted to a false representation under *§ 523(a)(2)(A)*. The court held that *§ 523(a)(2)(A)* and *11 U.S.C.S. § 523(a)(4)* were not mutually exclusive. The court found that debtor had knowledge of his duty to disclose. The court held that the creditor justifiably relied on debtor's failure to disclose all material facts to creditor regarding the loan and that such nondisclosure proximately caused the $ 250,000 loss. The court stated:

> *Restatement (Second) of Torts, § 551* (1976). Comment "f" of *§ 551* states that the attorney-client relationship constitutes a relationship of trust and confidence whereby the attorney has an affirmative duty of disclosure. *Id. §551, cmt. f*. This common law duty of disclosure has been codified by Rule 3-300.

E. In re Hutch Holdings Inc.

The court in *In re Hutch Holdings, Inc.*, held that the debtor's attorneys in the Chapter 11 case had not disclosed that they had represented the debtor's principal in a non-bankruptcy action in the year prior to the filing, or that the firm also intended to represent the CEO in a subsequent individual Chapter 11 case. The attorney, who the court described as respected bankruptcy practitioner with over 40 years' experience, argued that there was no actual or probable conflict in representing both the corporation and its CEO and therefore there was no need to disclose the simultaneous representations. The court held that counsel was mistaken, that the bankruptcy court, not the professionals, must determine whether prior connections rise to the level of actual conflict or pose a threat of potential conflict. The court held that the omitted connections were material and their disclosure mandatory. As sanctioned for the disclosure violation and in light of the fact that the charges should not be borne by the bankruptcy estate, the court did not allow the attorney any compensation.

***D. In re Cabe* 538 B.R. 753; 2015 Bankr. LEXIS 3246**

In this case a law firm that previously represented the debtor with respect to a fraudulent conveyance action subsequently represented other defendants from that fraudulent conveyance

action in the same or a substantially related matter in which the interests of the current clients were adverse to the interests of the former client, the debtor. The court stated:

> At approximately the same time, Burr & Forman ("B&F") started providing legal services to the Debtor. B&F and the Debtor discussed forming a new company, and on July 30, 2010, days after judgment was entered in the State Court Action, B&F filed articles of incorporation and was granted a certificate of organization for a new Georgia limited liability company: Turnkey ATM Solutions, LLC ("Turnkey"). A B&F attorney, Edward H. Brown, was listed as the registered agent. Like the Debtor, Turnkey sells, leases, services, and maintains ATMs. Trunkey has the same principal mailing address as the Debtor, and Mr. Cabe and Mr. Cato are Turnkey's only members.
>
> B&F represented the Debtor, Turnkey, Mr. Cabe, and Mr. Cato in a sale transaction in which Debtor transferred all, or nearly all, of its ATM machines and the cash then in those machines to Turnkey (the "Sale Transaction"). B&F drafted a bill of sale conveying the Debtor's equipment to Turnkey; the agreement was executed on September 24, 2010.
>
> While the District Court Action was pending, the Debtor agreed to indemnify Mr. Cabo and Mr. Cato for legal fees they incurred in litigation related to Andante's collection efforts. In February 2013, Mr. Cabe and Mr. Cato, as officers of the Debtor, also assigned a $100,000 note receivable then owed to Debtor to B&F to cover their attorney's fees. On June 5, 2013, Debtor filed bankruptcy. The United States Trustee appointed Barbara Stalzer, Jr. as the interim trustee, and she became the permanent trustee (the "Trustee") at the chapter 7 meeting of creditors on July 1, 2013.
>
> [B&F] noted that they had already spent over $200,000 in connection with the case. Mr. Kane [of B&F] succinctly stated B&F's involvement in the case did not pose an ethical problem — that B&F was permitted to represent the Debtor, Mr. Cabe, Mr. Cato, and Turnkey in the Sale Transaction, and that it should be permitted to continuing representing Mr. Cabe, Mr. Cato, and Turnkey against the Trustee. Mr. Kane [of B&F, who brought suit for fraudulent conveyance], concluded that if a B&F attorney is called to testify as a witness, disqualification should not be imputed to the firm.
>
> [A] party bringing a motion to disqualify bears the burden of proving the grounds for disqualification. *In re Bellsouth Corp., 334 F.3d 941, 961 (11th Cir.* 2003). The moving party must have "compelling reasons" to disqualify counsel. *Id.* Doubts as to the existence of an asserted conflict of interest should be resolved in favor of disqualification. *Westinghouse Electric Corp. v. Gulf Oil Corp., 588 F.2d 221, 225 (7th Cir. Ill. 1978).* Where a law firm has jointly represented a corporation and other clients before a bankruptcy case, the trustee appointed in the corporation's chapter 7 case stands in the shoes of the corporation as a former client of the law firm for the purposes of bringing a motion to disqualify the law firm. *In re Jaeger, 213 B.R. 578, 592 (Bankr. C.D. Cal. 1997).*

A failure to make a reasonably prompt motion to disqualify may result in the conflict being waived. *Id*. The rational of this rule is to prevent a litigant from using the motion as a tool to deprive his opponent counsel of his choice after completing substantial preparation of the case. *Cox v. Am. Cast Iron Pipe Co., 847 F.2d 725, 729 (11th Cir. 1988)* (quoting *Jackson v. J.C. Penney Co., Inc., 521 F.Supp 1032, 1034 (N.D. Ga. 1981)).*

The Trustee has established that an attorney-client relationship existed between B&F and the Debtor. In 2010, B&F started providing legal services to the Debtor. B&F and the Debtor discussed forming a new company, and on July 30, 2010, B&F helped create Turnkey. B&F then represented the Debtor in the Sale Transaction. The Debtor also agreed to indemnify Mr. Cabo and Mr. Cato for B&F's legal fees and assigned a $100,000 note receivable to B&F to cover Mr. Cabe and Mr. Cato's attorney's fees. The Trustee now stands in the Debtor's shoes as a former client of B&F. *In re Jaeger, 213 B.R. 578, 592 (Bankr. C.D. Cal. 1997)*; *c.f. Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343, 105 S. Ct. 1986, 85 L. Ed. 2d 372 (1985)* (explaining that any privilege relating to Debtor's representation passed to the Trustee on the petition date). There is a prior attorney-client relationship between the Trustee and B&F to satisfy the first requirement of *Rule 1.9*.

Once an attorney-client relationship is established, the Court must determine whether the prior and current matters are substantially related. The Rules do not define what constitutes a "matter" for conflict-of-interest purposes. Comment 2 to *Rule 1.9*, however, provides that "the scope of a 'matter' . . . depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree." *Ga Rules of Prof'l Conduct r. 1.9* cmt. 2. The comments are clear, though, that "[w]hen a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited." *Id*. "The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question." *Id*.

The comments to *Rule 1.9* further explain that matters are "substantially related" if they are connected.

Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. . . . Cases may be "substantially related" if they have material and logical connections. *Cardinal Robotics, Inc. v. Moody, 287 Ga. 18, 22, 694 S.E.2d 346 (Ga. 2010)*. For example, in *In re Jaeger, 213 B.R. 578 (Bankr. C.D. Cal. 1997)*, the bankruptcy court disqualified a law firm from representing defendants in a

fraudulent transfer action brought by the chapter 7 trustee where the law firm had represented the debtors in state court litigation on the same cause of action.

A client would feel wronged if an opponent prevailed against him with the aid of an attorney who formerly represented the client in the same matter. *Id*. The court concluded: "The need to safeguard the attorney-client relationship is not diminished by the fact that the prior representation was joint with the attorney's present client." *Id*.9; *see also Am. Airlines, Inc., 972 F.2d 605* (reviewing and explaining *Brennan's*).10

Pursuant to *Rule 1.9*, B&F, which previously represented the Debtor, cannot represent Mr. Cabe, Mr. Cato, and Turnkey in the same or a substantially related matter in which the interests of its current clients are adverse to the interests of its former client absent informed consent, confirmed in writing.

The Trustee argues that the conflict should be imputed to the entire firm pursuant to *Georgia Rule of Professional Conduct 1.10* and that no B&F attorney should be permitted to represent Mr. Cabe, Mr. Cato, and Turnkey in this bankruptcy and related adversary proceeding.

Rule 1.10(a) states: "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by *Rule . . . 1.9 . . . .*" *Ga. Rules of Prof'l Conduct r. 1.10(a).*

III. Confidentiality and Data Security

A. In re Levin v. DiLoreto 2002 Bankr. LEXIS 2049; 2002 WL 34573858

A liquidator of an insurance company's assets brought a state court suit against the debtor, his wife, and an affiliated company. The liquidator charged that the debtor was the "alter ego" of the affiliated company and thus personally liable for all debts owed by that company to the insurance company. In this objection to discharge action, the liquidator sought leave to obtain testimony from the attorney who had represented the debtor in the state court action regarding the debtor's ongoing control of the affiliated company and related non-bankrupt entities, along with the assets they owned. The liquidator contended that the testimony would be relevant to his assertions that the debtor should not receive a discharge and that the attorney-client privilege either had been waived or was inapplicable. The court stated:

> As I noted above, the present Model Rule of Professional Conduct 1.6(c)(3) authorizes a lawyer to reveal confidential information to the extent necessary "to

establish a claim ... on behalf of the lawyer in a controversy between the lawyer and the client ...."

The second opinion relevant to this issue is *In re Rindlisbacher, 225 B.R. 180 (9th Cir. BAP 1998).* In Rindlisbacher the debtor's former attorney, who was a creditor in his chapter 7 bankruptcy case, brought an adversary proceeding seeking to deny the debtor a discharge. This complaint opposing discharge was based upon the debtor's failure to disclose to his creditors and the trustee his receipt of income from rental property. The attorney-creditor knew of the existence of this rental income because of confidential information he obtained from his former client while representing the debtor in a pre-bankruptcy divorce action.

The appellate court acknowledged the existence of the state ethical rule which permits an attorney to disclose confidential information to the extent necessary to establish or collect a fee: The exception to the prohibition on disclosure of client confidences is, however, codified in California's privilege rules. The privilege does not apply to any "communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship." *Cal.Evid.Code § 958*. Under this rule, the attorney is released from the obligations of secrecy when the disclosure of communications, otherwise privileged, becomes necessary to the protection of the attorney's own rights, such as when the attorney's integrity, good faith, authority or performance of duties is questioned. *Arden v. State Bar of Cal., 52 Cal.2d 310, 320, 341 P.2d 6 (1959)*; *Carlson, Collins, Gordon & Bold v. Banducci, 257 Cal.App.2d 212, 227-28, 64 Cal.Rptr. 915 (1967).* Thus, an attorney may reveal confidences and secrets where it is necessary to do so to get paid. *In re Featherworks Corp., 25 B.R. at 645*. According to the California Law Revision Commission, the reason for this exception is that it would be "unjust to permit a client ... to refuse to pay his attorney's fee and invoke the privilege to defeat the attorney's claim." 7 Cal.L.Rev.Comm. Reports 1 (1965). *Id., at 183*.

Nevertheless, the appellate court concluded that the ethical rule permitting an attorney to use confidential information to the extent necessary to recover a fee from a client was not applicable to bankruptcy litigation involving an objection to a discharge.

We hold that, where the attorney obtains information in confidence from the client, the attorney cannot later use that information, whether independently verified or not, as the basis of a proceeding against the client to deny discharge.

Although I recognize that Mr. Trabucchi, as a creditor, may conceivably benefit from the successful prosecution of this proceeding, such a potential benefit is not sufficient to trigger the application of fee dispute exception to confidentiality found in the current ethical rules. As such, former counsel's status as a creditor does not, by itself, permit a "waiver" of the attorney-client privilege in the instant litigation…

> The liquidator last argument is based upon the long recognized "crime-fraud" exception to the attorney-client privilege. As explained by the Supreme Court: The attorney-client privilege is not without its costs.... "[S]ince the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose." *Fisher,425 U.S., at 403* .... The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection—the centrality of open client and attorney communication to the proper functioning of our adversary system of justice—"ceas[es] to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing." 8 Wigmore, § 2298, p. 573 (emphasis in original).... It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the "seal of secrecy,"... between lawyer and client does not extend to communications "made for the purpose of getting advice for the commission of a fraud" or crime. O'Rourke v. Darbishire, [1920] A.C. 581, 604 (P.C.).
> *U.S. v. Zolin, 491 U.S. 554, 562-63, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989)* (citations omitted).

> The crime-fraud exception, however, does not apply to crimes or frauds already committed by the client prior to the communication of confidential information to his attorney. "The crime-fraud exception applies only to communications about ongoing or future activities. Communications concerning past crimes or frauds are privileged, unless the privilege has otherwise been waived." *X Corp. v. Doe, 805 F.Supp. 1298, 1307 n.16 (E.D.Va. 1992),* aff'd sub nom., *Under Seal v. Under Seal, 17 F.3d 1435 (Table), 1994 WL 52197 (4th Cir. 1994)*; see e.g., McLaughlin, 3Weinstein's Federal Rules of Evidence, § 503.31[2] (2d ed. 2002).

B. In re Varan 2014 Bankr. LEXIS 2807; 2014 WL 2881162

The case involved counsel for a bankruptcy debtor who knowingly and willfully failed to disclose the debtor's sole membership in a limited liability company and interests in business entities, financial accounts, and life insurance policies. The counsel represented the debtor in subsequent denial of discharge action based on nondisclosure of assets. The court stated:

> Ultimately, the Debtor voluntarily waived his discharge under *§ 727(a)(10)* and the Adversary Proceeding was closed on November 12, 2013. On December 10, 2013, more than a year after [attorneys] Goodman and Tovrov had been retained to represent the Debtor, Goodman filed a Disclosure of Compensation of Attorney for Debtor (the "Compensation Disclosure Statement") indicating that his law firm had received $29,601.09 for legal fees and expenses related to the Debtor's bankruptcy case. Significantly, the Compensation Disclosure Statement was filed only after the U.S. Trustee provided Goodman and Tovrov with a prepared draft of the Motion for Sanctions that admonished them for failing to file a fee disclosure statement as required by *§ 329(a).*

On January 2, 2014, the U.S. Trustee filed his Motion for Sanctions. The Motion focuses on Goodman and Tovrov's failures to make two types of disclosures: (1) accurate disclosures of the Debtor's property interests in his Schedule B and (2) timely disclosure of their fee arrangements with the Debtor *Section 329(a)* requires a debtor's attorney to "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." *11 U.S.C. § 329(a). Rule 2016(b) of the Federal Rules of Bankruptcy Procedure* requires debtor's counsel to file this disclosure statement within fourteen days after the order for relief or at such other time as the court may direct. In addition, the Rule further provides that a supplemental statement of compensation must be filed within fourteen days after any payment or agreement not previously disclosed. *Fed. R. Bankr. P. 2016(b).* All compensation received during the applicable period must be disclosed, regardless of whether the attorney will be compensated from the estate or from some other source. *In re Jackson, 401 B.R. 333, 339 (Bankr. N.D. Ill. 2009)* (citing *In re Redding, 263 B.R. 874, 878 (8th Cir. BAP 2001)).*

[T]he disclosure obligations of consumer debtors are at the very core of the bankruptcy process and meeting these obligations is part of the price debtors pay for receiving the bankruptcy discharge." *In re Colvin, 288 B.R. 477, 481 (Bankr. E.D. Mich. 2003).* Complete financial disclosure is necessary to ensure the right of the trustee and the creditors to evaluate the case. *Grochocinski v. Morgan (In re Morgan), Bankr. No. 09-42248, Adv. No. 11-00580, 2013 Bankr. LEXIS 3304, 2013 WL 4067591, at *9 (Bankr. N.D. Ill. Aug. 12, 2013)*; *Fiala v. Lindemann (In re Lindemann), 375 B.R. 450, 469 (Bankr. N.D. Ill. 2007).* Filing schedules that omit a debtor's material interests in property provides grounds for denial of a debtor's discharge. *Morgan, 2013 Bankr. LEXIS 3304, 2013 WL 4067591, at *9.*
"Debtors have an absolute duty to report whatever interests they hold in property[.]" *In re Yonikus, 974 F.2d 901, 904 (7th Cir. 1992).* These interests must be fully disclosed in debtors' bankruptcy schedules. *See Browning v. Levy, 283 F.3d 761, 775 (6th Cir. 2002).* Disclosure is mandatory even if a debtor believes an asset to be worthless or unavailable to the bankruptcy estate. *Yonikus, 974 F.2d at 904*; *see also In re Gonzalez, Bankr No. 99-80751, 2001 WL34076427, at *2 (Bankr. C.D. Ill. Aug. 22, 2001)* ("A debtor has no discretion to exclude exempt or worthless property."). Thus, a debtor must "accurately and completely list all ownership interests he or she holds in property, and it is not for the debtor 'to decide which assets are to be disclosed to creditors.'" *In re Mosher, 417 B.R. 772 (Bankr. N.D. Ill. 2009)* (quoting *Neary v. Stamat (In re Stamat), 395 B.R. 59, 73 (Bankr. N.D. Ill. 2008)).* A debtor's duty to ensure the accuracy and completeness of his schedules is one which continues throughout the bankruptcy case. *Searles v. Riley (In re Searles), 317 B.R. 368, 377-78 (9th Cir. BAP 2004), aff'd, 212 Fed. Appx. 589 (9th Cir. 2006).* Thus, errors in previously filed schedules must be corrected. *See U.S. Trustee v. Bresset (In re Engel), 246 B.R. 784, 794 (Bankr. M.D. Pa. 2000)* (citing *Torgenrud v. Benson (In re Wolcott), 194*

B.R. 477, 486 (Bankr. D. Mont. 1996)). "The continuing nature of the duty to assure accurate schedules of assets is fundamental because the viability of the system of voluntary bankruptcy depends upon full, candid, and complete disclosure by debtors of their financial affairs." *Searles, 317 B.R. at 378*.
Nor does the duty of disclosure fall on the debtor alone. The debtor's attorney has an independent obligation to "review [the schedules] with his client before they become a part of the public record." *See Acclaim Legal Serv., PLLC v. Allard (In re Shannon), No. 09-CV-12710, Bankr. No. 09-40867, 2010 U.S. Dist. LEXIS 28439, 2010 WL 1246691, at *4 (E.D. Mich. Mar. 25, 2010)* (affirming a bankruptcy court's decision sanctioning debtor's attorneys for filing inaccurate schedules). This includes an "obligation to reasonably and expeditiously investigate [the schedules'] accuracy and tender amendments, if necessary." *Engel, 246 B.R. at 793*. Moreover, "attorneys must take emphatic care to encourage their clients to comply with the requirements of the Bankruptcy Code and the Bankruptcy Rules." *Cochener, 360 B.R. at 598*.

Congress emphasized its concern with full and complete disclosure by debtors and their counsel when it enacted the 2005 BAPCPA amendments. Those amendments added provisions which impose new duties on debtors' attorneys in connection with the filing of the bankruptcy petition and schedules. *See 11 U.S.C. § 707(b)(4)(C)* and *(D)*; *see also In re Moffett, No. 10-71920, 2012 Bankr. LEXIS 824, 2012 WL 693362, at *2 (Bankr. C.D. Ill. Mar. 2, 2012)*; *In re Robertson, 370 B.R. 804, 809 (Bankr. D. Minn. 2007)* (noting that BAPCPA has imposed "newly-heightened duties of verification as to accuracy" of documents filed by the debtor in bankruptcy). Specifically, *§ 707(b)(4)(D)* provides that "[t]he 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."4 *11 U.S.C. § 707(b)(4)(D)*. Courts have taken notice of these amendments and reiterated their commitment to enforcing them:

[D]ebtors' counsel are to exercise significant care as to the completeness and accuracy of *all* recitations on their client[']s schedules, after they have made a factual investigation and legal evaluation that conforms to the standards applicable to any attorney filing a pleading, motion, or other document in a federal court. The content of a debtor's petition and schedules is relied on, and should have the quality to merit that reliance. *Triepke, 2012 Bankr. LEXIS 1596, 2012 WL 1229524, at *5* (quoting *Robertson, 370 B.R. at 809, n.8*) (emphasis in original).

Goodman and Tovrov represented the Debtor generally in his bankruptcy case as well as in the Adversary Proceeding in which the U.S. Trustee objected to his discharge. This dual representation gave rise to at least two duties: (1) a duty to ensure that they zealously represented the Debtor in the Adversary Proceeding and (2) a duty of candor to the Court with respect to satisfying the disclosure requirements in the Debtor's bankruptcy case.

> Significantly, for purposes of this motion, "a lawyer's duty of candor to the court must always prevail in any conflict with the duty of zealous advocacy." *United States Dep't of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Mgmt. of Va., Inc., 64 F.3d 920, 925 (4th Cir. 1995)*; *see also Cleveland Hair Clinic, Inc. v. Puig, 200 F.3d 1063, 1067 (7th Cir. 2000).*
>
> By statute and rule, attorneys representing debtors in bankruptcy cases have additional obligations of candor that go far beyond what is expected of counsel in the ordinary civil lawsuit. A debtor's counsel in a bankruptcy case is "obligated both ethically and as an officer of the court not to file schedules and other disclosure documents that the counsel believes inaccurate." *Engel, 246 B.R. at 793*. In addition, "[t]he obligation to file
> accurate schedules includes a continuing duty to correct errors in filed documents." *Id. at 794*.
>
> Given the particular facts of this case, the Court finds that total disgorgement of fees is appropriate and is not unduly harsh.
>
> As experienced practitioners, Goodman and Tovrov knew or should have known the extent of their disclosure obligations. Their failure to timely file the mandatory fee disclosure statement is part of a larger course of conduct in which they in effect aided and abetted their client's failure to disclose his assets. The Court finds that the concealment of the Debtor's assets was the result of a willful decision by Goodman and Tovrov, as evidenced at least in part by their rationale that filing complete Schedules could have been construed as an admission in the Adversary Proceeding.

***C. In re Smith* 2013 Bankr. LEXIS 368; 2013 WL 1092059**

The attorney agreed to represent two debtors in Chapter 13 bankruptcy proceedings shortly after a suspension that was imposed on her by the Supreme Court of Tennessee expired, but subsequently learned that she could not file pleadings on behalf of the debtors in the bankruptcy court until she obtained a decision from the U.S. District Court for the Eastern District of Tennessee which reinstated her right to practice law in that court. The attorney prepared petitions for both debtors, had them sign statements that they were not represented by counsel, had her staff file the petitions on behalf of both debtors, and entered her appearance shortly thereafter after she was reinstated to practice law before the district court. The court stated:

> [The court found] her limitation was ineffective…she did not obtain her clients' informed consent to such a limitation…most importantly, the court [found] that the limited representation as Ms. Arthur has portrayed it was not reasonable under the circumstances of these two cases…the court [found] that the nondisclosure of

an attorney's participation is a breach of the attorney's duties of candor to the tribunal. Th[e] court [held] that directing a client to make an affirmative misrepresentation about attorney participation is an act of dishonesty…

Prior to 2011, the federal courts were almost unanimous in their condemnation of attorneys and litigants who failed to disclose the participation of an attorney in the preparation of pleadings filed with the court. *See* Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, *23 Geo. J. Legal Ethics 271*, *285* and n.73 (2010)("The federal courts have almost universally condemned ghostwriting." (collecting cases)). These federal cases do not address the propriety of the disclosure of attorney involvement in terms of materiality. They address the importance of fairness, candor, and compliance with the procedural rules and the risk that ghostwriting poses to those aspects of the administration of justice. Specifically, these courts objected to ghostwriting on the basis that (i) nondisclosure of attorney representation unfairly causes a more lenient standard to be applied to a *pro se* litigant who is not really *pro se*, (ii) it violates the attorney's duty of candor to the court, and (iii) it violates the attorney's obligations under *Rule 11 of the Federal Rules of Civil Procedure* to sign pleadings and to certify that the claims and defenses raised in those pleadings are not frivolous. *Duran v. Carris, 238 F.3d 1268,1273 (10th Cir. 2001)*(listing federal cases and the courts' objections to ghostwriting). At worst, the practice can be viewed as a deliberate avoidance of that certification obligation. One court also found that "ghostwriting arrangements interfere with the Court's ability to superintend the conduct of counsel and parties during the litigation." *United States v. Eleven Vehicles, 966 F. Supp. 361, 367 (E.D. Pa. 1997)*. The participation of an attorney in the preparation of the pleadings is "something" that these judges "consider important in assessing or determining how to act in a matter." TRPC 1.0(o). This fact is material under the TRPC's definition of that term.

The ABA Model Rules allow for the limitation of services. ABA Model Rule 1.2(c). In cases where the limitation provided for the attorney to assist with pleadings without appearing in court, the attorney was faced with the dilemma of whether to disclose his involvement when he had no intention of appearing again in the case. In light of the existing case law on ghostwriting and some state ethics opinions, the American Bar Association Committee on Ethics and Professional Responsibility addressed the "divergent conclusions" that state and local ethics committees were reaching" on the issue of disclosure.ABAComm. on Ethics & Prof'l Responsibility, Formal Op. 07-446 (2007)("ABA Ethics Opinion"). The committee issued a formal opinion in 2007 which states that in the committee's opinion "the fact that a litigant submitting papers to a tribunal on a *pro se* basis has received legal assistance behind the scenes is not material to the merits of the litigation." *Id.*at 2 (discussing undisclosed legal assistance to *pro se* litigants). The Bhojani comment, cited above, interprets that statement as evidence that the ABA's current position is that "ghostwriting attorneys do not violate their duties

> to the court because the behind-the-scenes legal assistance is not a material fact." *Bhojani, supra at 664.*
>
> [The attorney] admit[ted] she or her staff inserted the sentence "Debtor is not represented by counsel" on the petition where she should have signed. The court finds that this was an affirmative misrepresentation regarding the participation of their attorney. The misrepresentation made by the debtors is attributable to their attorney. Ms. Arthur's involvement in that misrepresentation is an act of dishonesty. TRPC 8.4(c); ABA Ethics Opinion at 4.
>
> In 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 elevated the importance of the disclosure of attorney participation by defining debt relief agencies, adding additional duties for counsel for the debtor and authorizing the court to award sanctions under *11 U.S.C. § 526(c)* for noncompliance. Without disclosure of attorney participation, the court will not know whether these provisions are being violated.
>
> These bankruptcy administrative and statutory requirements related to the attorney-client relationship, coupled with the federal courts' longstanding concerns about the impact of ghostwriting on fairness, candor, and compliance with the signature requirement of *Rule 11 of the Federal Rules of Civil Procedure,* lead this court to conclude that attorney participation in the preparation of a bankruptcy pleading is a material fact. It is a fact which is relevant to the proper administration of the bankruptcy law, and it is a fact that a bankruptcy judge would consider important in assessing or determining how to proceed. As such, it is a material representation under the TRPC. Any knowing misrepresentation regarding the level of attorney participation is a violation of an attorney's duty of candor to the tribunal and is a violation of TRPC 8.4(c).

D *In re Coyle v. Coyle,* 538 B.R. 753; 2015 Bankr. LEXIS 3246

In this case the billing records of the debtor's attorneys provided strong evidence that, after the debtor and her attorneys learned of the garnishment served on the debtor's investment company, they had multiple discussions about making a transfer from her investment account to the attorneys before the investment company could turn over the funds to plaintiffs. The debtor's intent to make the transfer to her attorneys in response to the garnishment was key to the court's ultimate finding that the debtor had to be denied her discharge, pursuant to *11 U.S.C.S. § 727(a)(2)(A)*; The court stated:

> Several days before trial, the Debtor filed a Motion in Limine raising objections to the admissibility of several documents marked as exhibits by the Plaintiffs and produced pursuant to this Court's pre-trial order as documents intended to be used at trial. In particular, the Debtor complained that the worksheet she had provided

to her attorney when she began her bankruptcy process was now in the possession of the Plaintiffs and was apparently going to be used against her at trial. Although the Debtor through her attorney at the hearing on the Motion in Limine [admitted] that she had voluntarily produced the worksheet to the Trustee, she asserted that it was subject to attorney-client privilege and should not be admissible. [The] Court denied the Motion in Limine and held that because the worksheet had been voluntarily produced to a third party without a protective order, any privilege had been waived.

During the trial, the Plaintiffs also introduced billing records from O'Neil Cannon, the attorneys representing the Debtor in the pending Wisconsin case. The billing records had also apparently been provided to the Trustee who had passed them on to the Plaintiffs' attorneys. The Debtor did not object to the admissibility of the billing records during the trial even though the records contained detailed descriptions of the attorneys' communications with the Debtor.

The admission of the worksheet and the billing records raise issues of attorney-client privilege which merit a brief discussion here. Th[e] Court ha[d] noticed a local practice of case trustees and, occasionally, the United States Trustee ("UST") requesting worksheets and other documents from debtors' attorneys and the wholesale turnover of such documents by debtors' attorneys in response without any apparent consideration of the privilege issues. Indeed, in this case, the Debtor's attorney asserted at the hearing on the Motion in Limine that he thought he was required to provide whatever documents the Trustee requested but assumed, albeit incorrectly, that the Trustee would then preserve the privileged nature of the documents produced.

Debtors must file honest, accurate schedules and other documents in their bankruptcy cases. *11 U.S.C. §521(a)(1)*; *Fed. R. Bankr. P. 1007(b)*. But there is no requirement that the first draft of such documents or that preliminary worksheets created to facilitate preparation of such documents be pristine. Negative inferences generally should not be drawn simply because preliminary documents never filed with the court are incomplete or contain inaccuracies.

[The] Court found the Debtor's worksheet introduced into evidence over the objection of the Debtor to be of no evidentiary value in the case. Nothing on the worksheet was considered in support of the Court's decision on the merits of the case. The lesson to be learned, however, is that the worksheet probably never should have been requested by or produced to the Trustee. Whatever the Trustee's questions were, they most likely could have been answered in another way. Or, if only production of the worksheet would have provided the answer to a relevant question, a protective order or *in camera* review should have been sought.

The Debtor's duty to cooperate with the Trustee does not specifically require a debtor to waive privilege. *11 U.S.C. §521(a)(3)*. Nevertheless, the worksheet was voluntarily produced without limitation or qualification and therefore the

> privilege, if any, which could have protected the document in whole or part was waived. Luckily for the Debtor, the document contained nothing that the Court considered relevant to the issues before it.
>
> The Debtor is not so lucky, however, when it comes to the billing records of O'Neil Cannon. Those billing records were produced in unredacted form…the billing records provide strong evidence that, after the Debtor and her attorneys learned of the garnishment served on Baird, they had multiple discussions about making a transfer from the Debtor's Baird account to the attorneys before Baird could turn over the funds to the Plaintiffs. Although other evidence, such as the Baird account records, shows the timing of the transfers, the attorney billing records provide the most compelling evidence of the Debtor's intent to make the transfer to her attorneys in response to the garnishment. That intent was key to this Court's ultimate finding that the Debtor must be denied her discharge.

IV. Attorney Fees – Current Issues

A. In re Wayne Seare, 493 B.R. 158 (Bankr. D. Nev. 2013)

Before sanctioning Anthony DeLuca, the court examined various aspects of the attorney's representation of the debtors. The court first addressed the area of unbundling legal services and stated, "While unbundling is permissible, it must be done consistent with the rules of ethics and professional responsibility binding on all attorneys. Those rules allow a lawyer to limit his or her representation only when it is reasonable under the circumstances to do so, and only when the client gives informed consent to the limitation." *Id.* 176. Mr. DeLuca's claim that the retainer controlled his relationship with the client fell on deaf ears. The court indicated that, "to the extent his retainer is inconsistent with the applicable rules of professional responsibility, his retainer is unenforceable, and his abandonment of his clients violated norms applicable to lawyers generally." *Id.* 176.

Mr. DeLuca argued that the clients had not told him that the judgment rendered in favor of the hospital was not due to hospital bills as he had assumed, but rather was for the hospital's attorneys' fees incurred in defending an ill-conceived lawsuit by the debtors alleging employment discrimination, where the debtors had "embellished" certain emails they presented to the court. The court dismissed this argument by pointing to 11 U.S.C. § 707(b)(4)(C), which states, "The signature of an attorney on a petition, pleading, or written motion shall constitute certification that the attorney has (i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion…"

Furthermore, Mr. DeLuca did not address the concerns of the court as to whether he had complied with the requirements set forth in 11 U.S.C. § 526(a). 526(a) states, "A debt relief agency shall not (1) fail to perform any service that such agency informed an assisted person or prospective assisted person it would provide in connection with a case or proceeding under this title; (2) make any statement, or counsel or advise any assisted person or prospective assisted person to make a statement in a document filed in a case or proceeding under this title, that is untrue or misleading, or that upon the exercise of reasonable care, should have been known by untrue or misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue or misleading; (3) misrepresent to any assisted person or prospective assisted person, directly or indirectly, affirmatively or by material omission, with respect to – (A) the services that such agency will provide to such person; or (B) the benefits and risks that may result if such person becomes a debtor in a case under this title; or (4) advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer a fee or charge for services performed as part of preparing for or representing a debtor in a case under this title."

Mr. DeLuca made the unbelievable argument that since the debtors were financially unable to pay for the additional services beyond the flat fee that it didn't matter that he wouldn't represent them, since they couldn't afford him anyway. Although not mentioned by the court, Mr. DeLuca should have heeded the well-known saying that an attorney who represents himself has a fool for a client.

Certainly it is common for attorneys to charge extra for adversary proceedings and to exclude those services from a flat fee. However, in Mr. DeLuca's case, the debtors filed bankruptcy to stop the garnishments levied by the hospital. While the debtors were able to discharge over $137,000 of other general unsecured debt, it was the hospital's judgment for $67,430.58 which represented the only active collecting effort and was the procuring cause for the bankruptcy filing.

The court concluded its hearing by finding that "DeLuca did not affirmatively represent that the St. Rose debt (hospital bill) was dischargeable. Nor did he explain anything about adversary proceedings, either in general or in relation to the debtors' particular circumstances. He moved quickly and did not pay sufficient attention to the debtors' individual goals and needs…the root problem is a view of legal practice as a mass consumer good rather than a

relationship founded on trust and individual attention. The practice of law is a professional service, not a prepackaged, one-size-fits-all product." *Id.* 181.

The court then discussed the nature of law practice and stated, "A profession such as law is different from other occupations in that (1) 'its practice requires substantial intellectual training and the use of complex judgments;' (2) it places clients in a position of trust because they typically cannot evaluate the quality of service and (3) 'the client's trust presupposes that the practitioner's self-interest Is overbalanced by devotion to serving both the client's interest and the public good." *Id.* 182.

The court indicated that unbundling services raises concerns because "The push to limit representation may come from the attorney, who often benefits from and has superior knowledge of the possible ramifications of excluding certain services." *Id.* 184. Therefore, unbundling is subject to "…special scrutiny…particularly when the lawyer requests the limitation." (Restatement (Third) of Law Governing Lawyers § 19 (2000)). *Id.*184. Judgment Markell further stated, "There is a particular concern in consumer bankruptcy practice that attorneys will unbundle services that are essential or fundamental to bankruptcy cases and clients' objectives." *Id.*184. Judge Markell acknowledged that bankruptcy services can be unbundled, but only, quoting from ABA Model Rule 1.2 when "…the limitation is reasonable under the circumstances and the client gives informed consent." *Id.* 185.

The court found that neither condition was present for Mr. DeLuca's representation of the debtors. The reason for the bankruptcy was the collection efforts by the hospital and therefore dealing with the hospital debt was the *raison d'être* for the bankruptcy. Furthermore, Mr. DeLuca did not discuss the problems with the dischargeability of the hospital judgment and therefore the debtors gave no informed consent to the unbundling of services by Mr. DeLuca. The court found this was especially true since it viewed Mr. Deluca's 19-page retainer as a contract of adhesion.

In summary, Judge Markell found that attorney DeLuca had engaged in nine ethical violations. He summarized those violations as follows:

- DeLuca violated the duty of competence, Nevada Rule 1.1, by unbundling services (adversary representation) that were reasonably necessary to achieve the debtors' reasonably anticipated result – permanent cessation of wage garnishment.

- He violated Nevada Rule 1.2(c) because unbundling adversary representation was unreasonable under the circumstances and because he failed to obtain the debtors' informed consent.
- He violated Nevada Rule 1.5 by failing to properly explain the scope of services and fees when the debtors agreed to retain him.
- He violated Nevada Rule 1.4 by failing to properly communicate with clients – about the overall progress of their case and St. Rose's intent to file an adversary proceeding.
- He violated Section 707(b)(4)(C) by failing to reasonably investigate the nature of the Judgment.
- He violated Section 526(a)(1) when he failed to quote a price to the debtors for adversary representation and instead flatly refused to represent them.
- He violated Section 526(a)(3) by failing to explain the risks of filing – namely, that an adversary proceeding was a near certainty.
- He violated Section 528(a)(2) by failing to provide a 'fully executed' contract to the debtors.
- He violated Section 528(a)(1) by failing to 'clearly and conspicuously' explain the scope of services and fees when the debtors retained him.

Judge Markell quoted the American Bar Association Joint Committee on Professional Sanctions, which stated:

> A lawyer's primary obligations are to her client, but she also owes duties to the public, the legal system, and her profession. The ABA has recognized this in articulating that "the purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession." Am. Bar. Ass'n, Joint Comm. on Prof'l Sanctions, Standards for Imposing Lawyer Sanctions 13 (2005) (the "ABA Standards")
>
> Bankruptcy courts have the inherent authority to regulate the practice of attorneys who appear before them. *In re Nguyen*, 447 B.R. 268, 280 (B.A.P. 9th Cir. 2011) (en banc) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-45, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991).

Judge Markell indicated that attorney DeLuca "knowingly created a system that maximizes efficiency, and therefore profit, in exchange for less client interaction and less attention to clients' particular needs and goals." Judge Markell also noted that: "He has refused to admit his mistakes." Therefore, Judge Markell ordered disgorgement of all attorney's fees that the Debtors paid to DeLuca, including but not limited to the $1,995.00 paid under the Retainer Agreement. Judge Markell found that DeLuca's services were that of a petition preparer at best, and therefore the value provided was worth $150. However, Judge Markell indicated that attorney DeLuca was not entitled to retain this $150 because deterrence is best served by disgorging all of the fees.

Judge Markell ordered that DeLuca "complete five hours of continuing education regarding collection and enforcement of judgments, and ten hours regarding ethical responsibilities to clients. He must complete the courses within one year of the date of entry of this opinion. DeLuca shall submit proof of attendance to the court within one week of completing each course." In addition, Judge Markell indicated that attorney DeLuca "provide a copy of this opinion to every client in the next two years who is sued in an adversary proceeding, but only if DeLuca declines to represent them in that adversary proceeding for any reason." The court noted that "this sanction [is] especially important because DeLuca engaged in a pattern of selfish misconduct that likely extends beyond his representation of the debtors."

B. In re Diaz 348 B.R. 752; 2006 Bankr. LEXIS 2008

The court stated after finding that the attorney for the debtors had knowingly presented false schedules:

> Canon 3(B)(3) of the Code of Conduct for United States Judge provides that "A judge should initiate appropriate action when the judge becomes aware of reliable evidence indicating the likelihood of unprofessional conduct by a judge or lawyer." Therefore, the court will forward a copy of this Memorandum Opinion to the Chief District Judge of this district and to the State Bar of Texas for appropriate consideration.
>
> Based on the foregoing, a separate Judgment will be entered denying the "1st Chapter 13 Fee Application."

C. In re Quaries & Brady v. Maxfield, 2005 U.S. Dist. LEXIS 49503

The attorneys for the debtors filed Chapter 11 bankruptcy for eleven interrelated companies. These separate filings were subsequently administratively consolidated. The attorneys for the debtors filed the usual applications to be employed indicating that they were disinterested and held no adverse interests to the estate. However, it subsequently became apparent during the administration of the case that there were claims between the various interrelated companies. However, the attorneys for the debtors did not amend their application for employment, nor did the original application stated specific facts regarding the attorney's dealing with the various debtors and the dealings the various companies had with each other.

The attorneys for the debtors during the fee application argued that the various claims between the debtors were disclosed during the bankruptcy proceedings and therefore there was no intent to hide the conflict when these claims were not disclosed in the actual employment application itself. The court held that the bankruptcy courts have neither the resources nor the time to root out the existence of undisclosed conflict of interest which are not set forth in the application itself. The court therefore held the application for employment to be fatally flawed.

Finally, the attorneys argued that the claims between the various related debtors were merely potential conflicts as opposed to actual conflicts and that under 11 U.S.C. § 327(c), the court could exercise its discretion to still employ the debtors. The court responded to that argument by indicating that unless there was full disclosure of specific facts it is impossible for the court to exercise its discretion under § 327(c). As a result, the court disallowed the fee application and ordered debtor's attorney to disgorge his pre-petition retainer.

Frankly, any time an attorney is contemplating filing bankruptcy for eleven interrelated companies, the assumption should be that there probably are multiple claims between the companies, one against the other, requiring separate representation for each.

D. In re Parikh, 508 B.R. 572 (Bankr. E.D. N.Y. 2014)

Counsel for the debtor filed an emergency Chapter 7 petition. Unfortunately, the schedules filed did not include a Citibank bank account, which had been set forth in a previous Chapter 13 petition filed by the debtor through a different attorney. The court held that the

attorney's duty to conduct an inquiry into the facts presented in the bankruptcy petition required the attorney to independently verify publicly available facts, which would have included the prior Chapter 13 filing. The attorney responded that this had been an emergency filing, but the court held that the emergency did not excuse the failure to review the prior Chapter 13 schedules.

As a result of this omission, a creditor brought a motion for sanctions against debtor's attorney under Rule 9011, but had not provided the 21 day safe harbor notification. The court, however, found that the safe harbor provision does not apply to the filing of the petition because petitions, unlike other pleadings, cause immediate collateral effects and cannot be withdrawn without the court's consent. Therefore, the safe harbor provision did not apply and the debtor's attorney was subject to sanctions. The failure of the attorney to amend the schedules no doubt factored into the court's finding that the attorney's conduct was sanctionable. The court did not impose a monitory fine, because the attorney had a good reputation with the court and felt that the publication of the court's decision was a sufficient sanction.

E. In re Chandler v. McIntosh 2015 Bankr. LEXIS 3760

The district court also noted the following with regard to the denial of attorney fees:

> The bankruptcy court also correctly observed that under Ninth Circuit law, it had discretion to deny fees to an attorney who commits an ethical violation. Id. "In making such a ruling, the [bankruptcy] court may consider the extent of the misconduct, including its gravity, timing, willfulness, and effect on the various services performed by the lawyer, and other threatened or actual harm to the client." Id.
>
> While Chandler did disclose that he had received the $10,000 amount through CMITH and applied that to his fees, that disclosure was inadequate. After the initially disclosed flat fee agreement, Chandler never supplemented his disclosure to show that he had entered into a new fee agreement with Debtor whereby he would bill at an hourly rate for services beyond those initially disclosed. As a sanction for failing to timely and adequately disclose the new fee agreement, the bankruptcy court has the inherent authority to order disgorgement and discretion to deny counsel all fees even if the violation was unintentional. *In re Lewis, 113 F.3d at 1045*.

> For all these reasons, we conclude that the bankruptcy court did not abuse its discretion by denying Chandler's fees and ordering disgorgement of amounts previously paid.

F. In re Olson

The court in *In re Olson*, 2016 Bankr. LEXIS 2308 considered the necessity of disclosing fees when a lawyer agrees to "appear" for another lawyer at a section 341 meeting. The court indicated that the "appearing" attorney at the 341 hearing was not substituting in for regular counsel, but rather was appearing as the attorney for the debtor and representing the debtor at the 341 hearing. Therefore, the attorney appearing at the 341 hearing had a duty under 2016(b) to disclose the payment within 14 days of his agreement to appear at the 341 hearing in exchange for payment of fees. Likewise, regular debtor's counsel had a duty under 2016(b) to disclose that he was sharing fees in the bankruptcy with another attorney.

The court further noted that nothing on the record indicated that the debtor had given her informed consent to the use of a substitute attorney at the 341 hearing.

The court indicated that even though a 341 hearing may be brief and uneventful, it still constitute legal representation of the debtor with all of the obligations which flow from such representation. Because the disclosure of compensation were not made by either debtors' regular counsel, nor the counsel appearing at the 341 hearing, and because informed consent of such substitute counsel was not obtained from the debtor, the court ordered a disgorgement of all compensation to both counsel. The court noted "the disclosure requirements imposed by 329 are mandatory, not permissive, and an attorney who fails to comply with the disclosure requirements forfeits any right to receive compensation." Citing *In re Crayton*, 192 B.R. 970, 981 (9th Cir. BAP 1996).

In another case involving 341 hearings, the court in *In re Ortiz*, 496 B.R. 144 (Bankr. S.D. N.Y. 2013) held that a flat fee retainer agreement which limited the attorney's appearance to only one 341 hearing violated the attorney's duty of competence. An attorney who represents a debtor is required to attend all 341 hearings if there are continuances.

G. In re Lindo v. Figeroux

Remedies for mistakes by attorneys in representing debtors is not limited to merely having the attorney disgorge fees. In *In re Lindo v. Figeroux*, 2015 U.S. Dist. LEXIS 169474 the court held that an attorney had mistakenly filed a Chapter 7 for a debtor when given the value placed on the debtor's taxi medallion (license to operate a taxicab in New York City) the case should have been filed either in Chapter 11 or Chapter 13. The attorney, despite several opportunities to correct the initial filing, failed to do so. As a result, the judge found that the debtor was entitled to recover the following: "(1) the administrative expenses related to the Chapter 7 bankruptcy, (2) the balance of time Defendant's attorneys billed during the Chapter 7 bankruptcy, (3) four months of lost wages, and (4) the retainer fee paid to Defendants" (attorney). The total damages came to $134,224.37.

Ethical Considerations for Debtor's Counsel

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I. Duties to Prospective Clients

A. In re Wayne Seare

Judge Bruce Markell (Nevada 2013)

Power of the court

1. § 329
2. B.R. 2016 and 2017

Factual Background

1. Chapter 7
2. Lawsuit from hospital
3. 19-page retainer agreement
4. Additional fee for adversary

In re Seare (cont.)

Factual background (cont.)

5. Indication of nondischargeability at 341
6. Discharge – form e-mail
7. Hospital's proposed stipulation
8 Adversary complaint
9. Non-representation in adversary

In re Seare (cont.)

I. Bankruptcy Code standards

A. 707(b)(4)(C) – reasonable investigation – Rule 9011

1. Explain need for full disclosure
2. Ask questions
3. Information is consistent
4. Demand honesty
5. Seek relief
6. Red flags
7. Attorney as expert

B. 707(b)(4)(D) – certification of correctness

In re Seare (cont.)

Sections 526-528

A. 526

1. Failed to provide service promised
2. Misrepresent service to be provided or benefit and risks

B. 527

1. General purpose and costs of chapters
2. Requirement of truthfulness
3. Possibility of litigation

In re Seare (cont.)

Sections 526-528 (cont.)

C. 528
1. Written contract
2. Clear explanation of scope
3. Fees to be charged

D. Specific failure of attorney
1. Failure to explain non-representation
2. Risks of adversary litigation
3. Agreement not fully executed
4. Retainer Agreement not clear

In re Seare (cont.)

2. Unbundling Services

   A. Competency

      1. Complexity increases need for competency
      2. Competency depends on objectives
      3. What are the client's objectives
      4. Must bundle services to obtain desired results
      5. Communication essential
         a. Can't rely on client
         b. No mutual mistake
         c. Attorney is the one with specialized training and knowledge
         d. Goals – obtain desires of client

In re Seare (Cont.)

6. Unbundled representation violated duty of competence
7. When is unbundling reasonable
    a. What is necessary to meet client's goals
    b. Reasonableness assessed at time of retainer
    c. 341 hearing
    d. Difficulties of appearing pro se in bankruptcy
8. Timing
    a. Prior to meeting
    b. Standard retainer
    c. Late unbundling
    d. Client driven

In re Seare (cont.)

2. Unbundling Services (cont.)
   B. Unbundling
      1. When is it available
         a. Reasonable under circumstances
         b. Informed consent
      2. Retainer doesn't control
      3. Attorney argued lack of disclosure
         a. 707(b)(4)(c) – reasonable investigation
      4. Violation of 526(a)
         a. failure to provide services
         b. risks incurred by filing548(a)(1)(A)

In re Seare (cont.)

B. Unbundling (continued)

5. Inability to pay
6. Procuring cause was garnishments
7. Lack of individual attention
8. Nature of law practice
   a. Intellectual training
   b. Trust
   c. Subservient self-interest of attorney

9. Unbundling is subject to scrutiny
   a. Requested by attorney or client
   b. Informed consent

In re Seare (cont.)

3. Informed Consent

    A. Disclosure of risks of unbundling

        1. Use of boiler plate
        2. Customize communication

    B. Indicia of informed consent

        1. Narrative of events
        2. Debtor’s knowledge

B. *In Re Pigg*

1. Failure to List non-exempt assets avoidable transfers
   a) 707(b)(4)
   b) Client response

2. Disgorgement § 329

3. Sanctions Rule 9011
   a) Experience factor
   b) Bankruptcy process

C. *In re Diaz*

1. False schedules
2. Schedules of expenses
3. Attorney's duty to instruct and supervise
4. Sanctions
5. Fee application

II. Conflicts of Interest

A. *In re Securities Investor Protection Corp. v. Blinder, Robinson & Co.*

1. Attorney client privilege – Trustee's right
2. Disqualification of former counsel
3. Confidence
4. Conflict of interest
5. Appearances

B. *In re Tomczak*

1. Attorney for debtor
2. Special counsel for trustee
3. Disclosure requirement for appointment
   B.R. 2014(a) and § 327
4. Court to determine relevancy
5. Fees denied amount $12,600

C. *In re Chandler v. McIntosh*

1. Attorney's position for client
2. Attorney's position regarding own fees
3. Duty of loyalty
4. Bankruptcy specialization
5. Correctness of position irrelevant
6. $92,000

D. *In re Tallant v. Kaufman*

1. Attorney as debtor
2. Adverse interest in business dealing
3. Need for independent counsel
4. Discharge problems 533(a)(2) & (4)

E. *In re Hutch Holdings, Inc.*

1. Disclosure required
    a) Other representation – debtor's principal
    b) Court to rule on conflicts
2. Disallowance of compensation

F. *In re Cabe*

1. Representation of corporate debtor in fraudulent transfer actions
2. Substantial related matters.
3. Motion to disqualify
4. Imputed conflict to firm

III. Confidentiality and Data Security

A. *In re Levin v. DiLoreto*

1. Disclosure of confidences to obtain fees
2. Attorney client privilege and discharge litigation
3. Crime-fraud exception – Post v. future activities

B. *In re Varan*

1. Failure to disclose assets
    a) full disclosure is heart of bankruptcy
    b) Continuing obligation
    c) Need to investigate
    d) BAPCPA
2. Failure to disclose for arrangements
    a) Candor with court
        1) Schedules
        2) Fees
3. Total disgorgement of fees

C. *In re Smith*

1. Suspended attorney's ghost writing
2. History of court's dealing with ghost writing
    a) Prior to 2011
    b) After 2011 – ABA
3. Misrepresentations on schedules - BAPCPA
4. Sanctions § 526(c)

D. *In re Coyle v. Coyle*

1. Billing records
2. Work sheets
3. Waiver of attorney client privilege & 521(a)(3)
4. Malpractice

IV. Attorney Fees

A. *In re Seare*

Violations by Attorney

1. Duty of competence
2. Unbundling unreasonable
3. Failure to explain scope of services
4. Failure to communicate
5. Failure to investigate judgment
6. Failure to price adversary representation
7. Failure to explain risks
8. No fully executed agreement
9. Retainer not clear and conspicuous

B. Attorney did not help himself by arguing

1. Retainer controlled
2. Client did not inform attorney
3. Clients couldn’t afford him

C. Sanctions

1. Disgorgement of fees
2. Five hours CLE
3. Ten hours ethics CLE
4. Adversary proceedings – copy of judgment

D. In re Quaries & Brady v. Maxfield,
2005 U.S. Dist. LEXIS 49503

1. Eleven related debtors
2. Claims between the debtors
3. Did not amend application for employment
    a) Disclosure otherwise insufficient
    b) Failed to comply with 2014
4. Must provide specific facts, not conclusions
5. Sec. 327(a) vs. 327(c) potential conflict
6. Appearance of potential conflict alone is sufficient to disqualify attorney

E. In re Parikh, 508 BR.572 (Bankr. E.D. N.Y. 2014)

1. 9011 rule – 21 day notice
2. Prior Chapter 13 information
3. No safe harbor on petition

F. *In re Chandler*

1. Failure to amend fee disclosure
2. Denial of Fee Application
3. Disgorgement of previously paid fees

G. In re Olson

1. 341 hearing appearance
   a. Debtor's attorney
   b. Appearing attorney
   c. Debtor's lack of consent
2. Disgorgement
3. Cannot limit 341 appearance to one hearing *In re Ortiz,* 496 B.R. 144 (Bankr. S.D. N.Y. 2013)

H. *In re Lindo v. Figerous*

1. Chapter 7 filing a mistake
2. Sanctions
   a. Administrative expense of Chapter 7
   b. Disgorgement and denial of fees
   c. Reimbursement of lost wages