ABI Webinar: The Complex Requirements and Ethical Duties of Representing Consumer Debtors

Jointly sponsored by the:

Consumer Committee and Ethics & Professional Compensation Committee

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II. Trust but Verify: The Duty to Independently Verify Information Provided by Clients

TOPIC #1: DUTY TO VERIFY INFORMATION PROVIDED BY CLIENT:

What is the duty of counsel to independently verify information provided by a debtor? How far does the obligation to be sure extend under Rule 9011 and the Bankruptcy Code? Must counsel independently verify assets with public records, liens with public records, lawsuits and potential claims with public records, creditors with credit reports and so forth?

RESPONSES / DISCUSSION:

The starting point for the answers to these questions in consumer cases is § 707(b)(4), which provides:

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

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

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

(I) is well grounded in fact; and

(II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).

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

To provide guidance on the broad new requirements in the statute, the *Ad Hoc Committee on Bankruptcy Court Structure and Insolvency Processes, Task Force on Attorney Discipline, ABA Section of Business Law* published an article entitled "**Attorney Liability Under Section 707(b)(4) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005**" *The Business Lawyer; Vol. 61, February 2006* (hereafter the "ABA 707(b)(4) article").

The ABA 707(b)(4) article provided specific guidance on what constitutes a "reasonable investigation" under the new provisions:

> "§ 3.1 "REASONABLE INVESTIGATION"
>
> **Recommendations**
>
> As a standard, "reasonable investigation" should be governed by the case law interpreting and applying the "reasonable inquiry" standard under Rule 9011. Attorneys should be able to rely on case law that allows time constraints to be taken into account.
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> The reasonableness of the attorney's inquiry should not be analyzed with the benefit of hindsight; rather, the analysis should, as under Rule 9011, focus on the attorney's inquiry at the time that the inquiry was made.
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> **Attorneys should verify information supplied by the debtor if such verification may be accomplished with a reasonable expenditure of time and expense and, in the attorney's professional judgment, the information provided by the client is inconsistent or contains other indications of inaccuracy**.
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> Attorneys should be able to rely upon documents prepared by third parties in the scope of their employment, including tax returns, credit and title reports, child support enforcement agency statements, or information from the debtor's pre-petition credit counseling agency.
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> Unless and until the courts articulate new standards for section 707(b)(3)'s good faith requirement,21 attorneys should be able to rely on case law developed under section 707(a),22 specifically those cases interpreting and applying the "bad faith" and "totality of the circumstances" tests. Case annotations relevant to these recommendations are attached as Appendix A and incorporated herein."

ABA 707(b)(4) report at p. 703. The same report also adopted a case law formulation of the duty:

> More specifically, the Task Force accepts the following articulation of an attorney's reasonable pre-filing investigation:

> The duty of reasonable inquiry imposed upon an attorney by 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 Schedules 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.

ABA 707(b)(4) report at p. 703 (citing *In re* Robinson, 198 B.R. 1017, 1024 (Bankr. N.D. Ga.1996); *In re* Armwood, 175 B.R. 779, 789 (Bankr. N.D. Ga. 1994); *In re* Matthews, 154 B.R. 673, 680 (Bankr. W.D. Tex. 1993). *See In re* Huerta, 137 B.R. 356, 379 n.8 (Bankr. C.D. Cal. 1992).

In addition, the ABA 707(b)(4) article provided specific guidance on what constitutes a "inquiry":

> **"§ 4. SECTION 707(B)(4)(D)**
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> § 4.1 "INQUIRY"
>
> **Recommendation**
>
> Attorneys should conform their "inquiry" requirement under section 707(b)(4)(D) to the "reasonable inquiry" standard under Rule 9011.
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> Attorneys should be able to rely on case law that allows time constraints to be taken into account.
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> The reasonableness of the attorney's inquiry should be not be analyzed with the benefit of hindsight; rather, the analysis should, as under Rule 9011, focus on the attorney's inquiry at the time that the inquiry was made.
>
> **Attorneys should verify information supplied by the debtor if such verification may be accomplished with a reasonable expenditure of time and expense and, in the attorney's professional judgment, the information provided by the client is inconsistent or contains other indications of inaccuracy**.
>
> Attorneys should be able to rely upon documents prepared by third parties in the scope of their employment, including tax returns, credit and title reports, child support enforcement agency statements, or information from the debtor's pre-petition credit counseling agency.

> Case annotations relevant to these recommendations are attached as Appendix A and incorporated herein."

The ABA 707(b)(4) article concludes that the duty of "reasonable investigation" or "inquiry" can normally be fulfilled by reliance on information provided by the client, confirmed by information in documents prepare by 3rd parties as long as the information is consistent across the board. If the information lacks internal consistency or contains other indications of inaccuracy, then additional verification or investigation is warranted. The magnitude or scope of the effort and resources in the additional investigation will vary depending on the case, issues and amount of inconsistency. Prudent counsel will confirm in writing the inconsistent information, additional documents / effort needed and related matters in written record to the client. Counsel will also document the professional judgments made at the time (problems, issues and additional investigation needed or not) in appropriate cases.

What is the scope of the duty to investigate or inquire in the absence of red flags or inconsistent information supplied by a client ?

That duty to investigate / inquire can be fulfilled by meeting the legal standard for disclosure in the bankruptcy schedules. In other words, the duty to inquire or investigate has been met when counsel's investigation has resulted in adequate information to comply with the applicable legal standard. In the **"Working Paper: Best Practices for Debtors' Attorneys"** *The Business Lawyer; Vol. 64, November 2008* (hereafter the "ABA Best Practices Paper") the standard was described as:

> **1.4.2. Judicial Standards on Disclosure**
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> . . . . The Working Group believes that notice should be the guiding principle underlying the debtor's duty of complete and accurate disclosure. In other words, disclosure should be sufficient to put the trustee and creditors on notice of the possible existence of assets available for distribution and actions that may be taken against the debtor.
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> There are a variety of reasons underlying our belief that notice is the appropriate standard. Foremost among them is the trustee's affirmative duty to investigate the financial affairs of the debtor.[1] Requiring the debtor and the debtor's attorney to undertake a comprehensive and detailed pre-

[1] *See* 11 U.S.C. § 704(a)(4) (2006).

> filing investigation would render this duty superfluous, especially in light of the debtor's post-petition obligation to cooperate with the trustee.[2]

Thus, it is the author's opinion that counsel has met the minimum duty of "investigation / inquiry" when adequate information has acquired so as to allow counsel to prepare bankruptcy documents that put readers of those documents on inquiry notice of assets, transactions and related matters.

TOPIC #2: CLIENT FRAUD, LAWYER USE OF FRAUDULENT INFORMATION PROVIDED BY CLIENT: What is the duty of counsel when he or she finds that the client has given him or her false information and that false information is disseminated by counsel?

RESPONSES / DISCUSSION:

Step #1: RECONFIRM THE FACTS: a) what the original information was; b) what the source(s) of the original information was; c) the basis for the current belief it was both false and provided by the client; d) how it was missed in the quality control process; and e) where it was actually used or disseminated by counsel.

Step #2: IDENTIFY THE RELEVANT RULES AND LAW

Model Rule 1.2(d) provides as follows:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

What is knowledge? Model Rule 1.0(f) provides that knowledge can be "inferred from the circumstances." The vagueness of the definition should be a red flag to a lawyer who "smells a rat" in connection with what a client is telling the lawyer or other parties to a transaction.

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[2] *See* 11 U.S.C. § 521(a)(3) (2006).

Excerpts from the Comments to Model Rule 1.2 appear below.

Comment Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. **There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.**

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. **The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.**

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

Disclosure of client fraud to others. Rules 1.6(b)(2)&(3) provide as follows:

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

* * * *

> 2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

Most states have an exception to confidentiality that is the same or nearly the same as the provisions quoted just above, see the state-by-state analysis at Thomas D. Morgan & Ronald D. Rotunda, 2008 Selected Standards on Professional Responsibility 149-164 (2008).

Most states' rules do not command the lawyer to reveal client fraud to others; they permit disclosure. One must, however, be wary of Model Rule 4.1(b), which provides:

> In the course of representing a client a lawyer shall not knowingly:
> * * *
> *
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Step #3: APPLY THE RULES AND LAW TO THE FACTS

The ABA Standing Committee on Ethics and Professional Responsibility addressed this situation in **Formal Opinion 92-366 (1992)**. The opinion advises that a lawyer who finds that his or her services are being used to perpetrate a fraud **must first withdraw from any representation** that would directly or indirectly assist the continuation of the fraud. If continuing the representation would suggest to innocent third parties that all was well in the client's legal affairs, then the lawyer must withdraw to avoid giving a false

impression. The committee suggested that a lawyer be allowed to withdraw any assistance unknowingly provided to a fraudulent project; this would be accomplished by means of a **"noisy withdrawal"--the lawyer's disavowal of previous work product, opinion letters, and the like**. This, the opinion acknowledged, "may have the collateral effect of disclosing inferentially client confidences obtained during the representation." **A noisy withdrawal is not permitted if the client's fraud is complete rather than ongoing**. The ABA committee was not in agreement on the rectification issue, and three members issued a strong dissent. For an overview of these issues and a discussion of the rules pertaining to disclosure of client fraud, see Weinstein, Client Confidences and the Rules of Professional Responsibility: Too Little Consensus and Too Much Confusion, 35 S. Tex. L. Rev. 727 (1994).

It has been suggested that the provision in the Comment to Rule 1.6 allowing a lawyer to give notice of withdrawal and disaffirm and withdraw documents prepared by the lawyer reconciles perceived inconsistencies among Rules 1.2, 1.6, and 4.1(b). Rotunda, The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag, 63 Or. L. Rev. 455 (1984).

STATE OPINIONS ON CLIENT BANKRUPTCY FRAUD

Connecticut Opinion 96-5 (3/14/96) Confidentiality; Disclosure of fraud; Bankruptcy; Malpractice. A lawyer who discovers that his former client, who is now suing him for legal malpractice, committed fraud in the bankruptcy proceeding in which the lawyer's services were used may reveal the fraud to the extent necessary to rectify its consequences. One reasonable method of rectification would be to contact the U.S. Trustee or his attorney. Whether the lawyer may reveal the information to establish a claim or defense in the malpractice action depends on the facts, the law, and the circumstances. Rule 1.6.

Maryland Opinion 2004-19 (undated) Confidentiality; Misrepresentation; Disclosure of fraud; Former clients; Candor toward tribunals.
A lawyer who learns that a former client's bankruptcy petition contained a misrepresentation has no obligation under the ethics rules to reveal this to the court or the bankruptcy trustee. The facts indicate that due to a clerical error, the court issued the client a discharge even though the judge had denied him one, and that any fraud that the client committed has already occurred. At no point did the lawyer knowingly fail to make any disclosure necessary to avoid assisting in a fraud. Only under the “rectification” exception could the lawyer even be permitted to disclose, and then only if the lawyer were aware of additional facts leading him to reasonably conclude that his services had been used in furtherance of a fraud. Absent such facts, the lawyer should advise the former client that he

will not be disclosing any confidential information. The lawyer should not try to induce the former client to make the disclosure by suggesting that the lawyer will do so if he does not do it himself. Opinion 2004-05; Rules 1.6, 3.3, 4.1.

Maryland Opinion 89-47 (6/12/89) Confidentiality; Disclosure; Bankruptcy. A lawyer who files a bankruptcy petition for a client may execute a declaration verifying that the lawyer has informed his client of debtor relief alternatives as required by law without breaching the attorney-client privilege or violating the rule on confidentiality. Once a client has authorized the lawyer to file the petition, he has impliedly authorized the disclosures necessary to carry out the representation. Rule 1.6.

North Carolina Opinion 99-15 (Revised) (10/20/00) Candor toward tribunals; Confidentiality; Disclosure of fraud; Disclosure of crimes; Bankruptcy; Former clients. A client consulted a lawyer about filing a bankruptcy petition, at which time the lawyer advised him that there were several problems that either would preclude filing under Chapter 7 or result in a very large monthly payment if filed under Chapter 13. Several weeks later the lawyer learned that the client has retained another attorney and has filed a bankruptcy petition. The lawyer believes that the client intentionally failed to reveal the problematic information to the new attorney. Whether the lawyer is required to disclose the information is a matter to be determined under relevant law, including 18 U.S.C. §152, which imposes criminal penalties for fraudulent concealment of property belonging to the estate of a debtor. However, under Rule 1.6, the lawyer may disclose the information if the lawyer knows that the client is committing a fraud on the court and that the lawyer's services were used to commit the fraud; mere suspicion is not enough to trigger the exception to the duty to maintain confidentiality. If the exception applies and the lawyer decides to take action to rectify the fraud, the lawyer should disclose confidential information only to the extent necessary. The lawyer should first ask the client to rectify the fraud. If this is unsuccessful, the lawyer may disclose the information to the new attorney and state that he will notify the bankruptcy administrator if the fraud is not rectified or if no response is received from the attorney. If the attorney fails to respond or fails to address the lawyer's concerns, the lawyer may notify the bankruptcy administrator. Opinion 98-20; 18 U.S.C. §152; Rule 1.6(d)(3)(5).

North Carolina Opinion 98-20 (4/23/99) Candor toward tribunals; Bankruptcy practice; Confidentiality; Disclosure of fraud; Perjury. When a lawyer who represented a client in a bankruptcy proceeding learns from a third party that the client inherited a substantial sum of money, the lawyer is not required by Rule 3.3(a) to reveal this information to the court or bankruptcy administrator, even though the client is required to do so. Once a proceeding has concluded, Rule 3.3(a) ceases to govern a lawyer's conduct. However, Rule 1.6(d)(3) permits, but does not require, the lawyer to reveal such information if the lawyer believes that he has a duty to do so under applicable law, unless it would substantially damage the interests of the client and there is a compelling legal interest of the client that may entitle the lawyer not to reveal the information. The lawyer should give the

client the opportunity of being the one to inform the authorities by advising the client of his ongoing duty to report this information, that he is subject to the penalties of perjury if he fails to do so, and that the lawyer may reveal the information should the client fail to do so. Opinion 175; 11 U.S.C. §§521, 541, 18 U.S.C. §152, Bankruptcy Rules 1007(h), 1008; Rules 1.6, 3.3.

Pennsylvania Opinion 96-192 (1/3/97) Confidentiality; Misrepresentation; Disclosure of fraud; Candor to tribunal; Bankruptcy. A lawyer who learns that his clients committed fraud in their bankruptcy petition by concealing an unliquidated pre-petition asset may, and perhaps must, move to reopen the case to disclose the asset if the clients will not agree to. 18 U.S.C. 152(1); Rules 1.6, 3.3(a)(4); DR 4-101.

Pennsylvania Opinion 94-101 (6/27/94) Confidentiality; Disclosure of fraud; Bankruptcy. A lawyer for an individual in a Chapter 13 reorganization who learns that certain corporate assets of the client were sold and the proceeds disbursed to the client rather than to the trustee is not under a duty to disclose this fact but may reveal it if she chooses. It is recommended that the lawyer first attempt to persuade the client to rectify matters or to disclose the situation to the court himself. Withdrawal from the matter is inappropriate under these facts; the lawyer's duty to the court as well as the duties imposed by the bankruptcy statutes impose a fiduciary duty upon the lawyer to preserve and protect the assets of the estate. Rules 1.6, 3.3.

Pennsylvania Opinion 91-108 (7/22/91) Confidentiality; Candor to tribunal; Disclosure of fraud. A lawyer who represented two business entities in many real estate transactions and rendered several opinions dealing with the binding effect of certain contracts has the following responsibilities when one of the businesses is forced into bankruptcy and the lawyer learns that the contracts had been based on false information that enabled buyers to obtain financing based upon fraudulent costs: (1) The lawyer has no obligation to take remedial action to inform the financial institutions of the fraud because the lawyer was unaware of the fraud when the loans were made. The lawyer may disclose the fraud if he chooses to do so because his services were used in the fraudulent acts. (2) If the lawyer is called as a witness in the bankruptcy proceedings, he may disclose information necessary to avoid assisting in the client's fraud and must refrain from offering false evidence. If the court compels disclosure of other confidential information, the lawyer may disclose the minimum information necessary. (3) The lawyer may withdraw from representing clients in litigation involving the past fraudulent transactions. If he chooses to continue the representations, the clients may not use the fraudulent information and the lawyer must counsel them to be truthful. If the clients persist in the misrepresentations the lawyer must withdraw and must
advise the court of the fraudulent information presented. Rules 1.6(b)(c)(2), 1.16(b), 2.3, 3.3.

Pennsylvania—Philadelphia Opinion 2005-7 (5/05) Candor toward tribunals; Reporting misconduct; Disclosure of fraud; Disclosure of crimes. If a lawyer suspects, based on the opinion of a forensic accounting expert in the course of discovery, that the opposing party committed tax fraud and fraud on the bankruptcy court, the lawyer is not required by Rule 3.3(b) to inform the court or other agency of the party's putative fraud; the fact that a nonlawyer expert opines that fraud is "likely" does not create the level of "actual knowledge" required by the rule, and the rule's requirement to take "reasonable remedial measures, including, if necessary, disclosure to the tribunal," is triggered only when the requisite degree of certainty is present. In addition the rule is unlikely to require disclosure where, as here, it appears that the conduct is the subject of the litigation and it is contemplated that the process will reveal that conduct. In any case, the rule would not impose a duty to disclose to any entity other than a tribunal. Similarly, if the lawyer believes that opposing counsel either aided in the fraud or knew of it and failed to reveal it, the lawyer is not required under Rule 8.3 to report it to disciplinary authorities because the lawyer lacks the requisite degree of "knowledge" required by the rule. Rules 3.3(b), 8.3.

Pennsylvania—Philadelphia Opinion 2004-12 (2/05) Candor toward tribunals; Confidentiality; Disclosure of crimes; Disclosure of fraud. A lawyer representing a client in a divorce and also in a bankruptcy filing discovered in the bankruptcy proceeding that the client had taken out a second mortgage on the marital home without the wife's knowledge, apparently forging her signature on the mortgage document, and falsely represented to the divorce court that there was only one mortgage on the home. Under Rule 3.3(a)(3), the lawyer is required to "take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Disclosing the facts to counsel for the wife would be an appropriate reasonable remedial measure. It is not necessary for the lawyer to disclose the matter to any court; whether to do so is for opposing counsel to decide. Accordingly, the lawyer should consult with the client and advise him to make, or authorize the lawyer to make, the disclosure. If the client refuses, the lawyer must make the disclosures himself. Rule 3.3(a)(3).

Pennsylvania—Philadelphia Opinion 97-8 (8/97) Candor toward tribunals; Confidentiality; Disclosure of fraud; Bankruptcy of clients. A lawyer who learns that a personal injury suit filed on a client's behalf is based on a fraudulent claim and is later asked by the client to withdraw the suit is not required to disclose the reasons for withdrawing the complaint. However, the lawyer may disclose such information if doing so might reasonably lead to rectifying the consequences of the fraud. If the lawsuit is listed as an asset in a bankruptcy proceeding, bankruptcy court approval would be necessary before the suit can be voluntarily withdrawn and may require disclosure of the reasons for the withdrawal. Rules 1.6, 3.3.

Pennsylvania—Philadelphia Opinion 97-7 (7/97) Candor toward tribunals; Confidentiality; Disclosure of fraud; Bankruptcy of clients. A lawyer who possesses an unused portion of an advance payment retainer from a client who

went through bankruptcy after hiring the lawyer is under no obligation to inform the bankruptcy court of the existence of the funds where the lawyer was not handling the bankruptcy, since the lawyer was not before a tribunal in a matter to which the information was relevant. Disclosure could be permitted if the lawyer discovers that the client intentionally placed her money with the lawyer in order to violate the bankruptcy code or other federal statutes; but if the retainer balance was disclosed in the bankruptcy filings, the lawyer may not disclose the existence of the retainer balance. Rules 1.6, 1.15(b), 3.3.

Pennsylvania—Philadelphia Opinion 94-2 (4/94) Confidentiality; Disclosure of fraud; Bankruptcy; Candor toward tribunal. A lawyer whose client in a bankruptcy matter forged the signature of her spouse on relevant documents and who misrepresented the spouse's participation in the case to the lawyer may release the file to the spouse's new counsel. Such disclosure may be necessary to rectify a fraudulent act wherein the lawyer's services were used. Additionally, since the client contacted the lawyer purportedly to secure representation for both spouses, there is no expectation of confidentiality as between them. The lawyer may have an obligation to the court to disclose that a signature on the bankruptcy petition was fraudulent. Rules 1.6(a)(c)(2), 3.3(a)(2).

Texas Opinion 480 (6/20/91) Confidentiality; Disclosure of fraud; Candor toward tribunals; Bankruptcy. A lawyer who represented a corporation in involuntary bankruptcy proceedings and later learned from the client that certain settlement funds purportedly transferred to a third party creditor had been returned to the president of the corporation and placed in a trust to which the president had access, must make a good faith effort to persuade the client to authorize disclosure of this information
to the court. If the client does not consent, the lawyer must himself disclose the information to the bankruptcy court to avoid assisting in perpetrating a fraud on the court. Rules 1.01(f), 1.05(c)(4)(6)(8), 3.03(a)(b)(c), 4.01(b).

Virginia Opinion 1777 (6/13/03) Confidentiality; Former clients; Disclosure of fraud; Candor toward tribunals; Bankruptcy. A lawyer who discovers that a former client for whom he had obtained a discharge in bankruptcy inherited real estate within the statutory 180-day notice period following the bankruptcy filing is neither required nor permitted to inform the bankruptcy court. Absent information clearly establishing fraud on the court, the lawyer must treat the former client's failure to disclose as a mistake. By the time the lawyer learned of the inheritance, the representation had concluded and the individual was no longer a client. Rules 1.6, 3.3.

Related Stories Lawyer Cannot Reveal Client's Omission In Reporting Assets to Bankruptcy Court, 19 Law. Man. Prof. Conduct 430 (07/30/2003).

Virginia Opinion 1140 (10/18/88) Confidentiality; Disclosure of fraud; Candor toward tribunals; Bankruptcy. A lawyer who learns that a bankrupt client, whom he represents in a breach of contract case, may have failed to report potential

assets from the contract case to the bankruptcy trustee must determine whether such failure constitutes a fraud upon the court; if a fraud has been committed, the lawyer must advise the client to correct it and the lawyer himself must reveal information necessary to rectify the matter if the client fails to do so. Opinion 833; DR 4-101(D)(1)(2).

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