

## **ETHICS PRESENTATION**

**May 20, 2022**

### **West Virginia Bankruptcy and Consumer Law Seminar**

#### **Office of Lawyer Disciplinary Counsel**

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### **THE WEST VIRGINIA RULES OF PROFESSIONAL CONDUCT**

The West Virginia Rules of Professional Conduct govern lawyers' conduct both in representing clients, dealing with other attorneys, other parties, the court, and, in some cases, their private lives [for example, a conviction of a crime which reflects adversely on a lawyer's honesty can be a violation of the Rules of Professional Conduct, even if the crime had nothing to do with a case or a client]. The Office of Lawyer Disciplinary Counsel is primarily tasked with screening, investigating, and prosecuting complaints of lawyers who have been alleged to have committed a violation of these Rules.

Our website contains a link to the most up-to-date version of the Rules of Professional Conduct, which includes the amendments that went into effect on January 1, 2015. In addition, the website also contains the West Virginia Rules of Lawyer Disciplinary Procedure, Legal Ethics Opinions that have been rendered by the Lawyer Disciplinary Board from 1976 to the present, links to all of the Supreme Court decisions that have been rendered in disciplinary cases, and contact information for the office staff.

## ETHICS HYPOTHETICAL #1

*Prospective debtor wants to file but “keep out” a significant asset in his case. You decline. Subsequently you see a Section 341 calendar showing he has filed his case with another attorney, and sure enough, this asset has not been disclosed. What can you do?*

The information that a lawyer learns during a conference with a client, or a prospective client, is confidential information that the lawyer may not disclose to third parties, including bankruptcy officials and the client’s currently lawyer, unless one of the exceptions to the duty of confidentiality found in Rule 1.6 of the Rules of Professional Conduct applies. Two exceptions to the duty of confidentiality are relevant:

Rule 1.6(b)(6) permits lawyer to reveal client’s confidences if required to do so by law. A number of bankruptcy statutes require disclosures of debtor’s assets and liabilities and other financial information. 18 U.S.C. §152, a federal criminal statute, imposes criminal penalties on “a person who knowingly and fraudulently conceals...any property belonging to the estate of a debtor...” Whether a lawyer has a duty to disclose confirmation information under the circumstances is a legal question and a matter to be determined under relevant law.

Rule 1.6(b)(2) and (3) permits a lawyer to reveal confidential information of a client to the extent that the lawyer reasonably believes necessary to rectify the consequences of a client’s criminal or fraudulent act “in furtherance of which the client has used or is using the lawyer’s services.” Mere suspicion that the client is committing a fraud on the court is not sufficient to trigger this exception to the duty of confidentiality. However, if you have actual knowledge that the client is committing a fraud on the court and that your services were used to perpetrate the fraud, you may reveal confidential information as necessary to rectify the fraud.

If you know that the bankruptcy petition is fraudulent and you decide to take action to rectify the fraud, you should reveal confidential information of the client only to the extent necessary. The first step usually is a letter to the client or the client’s lawyer requesting that action be taken to rectify the fraud. If this is unsuccessful, you may notify

the bankruptcy administrator. See also Rules 1.2(d), 1.9(c), and 1.18(b).

## **ETHICS HYPOTHETICAL #2**

*Where an asset arises after the commencement of a case, can you comply with a client's direction to seek dismissal rather than disclose it?*

Rule 1.2(d): "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."

Rule 1.16(a)(1): "Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if...the representation will result in violation of the Rules of Professional Conduct or other law."

Rule 1.16(b)(2): "Except as stated in paragraph (c), a lawyer may withdraw from representing a client if...the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent."

Rule 1.16(b)(4): "Except as stated in paragraph (c), a lawyer may withdraw from representing a client if...the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."

Rule 3.4(c): "A lawyer shall not knowingly disobey an obligation under the Rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists."

11 USC §541(a)(7): "The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held...any interest in property that the estate acquires after the commencement of the case."

Additionally, 11 USC §1306(a)(1) states "Property of the estate includes, in addition to the property specified in section 541 of this title...all property of the kind

specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.”

If you decide to withdraw due to a breakdown of the attorney/client relationship, keep your motion to withdraw as vague as possible so as to not reveal information protected by Rule 1.6. If the Court asks for more information, ask if you can disclose that information in camera. You are still counsel of record until the Court enters an order relieving you as counsel per Rule 1.16(c).

### **ETHICS HYPOTHETICAL #3**

*You represent a client in a civil matter and are aware the client has a bankruptcy case pending. Can you proceed to settle the case and provide the settlement check to the client?*

The filing of a bankruptcy petition by a client creates a bankruptcy estate which the trustee is appointed to administer. 11 U.S.C. §541(a) states that property of the estate consists of all legal or equitable interests of the debtor in property as of commencement of the case. If the injury occurred before the bankruptcy filing, the settlement is an asset of the bankruptcy estate, and you should advise your client as such and comply with all applicable law. The fees and costs that are paid to a personal injury attorney do not count as part of an award, however.

Upon disclosure, you may be appointed to represent the trustee as special counsel and need to obtain court approval before accepting or rejecting any settlement offers in the case. In some situations, the debtor may not be pleased with the settlement the trustee wishes to accept.

Rule 1.15(c) states that upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the

client or third person, shall promptly render a full accounting regarding such property.

*Lawyer Disciplinary Board v. Barry Nace*, 232 W.Va. 661, 753 S.E.2d 618 (2013): Supreme Court found that attorney violated West Virginia Rules of Professional Conduct 1.1, 1.3, 1.4(a) and 1.4(b), 1.15(b), 8.4(c) and 8.4(d), and issued a 120-day suspension, ordered 50 hours of community service through pro bono work, and to satisfy any obligations imposed on him in final disposition of pending adversary proceeding in bankruptcy court. The sanctions imposed were based upon a finding that Nace failed to turn over proceeds from a medical malpractice settlement to bankruptcy trustee after being hired to represent the trustee as special counsel. Over \$200,000.00 of proceeds from a settlement were distributed to client without the approval, authority, or knowledge of the bankruptcy estate's trustee.

#### **ETHICS HYPOTHETICAL #4**

*Should a lawyer take on representation of a Chapter 11 debtor even though he or she does not have substantial Chapter 11 experience?*

Rule 1.1 states that a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. A lawyer may accept representation where the requisite level of competence can be achieved by reasonable study and preparation. See Comments 1 and 2 to Rule 1.1:

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to

handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

### **ETHICS HYPOTHETICAL #5**

*How do you advise a corporate client's owner after learning that his or her company which you just helped file for Chapter 11 may have a duty to sue him or her?*

Rule 1.13(f): A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7 [Conflict of Interest; Current Clients]. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

### **FEEES**

Rule 1.5(b) states that "the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to client in writing, before or within a reasonable time after commencing the representation, . . ." Furthermore, any changes in the basis or rate of the fee or expenses is also required to be communicated to the client in writing.

Every fee and expense is required to be "reasonable, and any agreement that concerns a "non-refundable retainer" must be written and explained to the client and meet the reasonableness test of Rule 1.5. Even in so called "non-refundable retainers" and "flat fees," the burden of proof is always upon the attorney to show the reasonableness of the

fees charged. *Committee on Legal Ethics v. Tatterson*, 177 W.Va. 356, 352 S.E.2d 107 (1986). In addition, all funds shall be held in a trust account until earned per Rule 1.15(c). Fees are not to be considered “earned upon receipt” if no work has yet been completed.

### **SOCIAL MEDIA**

In Legal Ethics Opinion 2015-02, the Lawyer Disciplinary Board concluded:

1. Attorneys may advise clients about the content of the clients’ social networking websites, including removing or adding information;
2. Attorneys may connect with a client or former client on a social networking website;
3. Attorneys may not contact a represented person through a social networking website;
4. Although attorneys may contact an unrepresented person through a social networking website, they may not use a pretextual basis for viewing information on a social networking site that would otherwise be private/unavailable to the public;
5. Attorneys may use information on a social networking website in client-related matters;
6. Attorneys may accept client reviews but must monitor those reviews for accuracy;
7. Attorneys may generally comment on or respond to reviews or endorsements;
8. Attorneys may generally endorse other attorneys on a social networking website;
9. Attorneys may (and should) review a juror’s internet presence;
10. Attorneys may connect with judges on a social networking website provided the purpose is not to influence the judge in performing his or her official duties;
11. Attorneys may advertise on a social networking website provided such advertisement complies with the requirements of the Rules of Professional Conduct; and
12. A prospective attorney-client relationship may be formed on a social networking website.

You should know and advise your clients that the bankruptcy trustee will be searching any publicly available information. Comment 8 to Rule 1.1: “To maintain the requisite knowledge and skill, a lawyer must keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”

### **LAWYER WELLNESS**

The West Virginia Judicial & Lawyer Assistance Program (“WVJLAP”) was established by order of the West Virginia Supreme Court in 2013 and its mission is set forth in the Rules of the West Virginia Supreme Court. WVJLAP is a free and confidential assistance program providing consultation, referral, intervention, crisis management, monitoring and peer support for lawyers, judges, bar applicants and law students who are struggling with retirement, stress, anxiety, depression, substance abuse, suicidal ideation or other mental/physical/ emotional health issues. The Mission of WVJLAP is threefold:

- To confidentially assist members of the legal profession to identify quality of life issues, access continuing care resources and engage in an ongoing personal program of recovery;
- To protect the interest of clients, litigants and the general public from harm caused by impaired lawyers or judges; and
- To educate the bench, the bar, and the public to the types, causes and remedies for impairments affecting members of the legal profession.

For more information visit [wvjlap.org](http://wvjlap.org) or call 304-553-7232. Rule 8.3 covers a lawyer’s duties regarding reporting professional misconduct to the ODC.

### **CONCLUSION**

As a self-regulating bar, attorneys have an obligation under Rule 8.3 to report professional misconduct. A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to



that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority. The same duty applies to a lawyer having knowledge that a judge has committed a violation of the applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office. A member of the West Virginia State Bar may contact the ODC for guidance on this duty. However, informal advice is meant for to be a discussion of the caller attorney's own conduct, not a discussion of whether the other attorney's conduct is a violation of the Rules of Professional Conduct. Inquiries may be made from 9 a.m. to 5 p.m. on weekdays by calling (304) 558-7999.

You can also follow us on Twitter! @wv\_odc