DEALING WITH UNREPRESENTED PARTIES

Pupilage 7

November 13, 2014

Table of Contents

Self-Help Resources Pamphlet	Page 1
"Surviving the Emotional Toll of Bankruptcy"	Page 2
Local Rule 2090-2 for Bankruptcy Petition Preparers	Page 4
11 U.S.C. § 110 (Penalty for Bankruptcy Petition Preparers)	Page 5
11 U.S.C. § 707 (Chapter 7 Dismissal or Case Conversion)	Page 10
Select Rules of Professional Conduct	Page 11
Court's Treatment of Unrepresented Parties	Page 14
"A Beginner's Guide to Effectively Addressing the Pro Se Opponent"	Page 15
"Communicating with Unrepresented Parties"	Page 20

THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ARIZONA

THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ARIZONA

BANKRUPTY COURT SELF-HELP CENTER

866-553-0893/ 602.682.4007

www.azb.uscourts.gov

PHOENIX SELF HELP CENTER
U.S. Bankruptcy Courthouse
230 N. 1st Avenue,
6th Floor, Suite 6322,
Phoenix, AZ 85003-1706

TUCSON COURTHOUSE
James A. Walsh Courthouse,
30 S. Scott Avenue,
Tucson, AZ 85701

YUMA COURTHOUSE
John M. Roll U.S. Courthouse
98 W. 1st Street, Suite 270
Yuma, AZ 85364

Free services for individuals who have filed or are considering filing a Chapter 7 or Chapter 13 bankruptcy including:

- Bankruptcy Forms
- Instructional materials
- Informational videos
- Information from Pro Se Law Clerk
- Appointments with Volunteer Attorneys

To meet with a Self Help Attorney volunteer you must first 1) view an informational video; 2) complete a questionnaire, and 3) sign a disclaimer and acknowledgement form. Appointments are scheduled in advance on-line or by phone.

LAWYER REFERRAL RESOURCES:

- State Bar of Arizona: www.azbar.org
- Maricopa County Bar Assn.: (602) 257-4434 (*fee*)
- Pima County Bar Assn.: (520) 623-4625 (*fee*)
- Coconino County Bar Assn.: www.coconinobar.info

STATEWIDE LEGAL SERVICES :

For low income applicants
1—866-637-5341
Azlawhelp.org

FORECLOSURE RESOURCES

- Arizona Foreclosure Prevention Task Force
  877-448-1211
- Mortgage Settlement Program for Arizonans
  855-256-2834/ 602.542.1797
  AZmortgageResource.gov

SELF-HELP RESOURCES: Background:

Bankruptcy laws help people who can no longer pay their debts and get a fresh start. The U.S. Bankruptcy Court for the District of Arizona is committed to providing a high level of customer service. The Court provides free information about how the bankruptcy process works. This information should not substitute for the advice of competent legal counsel.

Debtor Help: www.azb.uscourts.gov/DebtorHelp The person filing the case is called the "Debtor." The Debtor Help link contains basic information a debtor may need to know during the bankruptcy process. The Debtor Help information is organized into these categories: "*Before You File*," "*When You File*," "*After You File*," and "*Frequently Asked Questions*" (FAQs).

- **Creditor Help:** www.azb.uscourts.gov/CreditorHelp A creditor in a bankruptcy case is a person who claims to be owed money by the debtor. This link contains basic information for creditors.

- **Online Chat With Us Live:** www.azb.uscourts.gov Chat online with a Clerk 9:00 a.m. — 4:00 p.m., Monday—Friday.

MAKE GOOD EDUCATED DECISIONS:

The decision whether to file bankruptcy is an important one. You should consider seeking professional advice from a competent bankruptcy attorney.

NOTE: Document preparers, "paralegals" and notary publics cannot advise you on whether bankruptcy is an option best suited to your financial situation.

Updated June 2014

Surviving the Emotional Toll of Bankruptcy

US News

By Daniel Bortz January 18, 2013 10:11 AM

Maybe money can't provide happiness, but it can certainly inspire negative emotions, including sadness, grief, and shame. Those are just a few feelings people may experience when they claim bankruptcy.

Chapter 7, the most common form of consumer bankruptcy in the United States, involves handing over one's non-exempt assets to a trustee, who then allocates funds to the filer's creditors, eliminating all or most of his or her debts. With Chapter 13 bankruptcy, filers undergo a financial reorganization to pay off debts with a goal of preserving assets, such as an estate. Those who file for Chapter 7 are typically people who find themselves in such financial ruin that it's not worth filing for Chapter 13.

While the financial consequences of bankruptcy are disconcerting, the mental burden can be overwhelming, with wide-reaching effects. "It's important to acknowledge the act of filing bankruptcy can be psychologically difficult, cause stress on relationships, and even be traumatic for a family," says Joseph Goetz, president of the Financial Therapy Association.

The focus is often on the financial steps--compiling a comprehensive list of debts, hiring an attorney, seeing the case through--but neglecting the emotional aspect can have long-term consequences. Many people who turn to bankruptcy have juggled their debt for so long that they're emotionally exhausted by the time they're ready to file. According to Rebecca Snyder, president and founder of Evergreen Financial Counseling in Salem, Ore., the problem is more internal than external. "Oftentimes a person's self-esteem takes a stronger hit than their finances," she says.

Many perceptions about bankruptcy are false, according to financial therapists, who provide counseling to people in need of emotional support due to a monetary crisis. While many general psychologists have offered this form of treatment for a number of years, the financial therapy industry is a relatively new field that has grown significantly in the past few years, as more people are coping with the effects of the poor economy. Filers may be concerned they've accumulated so much debt that bankruptcy won't offer relief, worry what their family thinks about the situation, or assume their credit score will be permanently destroyed. Such misguided beliefs build anxiety and fear, and only make the process more taxing. Yet no matter how much debt someone owes, bankruptcy is always a viable option. Some family members may disapprove, but their judgments are irrelevant if bankruptcy is the best solution. Yes, bankruptcy is a black mark on a credit history, but it is erased after 10 years.

"Bankruptcy is never something someone wants to fall into, but it gives you the breathing space to make a fresh start," says Andrea Fisher, an attorney with Squire Sanders in New York City who specializes in bankruptcy. When a client feels isolated--like they're the only person who has filed for bankruptcy--Fisher emphasizes they're not alone in that frightening financial realm. "Misery loves company," she

says. "Show them the statistics. Let them know that there are a lot of other people who file for bankruptcy."

Some believe an attorney's role is strictly to provide legal services, not emotional support. Snyder disagrees: "My opinion is that the relationship is very similar to a doctor and his bedside manner. You can have a doctor who tells you that you have one year left to live and you can look at them and feel their emotional support. Some attorneys can and should provide the same kind of hope to their clients."

However, sometimes the process is so overwhelming that people break down in their attorney's office--or even the court room. To avoid the latter situation, Fisher says attorneys should validate their client's feelings throughout the process and help them feel empowered to take control of their finances and their emotions. "They need to realize that this is not something they have to let continually upset them," she says.

Additionally, it's important for people to reverse their view of bankruptcy. Goetz says many think of it as something shameful and indicative of failure, when it should be seen as a path to a new beginning.

The experience can also be a learning tool. Goetz says bankruptcy itself shouldn't be a filer's only goal but rather part of a long-term plan to restore financial stability. If people distrust themselves with money after bankruptcy, he recommends they implement financial strategies they weren't using before, such as setting up automated savings.

Before becoming a financial therapist, Snyder worked as a grief counselor to people who lost a loved one. She says grieving the death of a friend or family member is similar to grieving the loss of financial identity. "People who file for bankruptcy need to come to terms with realizing that it's OK to have this moment of honesty and clarity of themselves and that they need help," Snyder says.

Blame is another critical component. Although many people's financial situations are a result of the poor economy and other elements outside their control, Snyder says it's important they take ownership for the things they had control over. The next step in the recovery process: Separating one's net worth from personal worth.

The rest is dependent on how well a person crafts a plan for handling finances from then on. To make things easier, Snyder suggests people set themselves up for small victories by making small, achievable goals. "As they accomplish them, then they can start to feel like they're changing," she says.

Anne Brennan Malec, a licensed clinical psychologist and marriage and family therapist at Symmetry Counseling in Chicago, says true emotional recovery lies in whether people are able to change their financial habits. Says Malec: "This process is so painful, in so many different ways, that if you're going to go through it, you have to learn something through it."

District of Arizona Bankruptcy Court Local Rule 2090-2

Bankruptcy Petition Preparers

(a) State Certification Required. Only bankruptcy petition preparers, as defined by Bankruptcy Code § 110, who are certified as legal document preparers pursuant to the Rules of the Supreme Court of the State of Arizona are permitted to prepare documents for filing in the United States Bankruptcy Court for the District of Arizona.

(b) Sanctions. Any bankruptcy petition preparer who prepares a document for filing in the United State Bankruptcy Court for the District of Arizona and who is not a certified legal document preparer as stated above may be subject to the sanctions provided in Bankruptcy Code § 110 and/or as provided by law.

(c) Certification Number. In addition to the requirements of Bankruptcy Code § 110, a bankruptcy petition preparer, certified as a legal document preparer under Arizona law, shall provide his or her certification number and a business phone number on any document prepared for filing.

(d) Other Prohibitions. This Order shall not be construed as a modification of Bankruptcy Code § 110(f), which prohibits bankruptcy petition preparers from using the word "legal" or any similar term in any advertisement or advertising under any category which utilizes said term.

TITLE 11 - BANKRUPTCY
CHAPTER 1 - GENERAL PROVISIONS

§ 110. Penalty for persons who negligently or fraudulently prepare bankruptcy petitions

(a) In this section—

(1) "bankruptcy petition preparer" means a person, other than an attorney for the debtor or an employee of such attorney under the direct supervision of such attorney, who prepares for compensation a document for filing; and

(2) "document for filing" means a petition or any other document prepared for filing by a debtor in a United States bankruptcy court or a United States district court in connection with a case under this title.

(b) **(1)** A bankruptcy petition preparer who prepares a document for filing shall sign the document and print on the document the preparer's name and address. If a bankruptcy petition preparer is not an individual, then an officer, principal, responsible person, or partner of the bankruptcy petition preparer shall be required to—

(A) sign the document for filing; and

(B) print on the document the name and address of that officer, principal, responsible person, or partner.

(2) **(A)** Before preparing any document for filing or accepting any fees from or on behalf of a debtor, the bankruptcy petition preparer shall provide to the debtor a written notice which shall be on an official form prescribed by the Judicial Conference of the United States in accordance with rule 9009 of the Federal Rules of Bankruptcy Procedure.

(B) The notice under subparagraph (A)—

(i) shall inform the debtor in simple language that a bankruptcy petition preparer is not an attorney and may not practice law or give legal advice;

(ii) may contain a description of examples of legal advice that a bankruptcy petition preparer is not authorized to give, in addition to any advice that the preparer may not give by reason of subsection (e)(2); and

(iii) shall—

(I) be signed by the debtor and, under penalty of perjury, by the bankruptcy petition preparer; and

(II) be filed with any document for filing.

(c) **(1)** A bankruptcy petition preparer who prepares a document for filing shall place on the document, after the preparer's signature, an identifying number that identifies individuals who prepared the document.

(2) **(A)** Subject to subparagraph (B), for purposes of this section, the identifying number of a bankruptcy petition preparer shall be the Social Security account number of each individual who prepared the document or assisted in its preparation.

(B) If a bankruptcy petition preparer is not an individual, the identifying number of the bankruptcy petition preparer shall be the Social Security account number of the officer, principal, responsible person, or partner of the bankruptcy petition preparer.

(d) A bankruptcy petition preparer shall, not later than the time at which a document for filing is presented for the debtor's signature, furnish to the debtor a copy of the document.

(e) **(1)** A bankruptcy petition preparer shall not execute any document on behalf of a debtor.

(2) **(A)** A bankruptcy petition preparer may not offer a potential bankruptcy debtor any legal advice, including any legal advice described in subparagraph (B).

(B) The legal advice referred to in subparagraph (A) includes advising the debtor—

(i) whether—

(I) to file a petition under this title; or

(II) commencing a case under chapter 7, 11, 12, or 13 is appropriate;

(ii) whether the debtor's debts will be discharged in a case under this title;

(iii) whether the debtor will be able to retain the debtor's home, car, or other property after commencing a case under this title;

(iv) concerning—

(I) the tax consequences of a case brought under this title; or

(II) the dischargeability of tax claims;

(v) whether the debtor may or should promise to repay debts to a creditor or enter into a reaffirmation agreement with a creditor to reaffirm a debt;

(vi) concerning how to characterize the nature of the debtor's interests in property or the debtor's debts; or

(vii) concerning bankruptcy procedures and rights.

(f) A bankruptcy petition preparer shall not use the word "legal" or any similar term in any advertisements, or advertise under any category that includes the word "legal" or any similar term.

(g) A bankruptcy petition preparer shall not collect or receive any payment from the debtor or on behalf of the debtor for the court fees in connection with filing the petition.

(h) **(1)** The Supreme Court may promulgate rules under section 2075 of title 28, or the Judicial Conference of the United States may prescribe guidelines, for setting a maximum allowable fee chargeable by a bankruptcy petition preparer. A bankruptcy petition preparer shall notify the debtor of any such maximum amount before preparing any document for filing for the debtor or accepting any fee from or on behalf of the debtor.

(2) A declaration under penalty of perjury by the bankruptcy petition preparer shall be filed together with the petition, disclosing any fee received from or on behalf of the debtor within 12 months immediately prior to the filing of the case, and any unpaid fee charged to the debtor. If rules or guidelines setting a maximum fee for services have been promulgated or prescribed under paragraph (1), the declaration under this paragraph shall include a certification that the bankruptcy petition preparer complied with the notification requirement under paragraph (1).

(3) **(A)** The court shall disallow and order the immediate turnover to the bankruptcy trustee any fee referred to in paragraph (2)—

(i) found to be in excess of the value of any services rendered by the bankruptcy petition preparer during the 12-month period immediately preceding the date of the filing of the petition; or

(ii) found to be in violation of any rule or guideline promulgated or prescribed under paragraph (1).

(B) All fees charged by a bankruptcy petition preparer may be forfeited in any case in which the bankruptcy petition preparer fails to comply with this subsection or subsection (b), (c), (d), (e), (f), or (g).

(C) An individual may exempt any funds recovered under this paragraph under section 522 (b).

(4) The debtor, the trustee, a creditor, the United States trustee (or the bankruptcy administrator, if any) or the court, on the initiative of the court, may file a motion for an order under paragraph (3).

(5) A bankruptcy petition preparer shall be fined not more than $500 for each failure to comply with a court order to turn over funds within 30 days of service of such order.

(i)

(1) If a bankruptcy petition preparer violates this section or commits any act that the court finds to be fraudulent, unfair, or deceptive, on the motion of the debtor, trustee, United States trustee (or the bankruptcy administrator, if any), and after notice and a hearing, the court shall order the bankruptcy petition preparer to pay to the debtor—

(A) the debtor's actual damages;

(B) the greater of—

(i) $2,000; or

(ii) twice the amount paid by the debtor to the bankruptcy petition preparer for the preparer's services; and

(C) reasonable attorneys' fees and costs in moving for damages under this subsection.

(2) If the trustee or creditor moves for damages on behalf of the debtor under this subsection, the bankruptcy petition preparer shall be ordered to pay the movant the additional amount of $1,000 plus reasonable attorneys' fees and costs incurred.

(j) **(1)** A debtor for whom a bankruptcy petition preparer has prepared a document for filing, the trustee, a creditor, or the United States trustee in the district in which the bankruptcy petition preparer resides, has conducted business, or the United States trustee in any other district in which the debtor resides may bring a civil action to enjoin a bankruptcy petition preparer from engaging in any conduct in violation of this section or from further acting as a bankruptcy petition preparer.

(2) **(A)** In an action under paragraph (1), if the court finds that—

(i) a bankruptcy petition preparer has—

(I) engaged in conduct in violation of this section or of any provision of this title;

(II) misrepresented the preparer's experience or education as a bankruptcy petition preparer; or

(III) engaged in any other fraudulent, unfair, or deceptive conduct; and

(ii) injunctive relief is appropriate to prevent the recurrence of such conduct,

the court may enjoin the bankruptcy petition preparer from engaging in such conduct.

(B) If the court finds that a bankruptcy petition preparer has continually engaged in conduct described in subclause (I), (II), or (III) of clause (i) and that an injunction prohibiting such conduct would not be sufficient to prevent such person's interference with the proper administration of this title, has not paid a penalty imposed under this section, or failed to disgorge all fees ordered by the court the court may enjoin the person from acting as a bankruptcy petition preparer.

(3) The court, as part of its contempt power, may enjoin a bankruptcy petition preparer that has failed to comply with a previous order issued under this section. The injunction under this paragraph may be issued on the motion of the court, the trustee, or the United States trustee (or the bankruptcy administrator, if any).

(4) The court shall award to a debtor, trustee, or creditor that brings a successful action under this subsection reasonable attorneys' fees and costs of the action, to be paid by the bankruptcy petition preparer.

(k) Nothing in this section shall be construed to permit activities that are otherwise prohibited by law, including rules and laws that prohibit the unauthorized practice of law.

(l) **(1)** A bankruptcy petition preparer who fails to comply with any provision of subsection (b), (c), (d), (e), (f), (g), or (h) may be fined not more than $500 for each such failure.

(2) The court shall triple the amount of a fine assessed under paragraph (1) in any case in which the court finds that a bankruptcy petition preparer—

(A) advised the debtor to exclude assets or income that should have been included on applicable schedules;

(B) advised the debtor to use a false Social Security account number;

(C) failed to inform the debtor that the debtor was filing for relief under this title; or

(D) prepared a document for filing in a manner that failed to disclose the identity of the bankruptcy petition preparer.

(3) A debtor, trustee, creditor, or United States trustee (or the bankruptcy administrator, if any) may file a motion for an order imposing a fine on the bankruptcy petition preparer for any violation of this section.

(4) **(A)** Fines imposed under this subsection in judicial districts served by United States trustees shall be paid to the United States trustees, who shall deposit an amount equal to such fines in the United States Trustee Fund.

(B) Fines imposed under this subsection in judicial districts served by bankruptcy administrators shall be deposited as offsetting receipts to the fund established under section 1931 of title 28, and shall remain available until expended to reimburse any appropriation for the amount paid out of such appropriation for expenses of the operation and maintenance of the courts of the United States.

(Added Pub. L. 103–394, title III, § 308(a), Oct. 22, 1994, 108 Stat. 4135; amended Pub. L. 109–8, title II, § 221, title XII, § 1205, Apr. 20, 2005, 119 Stat. 59, 194; Pub. L. 110–161, div. B, title II, § 212(b), Dec. 26, 2007, 121 Stat. 1914; Pub. L. 111–327, § 2(a)(7), Dec. 22, 2010, 124 Stat. 3558.)

References in Text

The Federal Rules of Bankruptcy Procedure, referred to in subsec. (b)(2)(A), are set out in the Appendix to this title.

Amendments

2010—Subsec. (b)(2)(A). Pub. L. 111–327, § 2(a)(7)(A), inserted “or on behalf of” after “from”.

Subsec. (h)(1). Pub. L. 111–327, § 2(a)(7)(B)(i), in last sentence, substituted “filing for the debtor” for “filing for a debtor” and inserted “or on behalf of” after “from”.

Subsec. (h)(3)(A). Pub. L. 111–327, § 2(a)(7)(B)(ii)(I), struck out “found to be in excess of the value of any services” after “paragraph (2)” in introductory provisions.

Subsec. (h)(3)(A)(i). Pub. L. 111–327, § 2(a)(7)(B)(ii)(II), inserted “found to be in excess of the value of any services” after “(i)”.

Subsec. (h)(4). Pub. L. 111–327, § 2(a)(7)(B)(iii), substituted “paragraph (3)” for “paragraph (2)”.

2007—Subsec. (l)(4)(A). Pub. L. 110–161 amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: “Fines imposed under this subsection in judicial districts served by United States trustees shall be paid to the United States trustee, who shall deposit an amount equal to such fines in a special account of the United States Trustee System Fund referred to in section 586 (e)(2) of title 28. Amounts deposited under this subparagraph shall be available to fund the enforcement of this section on a national basis.”

2005—Subsec. (a)(1). Pub. L. 109–8, § 221(1), substituted “for the debtor or an employee of such attorney under the direct supervision of such attorney” for “or an employee of an attorney”.

Subsec. (b)(1). Pub. L. 109–8, § 221(2)(A), inserted at end “If a bankruptcy petition preparer is not an individual, then an officer, principal, responsible person, or partner of the bankruptcy petition preparer shall be required to—” and added subpars. (A) and (B).

Subsec. (b)(2). Pub. L. 109–8, § 221(2)(B), added par. (2) and struck out former par. (2) which read as follows: “A bankruptcy petition preparer who fails to comply with paragraph (1) may be fined not more than $500 for each such failure unless the failure is due to reasonable cause.”

Subsec. (c)(2). Pub. L. 109–8, § 221(3)(A), designated existing provisions as subpar. (A), substituted “Subject to subparagraph (B), for purposes” for “For purposes”, and added subpar. (B).

Subsec. (c)(3). Pub. L. 109–8, § 221(3)(B), struck out par. (3) which read as follows: “A bankruptcy petition preparer who fails to comply with paragraph (1) may be fined not more than $500 for each such failure unless the failure is due to reasonable cause.”

Subsec. (d). Pub. L. 109–8, § 221(4), struck out par. (1) designation before "A bankruptcy petition preparer shall" and struck out par. (2) which read as follows: "A bankruptcy petition preparer who fails to comply with paragraph (1) may be fined not more than $500 for each such failure unless the failure is due to reasonable cause."

Subsec. (e)(2). Pub. L. 109–8, § 221(5), added par. (2) and struck out former par. (2) which read as follows: "A bankruptcy petition preparer may be fined not more than $500 for each document executed in violation of paragraph (1)."

Subsec. (f). Pub. L. 109–8, § 221(6), struck out par. (1) designation before "A bankruptcy petition preparer shall not" and struck out par. (2) which read as follows: "A bankruptcy petition preparer shall be fined not more than $500 for each violation of paragraph (1)."

Subsec. (g). Pub. L. 109–8, § 221(7), struck out par. (1) designation before "A bankruptcy petition preparer shall not" and struck out par. (2) which read as follows: "A bankruptcy petition preparer shall be fined not more than $500 for each violation of paragraph (1)."

Subsec. (h)(1). Pub. L. 109–8, § 221(8)(B), added par. (1). Former par. (1) redesignated (2).

Subsec. (h)(2). Pub. L. 109–8, § 221(8)(A), (C), redesignated par. (1) as (2), substituted "A" for "Within 10 days after the date of the filing of a petition, a bankruptcy petition preparer shall file a", inserted "by the bankruptcy petition preparer shall be filed together with the petition," after "perjury", and inserted at end "If rules or guidelines setting a maximum fee for services have been promulgated or prescribed under paragraph (1), the declaration under this paragraph shall include a certification that the bankruptcy petition preparer complied with the notification requirement under paragraph (1)." Former par. (2) redesignated (3).

Subsec. (h)(3). Pub. L. 109–8, § 221(8)(D), added par. (3) and struck out former par. (3) which read as follows: "The court shall disallow and order the immediate turnover to the bankruptcy trustee of any fee referred to in paragraph (1) found to be in excess of the value of services rendered for the documents prepared. An individual debtor may exempt any funds so recovered under section 522 (b)."

Pub. L. 109–8, § 221(8)(A) redesignated par. (2) as (3). Former par. (3) redesignated (4).

Subsec. (h)(4). Pub. L. 109–8, § 221(8)(E), substituted "the United States trustee (or the bankruptcy administrator, if any) or the court, on the initiative of the court," for "or the United States trustee".

Pub. L. 109–8, § 221(8)(A) redesignated par. (3) as (4). Former par. (4) redesignated (5).

Subsec. (h)(5). Pub. L. 109–8, § 221(8)(A) redesignated par. (4) as (5).

Subsec. (i)(1). Pub. L. 109–8, § 221(9), inserted introductory provisions and struck out former introductory provisions which read as follows: "If a bankruptcy case or related proceeding is dismissed because of the failure to file bankruptcy papers, including papers specified in section 521 (1) of this title, the negligence or intentional disregard of this title or the Federal Rules of Bankruptcy Procedure by a bankruptcy petition preparer, or if a bankruptcy petition preparer violates this section or commits any fraudulent, unfair, or deceptive act, the bankruptcy court shall certify that fact to the district court, and the district court, on motion of the debtor, the trustee, or a creditor and after a hearing, shall order the bankruptcy petition preparer to pay to the debtor—".

Subsec. (j)(2)(A)(i)(I). Pub. L. 109–8, § 221(10)(A)(i), struck out "a violation of which subjects a person to criminal penalty" after "any provision of this title".

Subsec. (j)(2)(B). Pub. L. 109–8, § 221(10)(A)(ii), substituted "has not paid a penalty" for "or has not paid a penalty" and inserted "or failed to disgorge all fees ordered by the court" after "a penalty imposed under this section,".

Subsec. (j)(3). Pub. L. 109–8, § 221(10)(C) added par. (3). Former par. (3) redesignated (4).

Subsec. (j)(4). Pub. L. 109–8, § 1205, substituted "attorneys" for "attorney's".

Pub. L. 109–8, § 221(10)(B), redesignated par. (3) as (4).

Subsec. (l). Pub. L. 109–8, § 221(11), added subsec. (l).

Effective Date of 2005 Amendment

Amendment by Pub. L. 109–8 effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109–8, set out as a note under section 101 of this title.

Effective Date

Section effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as an Effective Date of 1994 Amendment note under section 101 of this title.

§ 707. Dismissal of a case or conversion to a case under chapter 11 or 13

(a) The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including—

(1) unreasonable delay by the debtor that is prejudicial to creditors;

(2) nonpayment of any fees or charges required under chapter 123 of title 28; and

(3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521 (a), but only on a motion by the United States trustee.

The Debtors must establish cause to obtain dismissal of a voluntary chapter 7 case. In re Leach, 130 B.R. 855, 857 n.5 (9th Cir. BAP 1991). In the 9th Circuit: "a voluntary chapter 7 debtor is entitled to dismissal of his case so long as such dismissal will cause no legal prejudice to interested parties." Debtors bear the burden of proving that dismissal will not prejudice their creditors. In re Bartee, 317 B.R. 362 (9th Cir. BAP 2004).

"Chapter 7 is not something that you can dip your toe into in order to check the temperature of the water. It is something you jump into and you can only be rescued from it if you can show cause." In re Dreamstreet, Inc., 221 B.R. 724 (Bankr. W.D. Tex. 1998).

Select Rules of Professional Conduct

ER 4.2. Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Comment

[1] This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with non-lawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by the law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

[2] In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare ER 3.4(f).

[3] This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

Comment [2013 Amendment]

[4] A person to whom limited-scope representation is being provided or has been provided in accordance with ER 1.2(c) is considered to be unrepresented for purposes of this rule unless the opposing party or lawyer knows of the limited-scope representation and the identity of the lawyer providing the limited representation. With the consent of the client, a lawyer providing limited-scope representation should consider informing the opposing party or lawyer of the limited-scope representation with instructions as to when opposing counsel may communicate directly with the client. Such instructions may include, for example, whom the opposing counsel should contact on specific matters, to whom and where opposing counsel should send pleadings, correspondence and other notices, and whether the lawyer performing limited-scope services is authorized to accept service on the client's behalf.

ER 4.3. Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see ER 1.13(d).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

Comment [2013 Amendment]

[3] A person to whom limited-scope representation is being provided or has been provided in accordance with ER 1.2(c) is considered to be unrepresented for purposes of this Rule unless the opposing party or lawyer knows of the limited-scope representation and the identity of the lawyer providing limited representation. With the consent of the client, a lawyer providing limited-scope representation should consider informing the opposing party or lawyer of the limited-scope representation with instructions as to when opposing counsel may communicate directly with the client. Such instructions may include, for example, whom the opposing counsel should contact on specific matters, to whom and where opposing counsel should send pleadings, correspondence and other notices, and whether the lawyer performing limited-scope services is authorized to accept service on the client’s behalf.

ER 4.4. Respect for Rights of Others

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden any other person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of others. It is impracticable to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from others and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that a document was sent inadvertently, then this Rule requires the lawyer to stop reading the document, to make no use of the document, and to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to return such a document voluntarily is a matter of professional judgment ordinarily reserved to the lawyer. See ERs 1.2 and 1.4.

Court's Treatment of Unrepresented Parties

While it is true that pro se pleadings are held to a less stringent standard than those of litigants represented by counsel, a liberal interpretation of the pleadings does not require liberal treatment of the substantive law. See *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *In re McFadden*, 477 B.R. 686, 689 (Bankr. N.D. Ohio 2012) (citing *Durante v. Fairlane Town Ctr*., 201 Fed. Appx. 338, 344 (6th Cir. 2006)); see also *Shipman v. United States*, 2014 WL 4928858 at * 2 (Fed. Cl. Oct. 1, 2014).

A pro se litigant must follow the same rules of procedure that govern other litigants, and they should not be treated more favorably than parties with attorneys of record. *LBS Fin. Credit Union v. Manning (In re Manning)*, 2013 WL 44428761 at *9 (9th Cir. BAP Aug. 19, 2013) (citations omitted). "Trial courts generally do not intervene to save litigants from their choice of counsel, even when the lawyer loses the case because he fails to file opposing papers. A litigant who chooses himself as legal representative should be treated no differently." *Jacobson v. Filler*, 790 F.2d 1362, 1364-65 (9th Cir. 1986). It is still the pro se litigant's burden to establish a proper legal basis for any relief sought, or defense raised, and to follow the requirements of the Bankruptcy Code, Bankruptcy Rules, and Local Rules. *Heaton v. Miller (In re Miller)*, 2014 WL 3408028 at * 1 n. 5 (Bankr. D. Idaho July 10, 2014) (citations omitted).

It is not the proper function of the court to assume the role as an advocate for a pro se party or to seek out and make the best legal arguments or figure out the most advantageous legal strategies. Such action by the court would be beyond the judicial role, would implicate the court's impartiality, and discriminates against opposing parties who do have counsel. *Jacobsen*, 790 F.2d at 1365 n.7; *Miller*, 2014 WL 3408028 at * 1 n. 5; *McFadden*, 477 B.R. at 690 ("Anything more requires the court to read [the pro se party's] motion, take his factual assertions, and mold them into plausible legal arguments. This is beyond the purview of the court's judicial role and can result in subversion of the court's neutrality").

32-AUG Am. Bankr. Inst. J. 28

American Bankruptcy Institute Journal
August, 2013

Building Blocks I

*28 A BEGINNER'S GUIDE TO EFFECTIVELY ADDRESSING THE PRO SE OPPONENT

Thomas M. Horan[a1]

Womble Carlyle
Sandridge & Rice LLP
Wilmington, Del.
Ericka Fredricks Johnson[a1]
Womble Carlyle
Sandridge & Rice LLP
Wilmington, Del.

The typical lawyer has spent three years in law school, has been admitted to practice after passing a rigorous bar examination and being assessed for his or her character and fitness, and spends hours in continuing legal education every year. Yet despite this extensive training and vetting, sometimes the most challenging adversary that an attorney can face is the one who has received no training at all: the *pro se* litigant.[1]

At some point in one's career, an attorney is going to communicate with a *pro se* party in connection with his or her representation of a client. These interactions can be significant, perhaps in connection with representing a plaintiff against a *pro se* defendant in an adversary proceeding, or they can be more limited, perhaps responding to a *pro se* creditor's questions about a bar date order in connection with the representation of a debtor or creditors' committee. Regardless of the nature of these *pro se* interactions, ethical rules govern.

The American Bar Association's Model Rules of Professional Conduct (the "Model Rules") serve as the basis for the ethical rules of most states. Every state except California[2] has adopted professional conduct rules in the format of the Model Rules; however, the specific professional conduct rules for the state in which one practices should be consulted to understand the variations to the Model Rules discussed herein.

The Model Rules prohibit communications with represented persons regarding matters for which the party is represented. Specifically, Model Rule 4.2 provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.[3]

The purpose of Model Rule 4.2 is to protect the represented party from overreaching by the lawyer, interference with the attorney/client relationship and the uncounseled disclosure of information.[4] Model Rule 4.2 applies even if the represented person consents to the communication or initiates the contact.[5] Accordingly, if it is unclear whether a person is represented or unrepresented in a matter, one must identify whether the person is represented by counsel prior to initiating contact or responding to a communication. Review notices of appearance and filed proofs of claim, and ask the person whether they are represented by counsel before discussing the bankruptcy case, matter or proceeding. Once a determination has been made that the person is unrepresented, Model Rule 4.3 becomes relevant. Model Rule 4.3 proscribes ethical guidelines for communicating with unrepresented persons. Specifically, Model Rule 4.3 provides:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.[6]

According to the comments to Model Rule 4.3, an unrepresented party, particularly one who is unfamiliar with the law, may assume that an attorney is a disinterested authority on the law.[7] Thus, an attorney "will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person."[8] As stated in the Model Rule, the requirement to disclose this potentially adverse connection is required under circumstances where a lawyer ""knows or reasonably should know" that the *pro se* party does not understand the lawyer's role in the matter. The circumstances under which a lawyer "reasonably should know" are ambiguous, ***29** and this ambiguity suggests that disclosures should always be made.

These ethical rules may appear to weaken an attorney's efficacy in advocating for a client when the opposing party is unrepresented. However, Model Rule 4.3 does not prevent an attorney from negotiating or settling a dispute on behalf of his or her client when dealing with an unrepresented person.[9] It also does not prohibit an attorney from drafting documents or explaining the attorney's view on the underlying legal obligations.[10] The key is that disclosure of the attorney's lack of disinterestedness is required and no legal advice may be given to the unrepresented person, which may present difficulty when communicating with a *pro se* party because it is not uncommon for an unrepresented party who is unfamiliar with the legal process to ask a lot of questions. While an attorney's initial reaction may be to be help-ful, the attorney must refrain from helping to the point where helpfulness becomes offering legal advice.

Of course, not all paths toward ethical violations are paved with selflessness and good intentions. The following cases provide examples of potential pitfalls for the unwary. Although the cases do not involve bankruptcy matters, the lessons learned are equally applicable in the bankruptcy context.

In *Hopkins v. Troutner*, the Idaho Supreme Court affirmed the lower court's order setting aside a release of all claims and an indemnity agreement and stipulation for dismissal with prejudice.[11] The lower court judge found that there were violations of the Idaho ethical rules by the defendant's attorney in conducting the negotiations of the release and indemnity agreement, and therefore, set it aside.[12] Specifically, the court relied on an affidavit submitted by the attorney that indicated that the *pro se* plaintiff asked him for what the value of the case would have been.[13] The defendant's attorney responded, "in my opinion, the case was worth $3,000 to $4,000.""[14] The court indicated that the proper response would have been to tell the unrepresented plaintiff that he needed to form his own opinion as to the value of the case or find someone to provide a value, and then to state that the attorney's client would only pay 53,000 or $4,000.[15] This case presents an example of how carefully settlement negotiations with an unrepresented party must be conducted to avoid unintentionally providing legal advice.

In *Suzanne Serv. v. City o/Meriden*,[16] the plaintiff's attorney contacted various employees of the defendant to solicit information that would have otherwise been available through a Freedom of Information Act (FOIA) request. The Connecticut Superior Court held that the attorney violated Connecticut's version of Model Rule 4.2 through his unauthorized communications with the city's employees. Although the employees themselves were not named defendants in the action, the court found that the rule also prohibited unauthorized contact of employees of an organization if such employees have managerial responsibility or the employee's statements could be construed as admissions on behalf of the organization.[17] The court also found that at least one employee was unclear as to the nature of the attorney's inquiry.[18]

Under the rules, it is the attorney's burden to clarify any misunderstandings, and because at least one of the employees was unclear, the attorney was also in violation of Connecticut's version of Model Rule 4.3.[19] Minimal sanctions were imposed on the attorney because all of the information obtained from the employees could have been obtained properly through a FOIA request.[20] This case underscores the importance of understanding the scope of the Model Rules and whether they extend to parties other than named defendants, and emphasizes that the burden of proof is generally going to be on the attorney. Thus, if there is ambiguity, the facts and circumstances will usually be construed in favor of the unrepresented party.

In a Delaware Superior Court case, the court interpreted Delaware's version of Model Rule 4.2 as not prohibiting *ex parte* communications with unrepresented former employees, but requiring under such circumstances a cautionary disclosure pursuant to Delaware's version of Model Rule 4.3. In *Monsanto Co. v. Aetna* ***60** *Cas. & Surety Co.*, an insured, Monsanto Company, sued several of its insurers.[21] The defendant insurers' counsel hired investigators who interviewed former Monsanto employees. During those interviews, the investigators did not inquire as to whether the employees were represented by counsel, did not inform the former employees that they were hired by insurance companies involved in litigation adverse to Monsanto, and misrepresented the scope of the investigation.

In construing Delaware's version of Model Rule 4.2, the *Monsanto* court noted that the rule does not prohibit contact with former employees.[22] However, the rule does require that precautions be taken because Model Rule 4.2 only applies if the lawyer knows a person that is represented by counsel.[23] Further, Model Rule 4.2, read in conjunction with Model Rule 4.3, "contemplate[s] that former employees, unrepresented by counsel, be warned of the respective positions of the parties to the dispute."[24] To illustrate the form of cautionary communication to be used, the *Monsanto* court provided a sample script that investigators were required to state prior to conducting future interviews, which is sometimes referred to as the Monsanto letter.

[1.] I am a (private investigator-attorney) working on behalf of [client]. I want you to understand that [client] and several other insurance companies have sued Monsanto Company. That suit is pending in Delaware Superior Court. The purpose of that lawsuit is to determine whether Monsanto's insurance companies will be required to reimburse Monsanto for any amounts of money Monsanto must pay as a result of alleged environmental property damage ***61** and personal injury caused by Monsanto. I have been engaged by [client] to investigate the issues involved in that lawsuit between Monsanto and its insurance companies.

2. Are you represented by an attorney in this litigation between Monsanto and its insurance companies?
If answer is "yes," end questioning.

If answer is "no," ask:

3. May I interview you at this time about the issues in this litigation?
If [the] answer is "no," end questioning.

If [the] answer is "yes," substance of interview may commence.[25]

Not all courts agree that the Model Rules impose an affirmative duty to provide a Monsanto-like letter outlining cautionary communication.[26] Nonetheless, the *Monsanto* decision reiterates the importance of understanding the ethical guidelines governing communications with unrepresented persons.

Despite the complex ethical and practical issues presented when dealing with self-represented parties, there are certain best practices that practitioners can observe to make these interactions less challenging.

Five Easy Tips

Know the Rules: In addition to the ethical rules applicable in the court where you practice, the court may have local rules or chamber procedures that affect *pro se* litigants. Be familiar with these rules.

Communicate: Misunderstandings and perceived grievances can only be compounded when the *pro se* litigant feels ignored. Responding to a letter or returning a phone call may not resolve the dispute, but it opens communications. It also gives you the opportunity to let the court know that you have been working in good faith to resolve the *pro se* litigant's issues.

Document: Lawyers and laypersons sometimes speak different languages. As a result, misunderstandings often will arise, which can lead to a disparate record before the court of what the lawyer said to the nonlawyer. Documenting conversations with the *pro se* parties, either through a follow-up letter or a contemporaneous memorandum to keep on file, can help you

keep track of what was said and when.

Respect: Related to good communication is showing respect to your *pro se* opponent. They may feel that the lawyers and judges do not understand them and, owing to the professional contacts that the bench and bar have with one another, that outsiders are at a disadvantage. Simply showing understanding and concern about the *pro se* litigant's position--even where it may be non-meritorious--has the potential to reduce the anxiety and acrimony that are common in these situations.

Keep Calm: What may be one of many legal issues on your plate is likely to be a highly personal and emotional issue for the *pro se* litigant. Even if your opponent raises the temperature in communications, do your best to lower it. You will be glad you did.

Footnotes

a1 *Tom Horan is an attorney in Womble Carlyle Sandridge & Rice's Wilmington, Del., office. He also serves as co-chair of ABI's Secured Credit Committee and as a coordinating editor for the ABI Journal. Ericka Johnson is an attorney in the same office and serves as listserve facilitator of ABI's Technology and Intellectual Property Committee*.

1 The legal profession calls self-represented parties *"pro se"* or refers to them as appearing *"in propria persona*," which demonstrates the gulf that often exists between legal professionals and the rest of society; we use Latin phrases that many nonlawyers would neither recognize nor understand.

2 *See* Table of State Adoption of the ABA Model Rules of Professional Conduct, available at www.americanbar.org/groups/prolessional_ responslbility/publlcations/model_rules_of_professional_conduct/alpha_list_ state_adopting_modeLrules.html.

3 Model Rules of Prof'l Conduct R. 4.2.

4 *Id.*, cmt. 1. In general, the comments to the Model Rules serve only as guides to interpreting the Model Rules. Each state's rules of professional conduct should be consulted to understand the weight given to the Model Rules' comments.

5 *Id.*, cmt. 3.

6 Model Rules of Prof'l Conduct R. 4.3.

7 *Id.*, cmt. 1.

8 *Id.*

9 *Id.*, cmt. 2.

10 *Id.*

11 4 P.3d 557 (Idaho 2000).

12 *Id.* at 558.

[13] *Id.*

[14] *Id.*

[15] *Id.* at 560.

[16] Case No., CV94-0241732, 1995 Conn. Super. LEXIS 3134 (Super. CI. Conn. Nov. 9, 1995).

[17] *Id.* at *6.

[18] *Id.* at *11.

[19] *Id.*

[20] *Id.* at *12.

[21] 593 A.2d 1013 (Del. Super. Ct. 1990).

[22] *Id.* at 1016.

[23] The *Monsanto* decision was decided using a prior version of Rule 4.2, but the differences in the former rule to the current rule do not impact the *Monsanto* court's reasoning or continued viability of the cautionary communication to be included in communications with unrepresented employees.

[24] *Monsanto*, 593 A.2d at 1018.

[25] *Id.* at 1021.

[26] *See, e.g., Todd v. Montoya*, Case No. CIV 10-0106, 2011 U.S. Dist. LEXIS 14435 (D.N.M. Jan. 12, 2011) (finding *Monsanto* decision unpersuasive and stating importance of not imposing additional requirements above requirements contained in rules of professional conduct).

26-JUN Am. Bankr. Inst. J. 24

American Bankruptcy Institute Journal
June, 2007

Column
Straight and Narrow

*24 COMMUNICATING WITH UNREPRESENTED PARTIES
Ethical Issues for the Estate Professional

Michael P. Richman[a1]

Foley & Lardner LLP; New York mrichman@foley.com
Geoffrey S. Goodman[a1]
Foley & Lardner LLP; Chicago[1] ggoodman@foley.com

"Hello Attorney Jones. My name is Joe and I am the Chief Financial Officer of Small Trade Creditor, Inc. I understand that you are the attorney for the debtor in the chapter 11 case of Big Company (BC). I am pleased that I am getting a chance to talk to you. Small Trade is out $70,000 because BC did not pay for the widgets we shipped to BC about 20 days before it filed chapter 11. Small Trade has never been involved in a bankruptcy before. I have received some papers in the mail from your office mentioning reclamation, §503(b)(9) of the Bankruptcy Code and other matters. But I don't really understand what that means and we cannot afford to hire a lawyer. What should Small Trade be doing?"

Fielding telephone calls and other inquiries similar to the fictitious one set forth above is commonplace for estate professionals in chapter 11 cases. Indeed, counsel for the debtor and the creditors' committee will likely field hundreds (or even thousands) of calls from unrepresented parties during the course of a chapter 11 case, even in the so-called "mega cases." In certain instances, the unrepresented party is a neophyte to the chapter 11 process like Small Trade. In other instances, however, the unrepresented party may be, among other things, a sophisticated financial creditor, a member of the committee or even a client of the estate professional's firm in other matters who is "going it alone" in the chapter 11 case.

In each instance, when an estate professional communicates with an unrepresented party, he or she must be aware of the dictates of Rule 4.3 of the Model Rules of Professional Conduct, which governs an attorney's ethical duties when dealing with unrepresented parties. Unfortunately, given the dearth of case law applying Rule 4.3 in the bankruptcy context, estate professionals have little guidance in navigating the pitfalls in their dealings with unrepresented parties. This article provides an overview of the principles of Rule 4.3, then applies those principles to representative scenarios in the chapter 11 process where estate professionals deal with unrepresented parties.

Overview of Rule 4.3

Rule 4.3 of the Model Rules provides as follows:
Rule 4.3: Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.
Model Rules of Prof'l Conduct R. 4.3.[2]

Rule 4.3 contains three core principles for dealing with unrepresented parties. First, an attorney cannot mislead an unrepresented party as to the attorney's role in the matter. The Comments to Rule 4.3 recognize that an unrepresented party, particularly if such party is inexperienced in legal matters, "might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client." Model Rules of Prof'l Conduct R. 4.3 cmt. (2003). As such, the attorney's role as an advocate for his or her client must be made crystal clear to the unrepresented party. An attorney must "make clear to the unrepresented [party] the lawyer's role in the case, including the nature of the case, the identity of the lawyer's client, and the fact that [his client] is an adverse party." *Brown v. St. Joseph County*, 148 F.R.D. 246, 254 (N.D. Ind. 1993).

Second, if an unrepresented party appears to misunderstand the attorney's role in the matter, the attorney must act affirmatively to correct the misunderstanding. *See Jones v. Allstate Ins. Co*., 45 P.3d 1068 (Wash. 2002) (*en banc*) (holding that a claims adjuster for Allstate violated Rule 4.3 by failing to correct the plaintiff's misunderstanding that the adjuster had her best interests at heart in the settlement of a claim); *X-It Prod. L.L.C. v. Walter Kiddie Portable Equip. Inc*., No. Civ. A. 2:00CV513, 2002 WL 1769804 (E.D. Va. June 25, 2002) (attorney violated Rule 4.3 by allowing unrepresented defendant to mistakenly believe he was neutral when he in fact represented the plaintiff).

Third, an attorney cannot give any advice to an unrepresented party whose interests conflict or have a reasonable possibility of being in conflict with his client except for the advice to engage counsel. *See* ***25** *Molski v. Mandarin Touch Restaurant*, 359 F. Supp.2d 924, 929 (C.D. Cal. 2005) ("It is unethical for a lawyer to offer advice to an unrepresented party whose interests actually or potentially conflict with the lawyer's client.") (citing Rule 4.3); *Cf. Heutel v. Stumpf*, 783 S.W.2d 421, 423 (Mo. Ct. App. 1989) (finding no violation of Rule 4.3 where attorney strongly suggested that unrepresented party hire her own counsel). This provision was added in 2002 to discourage attorneys from over-reaching when negotiating with unrepresented parties. *See* ABA Report to the House of Delegates, No. 401 (Feb. 2002).

While these three core principles appear straightforward, they are not always easy to apply in the chapter 11 process, as discussed below.

Examples of Rule 4.3 Scenarios in Chapter 11 Cases

Chapter 11 professionals are confronted on a regular basis with scenarios that implicate the principles of Rule 4.3. In each scenario, the chapter 11 professional must consider how Rule 4.3 impacts how he or she should communicate with the unrepresented party.

Scenario #1: Claim Negotiations with a Trade Creditor

Creditor X, an unsophisticated trade creditor, calls debtor's counsel to discuss an objection the debtor filed to Creditor X's rejection damages claim under a widget supply agreement. Creditor X states that he believes he is entitled to a claim for the full amount owed for unsupplied widgets under the supply agreement, but admits that he does not understand the concept of rejection damages. As such, he asks debtor's counsel for his view of the "fair value" of Creditor X's claim.

Debtor's counsel should not give Creditor X his opinion of the fair value of Creditor X's claim or even a range of values. Doing so likely would qualify as providing "legal advice" in violation of Rule 4.3. In *Hopkins v. Troutner*, 4 P.3d 557 (Idaho 2000), an unrepresented plaintiff asked defense counsel for his opinion of the value of the plaintiff's case. In response, defense counsel gave his opinion, which led to a quick settlement. *See id*. at 558. The court held that defense counsel violated Rule 4.3 by providing "legal advice" to the plaintiff. The court held that the circumstances surrounding the inquiry should have led defense counsel to believe that his opinion of the value of the case would be relied on by the plaintiff, who was unsophisticated. *See id*. at 560; *see also Molski*, 359 F. Supp.2d at 929 (holding that attorney gave impermissible legal advice in violation of Rule 4.3 by proclaiming that the unrepresented defendant had "no bona fide defense" to his client's lawsuit); Model Rules of Prof'l Conduct R. 4.3 cmt. (2003) (stating that "[w]hether a lawyer is giving impermissible advice may depend on the character and legal sophistication of the unrepresented person, including the setting in which the behavior and comments occur").

The better course would be for debtor's counsel to remind Creditor X that he represents the debtor—and not Creditor X—and therefore cannot give any opinion regarding the value of Creditor X's claim. Rather, he can only advise Creditor X of the terms on which the debtor is willing to settle the dispute over Creditor X's claim.[3] Finally, if Creditor X would like to discuss those terms with a third party or has any other concerns about his claim, he should secure his own independent counsel. This course may delay the claims-resolution process, but it will ensure that debtor's counsel does not run afoul of the ethical obligations in Rule 4.3.

***80 Scenario #2: Plan Negotiations and a Member of the Committee**

Barry Bondholder is an unrepresented member of the committee and holds 40 percent of the $20 million in unsecured bonds issued by the debtor. The bonds are only a small percentage of the $400 million in estimated unsecured claims asserted against the debtor. As such, Barry was the only bondholder appointed to the committee. Barry purchases distressed debt and has served on approximately 20 creditor committees in chapter 11 cases.

The case has reached the stage where the various constituencies are negotiating the terms of a chapter 11 plan. On the way to a plan negotiation session, Barry requests that committee counsel provide Barry with some advice regarding how to approach his negotiations with the debtor's new investors over how equity in the reorganized debtor will be split between the bondholders and the investors. The debtor's other unsecured creditors will be receiving cash payments under the plan and are unaffected by the bondholder/investor negotiations.

Rule 4.3 does not prohibit committee counsel from providing legal advice to Barry to assist him in his negotiations with the investors. Rule 4.3 only prohibits providing legal advice to an unrepresented party when the interests of that party are *adverse* to the interests of the attorney's client. Here, Barry's interests are aligned with the interests of the committee, as Barry is acting to increase distributions to all bondholders in a way that does not impact the rest of the unsecured creditor constituency. Although the bondholders are only a small class of unsecured creditors in the case, the committee has a fiduciary duty to the bondholders and must attempt to protect their interests. *See In re Bohack Corp.*, 607 F.2d 258, 262 n.4 (2d Cir. 1979) ("The committee owes a fiduciary duty to other creditors and must guide its actions so as to safeguard as much as possible the rights of *minority* as well as majority creditors.") (emphasis added); *In re Victory Markets Inc.*, 195 B.R. 9, 16 (N.D.N.Y. 1996) ("[A]n unsecured creditors' committee has a fiduciary obligation to represent the interests of all unsecured creditors.").

Scenario #3: More Plan Negotiations and a Member of the Committee

Following up on the scenario above, obtaining a large equity stake in the reorganized debtor is not Barry Bondholder's only goal in the plan negotiations. Barry also believes that he is entitled to a "substantial contribution" claim against the debtor, pursuant to §503(b)(3)(D) of the Bankruptcy Code, for his work on the debtor's chapter 11 case. Barry asks committee counsel for advice on how to convince the other constituencies that they should agree to set aside $1 million out of the $20 million in cash available for unsecured creditors to pay Barry's substantial contribution ***81** claim. In doing so, Barry notes that he is asking for committee counsel's advice on the substantial contribution issue because he always heard that committee counsel was "bondholder friendly."

Rule 4.3 requires that committee counsel make two points in responding to Barry's request. First, committee counsel must remind Barry that the committee and its counsel are fiduciaries for all unsecured creditors. As such, committee counsel's role is to increase the assets available for all unsecured creditors, not to favor one unsecured creditor or any group of unsecured creditors at the expense of others.

Second, committee counsel should not provide any advice to Barry on his substantial contribution claim. Unlike his negotiations with the investors, which if successful would provide a benefit to all bondholders, Barry is acting solely for his own interests in pursuing the substantial contribution claim. Moreover, Barry's attempt to lay claim to $1 million of the $20 million pot available for unsecured creditors puts his interests in direct conflict with the interests of all other unsecured creditors. Committee counsel therefore must decline to provide Barry with any advice on his substantial contribution claim.[4]

It is important to note, however, that committee counsel should not actively discourage Barry from filing the substantial contribution claim. While Barry's sophistication gives committee counsel more latitude to discuss the merits of the claim than

the situation with Creditor X described above,[5] committee counsel should still tread lightly given Barry's unrepresented status. The prudent approach would be to (1) inform Barry that the committee cannot assist him with his substantial contribution claim, (2) advise Barry that the committee will independently analyze the claim and may raise objections, and (3) suggest that Barry consider retaining independent counsel to advise him in that endeavor.

Scenario #4: Creditor Release Issue

Debtor's counsel is negotiating the terms of a critical vendor agreement with Creditor Z, an unrepresented trade creditor. Creditor Z has some experience in chapter 11 cases, but has not been involved in a case governed by BAPCPA. The debtor owes Creditor Z $600,000, almost all of which arose out of Creditor Z's shipments of goods to the debtor within 20 days of the petition date. The debtor's proposed critical vendor agreement would pay 50 percent of Creditor Z's claim over a two-year period. In exchange, Creditor Z would release any other claims against the debtor arising out of its pre-petition shipments of goods, including any claims under §503(b)(9) of the Code.

Creditor Z calls debtor's counsel when he is about to sign the critical-vendor agreement. He informs debtor's counsel that "I have never received more than a 50 percent recovery in any other chapter 11 case, and I am sure I would never recover 50 percent on my unsecured claim in this case unless I enter into this agreement. Thanks for your help. Where should I send the signed agreement?"

Here, Creditor Z clearly is assuming that his pre-petition shipments would be treated as an unsecured claim. In addition, Creditor Z appears to be relying on debtor's counsel's expertise and does not appreciate the impact of his waiver of rights under §503(b)(9) by entering into the critical-vendor agreement.

Under these circumstances, debtor's counsel arguably has an ethical duty to explain the consequences of Creditor Z's release of rights under §503(b)(9) by entering into the critical-vendor agreement. The Comment to Rule 4.3 provides that "[t]his Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may...prepare documents that require the person's signature...." Model Rules of Prof'l Conduct R. 4.3 cmt. (2003). Courts, however, have found violations of Rule 4.3 in cases where lawyers have prepared documents for the signature of an unrepresented party without explaining the potential adverse consequences of signing the documents. *See Office of Disciplinary Counsel v. Rich*, 633 N.E.2d 1114, 1117 (Ohio 1994) (attorney violated Rule 4.3 by preparing legal documents for an unrepresented party to sign without explaining the consequences to her and the benefit to his client from signing the documents); *Jones*, 45 P.3d at 1078-79 (claims adjuster violated Rule 4.3 by failing to explain the legal consequences of a release to unrepresented party).

Although this is a close call, given the important rights that Creditor Z would be waiving by entering into the critical vendor agreement, debtor's counsel has a duty to (1) briefly inform Creditor Z about §503(b)(9), (2) advise Creditor Z that the critical vendor agreement would release all rights on his pre-petition claim other than the rights provided by the agreement, and (3) suggest Creditor Z engage his own counsel to review the agreement before he signs and returns it.

Scenario #5: Communications with Firm Client

Important Client Inc. (ICI) is a large trade creditor and a member of the committee. Committee counsel has represented ICI in other matters, but ICI is unrepresented in the debtor's chapter 11 case. The debtor has proposed a sale of substantially all of its assets. Under the sale, the buyer would, among other things, partially assume the debtor's trade creditor claims, including ICI's claim. The sale would also provide trade creditors with an opportunity to recover more on account of their claims based on providing future business to the buyer.

The committee may ultimately reach a deal with the debtor on the terms of the sale; however, the committee is still negotiating certain material issues with the debtor. As such, debtor's counsel has extended the committee's deadline to file objections to the sale. Individual creditors, however, have not received an extension of the objection deadline and must promptly file any objections to the sale. General counsel to ICI approaches committee counsel and asks for his advice on which objections ICI could raise to the sale.

As an initial matter, committee counsel has a duty to remind ICI that he ***82** represents the committee as a whole and does not represent ICI or any other committee member individually in this case. In addition, committee counsel cannot provide any advice to ICI regarding potential objections it could raise to the sale. Rule 4.3 prohibits attorneys from providing legal advice to an unrepresented party when the party's interests have "a *reasonable possibility* of being in conflict with the interests of the client." Model Rules of Prof'l Conduct R. 4.3 (emphasis added). In this case, because the committee has not yet reached a deal with the debtor (although it may do so), at this point the interests of the committee have a reasonable possibility of being in conflict with the interests of ICI. Had the committee already decided to object to the sale, the interests of the committee and ICI would be aligned and Rule 4.3 would not preclude committee counsel from offering suggested objections to ICI.

Conclusion

Chapter 11 estate professionals encounter unrepresented parties at almost every juncture in a chapter 11 case. This article summarizes the obligations imposed by Rule 4.3 and analyzes a number of scenarios where an estate professional must consider the impact of Rule 4.3 before communicating with an unrepresented party. Although every communication with an unrepresented party is different, the estate professional should be (1) clear and candid about his or her role in the chapter 11 process, (2) careful to avoid overreaching, especially in documents signed by the unrepresented party, (3) aware of potential adverse interests and how any communications could be construed as legal advice, and (4) quick to suggest that the unrepresented party obtain independent counsel. Following this approach should assist the estate professional in navigating through the thorny ethical issues that arise when engaging in the (often necessary) communications with unrepresented parties in the chapter 11 process.

Footnotes

a1 *Michael Richman is a partner in the New York office of Foley & Lardner LLP and is the chair of its national Business Reorganizations Practice Group. He is also a former ABI president and Board chairman. Geoffrey Goodman is a senior counsel in the firm's Chicago office*.

1 The authors gratefully acknowledge the research assistance provided by Michael Phinehart in the preparation of this article.

2 Rule 4.3 has a counterpart in Rule 7-104(A)(2) of the Model Code of Professional Responsibility, which provides: "During the course of his representation of a client a lawyer shall not...(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client." Courts have found that there is no material difference between Rule 7-104(A)(2) and Model Rule 4.3. *See, e.g.*, *Attorney O v. Mississippi State Bar*, 587 So. 2d 228, 232 (Miss. 1991). To date, 47 states have adopted the Model Rules, with New York following the Model Code and Maine and California following their own separately developed ethical rules.

3 The Comment to Rule 4.3 provides that "[t]his Rule does not prohibit a lawyer from negotiating the terms of a transaction or setting a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may...prepare documents that require the person's signature...." Model Rules of Prof'l Conduct R. 4.3 cmt. (2003). Whether a particular communication is an acceptable negotiation with an unrepresented party or impermissible legal advice depends in part on the sophistication of the unrepresented party and the circumstances surrounding the communication. In this scenario, the unrepresented party is clearly looking for guidance, which requires the estate professional to exercise extreme caution in proceeding with the negotiation to protect against misleading the unrepresented party and running afoul of the requirements of Rule 4.3.

4 Indeed, if committee counsel were to assist Barry in his substantial contribution claim negotiations, even informally, he arguably would be (1) violating his fiduciary duty to the committee and (2) running afoul of the §1103(b) prohibition against representing interests adverse to the committee, *See, e.g.*, *In re Johns Manville Corp*., 26 B.R. 919, 925 (Bankr. S.D.N.Y. 1983) ("[W]here a committee representative or agent seeks to represent or advance the interest of an individual member of a competing class of creditors or various interests or groups whose purposes and desires are dissimilar, this fiduciary is in breach of his duty of loyal and disinterested service."); 11 U.S.C. §1103(b) (stating in part that "[a]n attorney or accountant employed to represent a committee...may

not, while employed by such committee, represent any other entity having an adverse interest in connection with the case").

[5] *See W.T. Grant Co. v. Haines*, 531 F.2d 671, 675-76 (2d Cir. 1976) (relying in part on the experience of an unrepresented executive in finding that counsel's behavior in communicating with the executive, while "not to be encouraged," did not violate Model Code 7-104(A)).

26-JUN AMBKRIJ 24

End of Document