

**LITIGATION: PROFESSIONALISM**  
**PROPER LEGAL REPRESENTATION OF THE CLIENT**

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**I. The Attorney- Client Relationship**

**A. No Particular Formalities Required**

1. No particular formalities are needed to create an attorney-client relationship. The conduct of the parties can suffice to form the relationship.
2. The existence of the relationship turns on the reasonable expectations of the “client” in light of all of the attendant circumstances.

**B. Debt Relief Agency Disclosures & Requirements**

1. Notices must be sent to prospective clients within three days of the first offer to provide bankruptcy representation. 11 U.S.C. § 527(a) & (b); *In re Gutierrez*, 356 B.R. 496 (Bankr. N.D. Cal. 2006) (attorney violated provision of BAPCPA by failing, within three days after meeting with debtor-client to discuss possibility of filing bankruptcy petition, to provide debtor-client with notice; accordingly, disgorgement of fees was ordered).
2. Attorney must execute a written contract with the client within five days of first providing assistance. The contract must clearly explain the services to be provided, the charges, and the terms of payment. 11 U.S.C. § 528(a).

**C. Conflicts of Interest**

1. In chapter 11 cases, the debtor in possession has a fiduciary obligation to the bankruptcy estate, and as attorney for the debtor in possession the chapter 11 attorney must be disinterested. In chapter 7 cases, the trustee has the fiduciary obligation to the estate, and the trustee and the trustee’s attorney must be disinterested. The attorney for the chapter 7 debtor is not so constrained. 11 U.S.C. §§ 327 & 328.

2. ABA Model Rules of Professional Conduct provide:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

ABA Model Rules of Professional Conduct Rule 1.7.

3. Somewhere Along the Potential Conflict to Actual Conflict Continuum:

- a. Purchasing assets of the debtor or taking a security interest in the debtor's collateral to secure payment of fees.
- b. Simultaneous representation of a corporation, partnership or limited liability company and the entity's shareholder, partner or member.
- c. Representation of married, but separated, debtors.
- d. Representation of clients with competing interests, such as two unmarried individuals who are jointly liable on debts.

D. The Engagement Letter

1. Elements:

- a. The identity of the client. In many situations it is important to clarify who is (and, perhaps more importantly who is not) the client. The individual or the business?
- b. The scope of the engagement. A lawyer may limit the scope of what otherwise might normally be a broader engagement (for example, by agreeing to represent the debtor in the main bankruptcy case, but not any adversaries), as long as the limitation is clearly understood by the client and the limited representation does not violate any disciplinary rules. Because the courts are not privy to the retention agreement, attorneys may be required to file a formal request for withdrawal in matters beyond the scope of the written agreement.
- c. The fee that will be charged. Also include how and/or when the client will be billed; the types of costs and expenses that will be billed to the client; what the client's responsibilities are with respect to payment; and what rights the lawyer has in the event the client fails to discharge those responsibilities.
- d. The allocation of work within the firm. A lawyer may allocate various tasks involved in representing a client to different lawyer and non-lawyer personnel who are qualified to undertake those tasks. It is prudent to include a provision in an engagement letter regarding this.

2. Avoid:

- a. Provisions restricting the client's control over key decisions concerning a matter. Don't try to condition the client's right to settle the case on securing your approval. Don't seek to limit the client's right to discharge you.
- b. Provisions regarding conclusion of a representation. Don't put provisions in your engagement letters giving you the right to withdraw from representing a client in circumstances other than those provided for in professional rules. Don't try to alter your entitlement to a fee upon withdrawal or termination of your representation by the client.
- c. Provisions limiting liability for malpractice or other professional

misconduct.

- d. Provisions limiting the client's right to resort to the grievance system.

- 3. Updated or Amended Engagement Letter May be Necessary, if the following is applicable:

- a. Has the scope of the relationship changed?
- b. Have clients been added or removed from the representation?
- c. Have any of the terms of the letter become outdated?
- d. Are there additional conflicts that should be disclosed and waived?
- e. Have fee provisions changed?

E. Termination of Representation

- 1. A client is free to discharge a lawyer at any time, with or without cause. No special formality is required to effect the discharge of an attorney.
- 2. When representation is terminated by mutual agreement of lawyer and client, the lawyer remains under the same obligations as when the termination is made by the client. In most jurisdictions, even if just cause exists, the attorney must, before discontinuing his or her representation, obtain leave of the court and give proper notice, so as not to leave the client without adequate representation.
- 3. When a lawyer withdraws from representing a client, the lawyer bears all of the responsibilities involved in situations where the representation is terminated at the instance of the client or by mutual agreement. *See* ABA Model Rules of Professional Conduct Rule 1.16.
  - a. A lawyer should not withdraw from employment until he or she has taken reasonable steps to avoid foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled and complying with applicable laws and rules; furthermore, a lawyer who withdraws from employment must refund promptly any part of a fee paid in advance that has not been earned.
    - (i) Even where grounds for withdrawal exist, a lawyer ordinarily must take reasonable measures to protect the

client's interests. Such measures include delaying withdrawal for a reasonable period to provide the client with the opportunity to obtain successor counsel, advising the client of any imminent pending deadlines, and seeking to delay resolution of any pressing issues.

- (ii) There is the possibility, of course, that a court may deny leave to withdraw even though the lawyer has complied with the rule requirements and good grounds for withdrawal exist. In such circumstances, the lawyer is obliged to continue the representation.

b. Circumstances in which the lawyer may or must withdraw:

- (i) Client fails to advance money for costs, or to recognize his or her liability for attorney's fees, or to make requested payments on account of fees during the progress of protracted litigation.
- (ii) Insistence by the client that improper or unethical methods or tactics be used by the attorney.
- (iii) Client failures to communicate or otherwise cooperate with counsel.
- (iv) Actual conflict of interest arises.

4. Termination Letter

- a. The letter sent from lawyer to client telling the client that the matter for which representation was sought has concluded or that the lawyer is no longer performing work for the client.

b. Purposes of Termination Letter:

- (i) Informs the client that the representation has ended, giving the client notice that the lawyer is no longer working for the client and that new counsel, if needed, should be sought. Not using a termination letter risks failing to communicate the end of the relationship with the client and opens the door to disputes. On the other hand, using a termination letter risks lost business from the client in the future.
- (ii) Creates a finite end to the lawyer-client relationship,

allowing lawyers, clients, and courts to determine (for purposes of conflict analysis) whether the client is a current or former client. In cases in which the status of the relationship is unclear, the court will likely fault the lawyer for the ambiguity, even if several months have passed since the lawyer last did work for the client.

- (iii) Specifies the date on which the attorney-client relationship ended, which may affect the statute of limitations on a malpractice claim.
- (iv) Provides an opportunity to discuss file retention and outstanding fees, expenses and disbursements. The client is entitled to the file upon request, regardless of whether the client owes the attorney money. If Local Rules require counsel to retain the original signed documents, counsel should provide copies to the client.

5. Fees Upon Termination

- a. Upon termination, attorneys are obligated to return any unearned portion of advanced fees.
- b. Courts generally allow attorneys to only receive *quantum meruit* compensation when discharged without cause, regardless of contrary language in the attorney's fee agreement.
- c. If an attorney is discharged for cause for failing to provide adequate legal services and has provided no value to the client, the attorney is not entitled to any compensation.

F. Nonengagement

- 1. When an attorney declines representation, the attorney must make clear to the prospective client that the attorney has not been retained so that the person or entity does not leave with the feeling that they now have an attorney.
- 2. A nonengagement letter can be useful for prospective relationships. It serves to protect both the potential client and attorney if the attorney determines not to represent a particular client in a specific matter.

## II. Attorney-Client or Work-Product Privilege

## A. Privilege

### 1. Defined

- a. The attorney-client privilege refers to the right of a client to refuse to disclose confidential communications made to his or her attorney. The filing of a bankruptcy case may affect the client's right to assert this privilege, depending on the type of entity filing and the chapter under which the entity files.
  - (i) Under state law, the specific elements of the privilege vary. In bankruptcy, federal law controls scope of attorney-client privilege.
  - (ii) Under federal common law the elements are those described in *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950): 1. The asserted holder of the privilege is or sought to become a client; 2. The person to whom the communication was made (a) is a member of the bar of a court or his subordinate and (b) in connection with his communication is acting as a lawyer; 3. The communication relates to a fact of which the attorney was informed (a) by his client, (b) without the presence of strangers, (c) for the purpose of securing primarily, either (1) an opinion on law, (2) legal services, or (3) assistance in some legal proceeding, and (d) not for the purpose of committing a crime or tort; and 4. The privilege has been (a) claimed and (b) not waived by the client.
  - (iii) The attorney-client privilege only protects disclosure of communications, not the underlying facts communicated to an attorney. Parties may not cloak relevant fact in privilege merely by alleging it was discussed with counsel. Additionally, the attorney-client privilege does not protect criminal plotting or statements made to counsel about it
- b. The work-product privilege serves to protect certain documentation prepared by the attorney in anticipation of litigation.

- (i) Work-product consists of material, tangible and intangible, that reflects the attorney's investigative and preparatory efforts in planning a case. *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947).
- (ii) In bankruptcy, federal common law governs control of debtor's privileges.
- (iii) The attorney work-product privilege originated in an adversary context and is intended to be limited to that context. The doctrine generally applies where information is sought by an adversary during the course of litigation. However, invocation of the doctrine does not necessarily require the existence of an ongoing adversarial action, so long as litigation is anticipated. *See In re Financial Corp. of America*, 119 B.R. 728, 738 (Bankr. C.D. Cal. 1990). Therefore, in the bankruptcy context, Rule 26(b)(3) has been held to apply to nonadversarial Rule 2004 proceedings. *Id.*

## 2. Exceptions to Privilege

- a. Crime-Fraud. Disclosure allowed to prevent reasonably likely death or substantial bodily harm or to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.
- b. Attorney Malpractice. Disclosure allowed to secure legal advice about the lawyer's conduct under professional rules; to establish a claim or defense on behalf of the lawyer in the controversy between the lawyer and the client; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or to comply with the law or a court order.

## 3. Privilege and the Trustee

- a. Upon filing of the petition, it is possible that privileges personal to the debtor will pass to the trustee, such as the attorney-client privilege. Because of this, the debtor will not be allowed to refuse to answer questions asked by the creditors.



- b. Trustee in bankruptcy has statutory authority to require turnover of records held by debtor's former attorneys, but such authority is subject to any applicable privilege.
- c. Another issue is whether a trustee can waive an attorney-client privilege. The Supreme Court held in *Commodity Futures Trading Com'n v. Weintraub*, 471 U.S. 343, 105 S. Ct. 1986, 85 L. Ed. 2d 372 (1985), that the trustee of a debtor-corporation in a chapter 7 case could waive the attorney-client privilege of that entity. The Court reasoned that the trustee stepped into the shoes of the corporate officers and directors and in that capacity could waive that privilege on the corporation's behalf.
- d. Unresolved: who controls the privilege where an individual or partnership files a chapter 7 petition; who controls the privilege when a chapter 11 is filed and a trustee is appointed; and whether a distinction should be drawn between a corporate filing and an individual filing.

## B. Protecting Privilege

### 1. Communicating and Consulting with Associates of Client

- a. Family Members of Client
  - (i) Under certain circumstances the attorney-client privilege can extend to shield communications to others when the purpose of the communication is to assist the attorney in rendering advice to the client. *United States v. Adlman*, 68 F.3d 1495 (2d Cir. 1995).
  - (ii) In *U.S. v. Stewart*, 287 F. Supp. 2d 461 (S.D.N.Y. 2003), the court ruled that an unsolicited e-mail sent by Martha Stewart to her attorney a year before her indictment was not protected by the *attorney-client privilege*. Stewart waived the privilege when she sent a copy of the e-mail, which dealt with Stewart's sale of ImClone stock to her daughter. However, the e-mail was privileged under the Second Circuit's approach to the *work-product doctrine* because even though Stewart and her daughter did not share a "litigation interest," they did share a common familiar interest, which Stewart did not waive by sending a copy of the e-mail to her daughter.

- (iii) Counsel can request the relative of a client refrain from giving information to the opposing party without running afoul of the Rules of Professional Conduct. *See* ABA Model Rules of Professional Conduct Rule 3.4.

b. Business Associates of Client

- (i) For purposes of the attorney-client privilege, the presence of certain third parties who are agents or employees of an attorney or client, and who are necessary to the consultation, will not destroy the confidential nature of the communications.
- (ii) The attorney-client privilege is destroyed when such communications are made in the presence of a nonnecessary agent of the attorney or client.
- (iii) Federal common law does not recognize accountant-client privilege. *In re Oxford Royal Mushroom Prods., Inc.*, 41 B.R. 863 (Bankr. E.D. Pa. 1984).
- (iv) Counsel can request the employees of a client refrain from giving information to the opposing party without running afoul of the Rules of Professional Conduct. *See* ABA Model Rules of Professional Conduct Rule 3.4.

2. Electronic Data

- a. E-data is also subject to the attorney-client privilege and attorney work-product privilege. With so many documents potentially discoverable, counsel will want to avoid inadvertent disclosure which could waive the privilege. Wherever possible, stamp each page of a confidential and/or privileged document as such.
- b. Using Encryption. Regarding the problem of potentially insecure client communications, encryption programs cipher e-mail messages to ensure that unintended recipients cannot read the message, thus protecting the communication.
- c. Electronic documents may contain much more information than the visible text the attorney intends to send. Such information is known as “meta data.” Some examples of meta data that may be stored in the document includes the name of the author of the document, the name of the network server or hard disk where the

document was saved, other file properties and summary information, document revisions, hidden text, comments, prior edits or corrections to the document, and time spent editing the document. Attorneys concerned about disclosing confidential information in the meta data should employ “scrubbing” programs or other methods to prevent disclosure to an opponent.

C. Communications with Experts

1. The expert witness is not the attorney’s client, but rather a hired independent contractor, and those communications are not protected by attorney-client privilege.
2. Everything written between the expert and the attorney is “discoverable” (i.e., the opposing attorney has a legal right to see it).

**III. Limits of Advice and Assistance Regarding the Protection of Assets**

A. Pre-bankruptcy Planning

1. Conversion of Nonexempt Assets into Exempt Assets
  - a. Congress has acknowledged that conversion is generally not considered to be a fraudulent conveyance. The House and Senate Reports stated: “As under current law, the debtor will be permitted to convert non-exempt property into exempt property before filing a bankruptcy petition. The practice is not fraudulent as to creditors, and permits the debtor to make full use of the exemptions to which he is entitled under the law.” HR Rep. No. 595, 95th Cong., 1st Sess. 361 (1977); S. Rep. No. 95th Cong., 2d Sess. 76 (1978).
  - b. But: In a number of cases, it has been held that conversion of nonexempt property into exempt property on the eve of bankruptcy was done with actual intent to hinder, delay, and defraud creditors and was thus a bar to discharge. Generally, these cases have involved significant amounts of property and what might be characterized as extreme or abusive circumstances.
2. Fraudulent Conveyances
  - a. Legal Authority

- (i) “Fraudulent transfers,” under the Bankruptcy Code, are defined as transfers by the debtor made within two years of the filing of the petition either: (1) with the intent to “hinder, delay or defraud” a creditor (actual fraud) or (2) for less than “reasonably equivalent value” while the debtor is insolvent or is rendered insolvent (sometimes labeled constructive fraud). 11 U.S.C. § 548(a)(1).
- (ii) Uniform Fraudulent Transfer Act
  - (A) Enacted in Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin.
  - (B) *See, e.g.*, UFTA § 4(a) (“A transfer made or obligation incurred by a debtor is fraudulent as to a creditor ... if the debtor made the transfer or incurred the obligation ... with actual intent to hinder, delay, or defraud any creditor ... without receiving a reasonably equivalent value ....”); UFTA § 5(a) (“A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred ....”).
- (iii) Uniform Fraudulent Conveyance Act
  - (A) Predecessor to the UFTA; enacted and retained in Maryland, New York, Tennessee, Virginia Islands, Wyoming.
  - (B) *See, e.g.*, UFCA § 4 (“Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent ....”); UFCA § 6 (“Every conveyance made and every obligation incurred without fair consideration ... is fraudulent as to both present and future creditors.”);

UFCA § 7 (“Every conveyance made and every obligation incurred with actual intent ... is fraudulent as to both present and future creditors.”); UFCA § 8 (“Every conveyance of partnership property and every partnership obligation incurred when the partnership is or will be ... insolvent, is fraudulent ....”).

b. Common Law Badges of Fraud.

- (i) Conduct intentionally designed to mislead or deceive creditors, conveyances of property for less than adequate consideration, or conveyances that are illusory because the debtor retains possession and control of the property.
- (ii) Courts often look at the transferor’s financial situation at the time of the transfer, the issue of whether there has been a series of questionable transactions, and the general chronology of events.
- (iii) Other indicia of fraud necessary to find fraudulent use of an exemption include the use of credit to buy exempt property, the disposition of property while retaining its beneficial use, and evidence that the majority of the debtor’s belongings are not located on homestead property being claimed as exempt. It may be especially significant that the debtor engaged in a covert activity, or sold collateral or borrowed money to fund the conversion.

3. Transfers in Divorce or Contemplation of Divorce.

- a. An unequal division of property is allowed under various state statutory schemes, but the division should be at arm’s length or it could be subject to avoidance under the relevant fraudulent transfer act.
- b. A common practice for divorcing parties is to divide marital assets so that the spouse facing significant debts receives exempt assets, whereas the nondebtor-spouse receives other assets. In *In re Beverly*, 374 B.R. 221 (B.A.P. 9<sup>th</sup> Cir. 2007), the court held the transfer voidable as actual fraud because the debtor sought to structure the division of assets so as to maximize protection from creditors’ claims.

- c. A transfer that discharges future spousal support or alimony can constitute valid consideration only if it discharges a legal obligation, which necessarily requires that such an agreement be valid under local law. Circumstances in which courts found no valid consideration with respect to transfers: to smooth out marital difficulties; to compensate a spouse for dutiful devotion or to compensate a spouse for the spouse's participation in the business; in satisfaction of a moral obligation; in exchange for a spouse's agreement not to institute divorce proceedings; to make the spouse feel more secure by putting the home solely in the spouse's name; to extinguish child support obligations.
- B. The "Debt Relief Agency" provisions also address the responsibilities of the debtor's attorney regarding the disclosure of assets. The debtor's attorney must warn the debtor that:
  - 1. "... a person who knowingly and fraudulently conceals assets or makes a false oath or statement . . . in connection with a case under this title shall be subject to fine, imprisonment, or both . . ." 11 U.S.C. § 342(b)(2)(A).
  - 2. "... all information supplied by a debtor in connection with a case under this title is subject to examination by the Attorney General." 11 U.S.C. § 342(b)(2)(B).
  - 3. "... all information that the assisted person is required to provide with a petition and thereafter during a case under this title is required to be complete, accurate, and truthful . . ." 11 U.S.C. § 527(a)(2)(A).
  - 4. "... all assets and all liabilities are required to be completely and accurately disclosed in the documents filed to commence the case . . ." 11 U.S.C. § 527(a)(2)(B).
  - 5. "... current monthly income . . . and . . . disposable income . . . are required to be stated after reasonable inquiry . . ." 11 U.S.C. § 527(a)(2)(C).

6. “. . . information that an assisted person provides during their case may be audited pursuant to this title, and that failure to provide such information may result in dismissal of the case under this title or other sanction, including a criminal sanction.” 11 U.S.C. § 527(a)(2)(D).

#### **IV. Duties of Candor**

##### **A. Candor to Opposing Counsel**

1. An attorney may not knowingly make or affirm a false statement of material fact or law to others or fail to disclose a material fact necessary to avoid defrauding others. *See* ABA Model Rules of Professional Conduct Rule 4.1.
2. A lawyer is prohibited from making a false statement of material fact during settlement. However, false statements regarding the party’s willingness to settle or the party’s negotiation goals do not constitute false statements of material fact within the meaning of the Model Rules. *See* ABA Model Rules of Professional Conduct Rule 4.1 Comments.
3. A lawyer shall not unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. *See* ABA Model Rules of Professional Conduct Rule 3.4.

##### **B. Candor to the Court**

1. ABA Model Rules of Professional Conduct states:
  - (a) A lawyer shall not knowingly:
    - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
    - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
    - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that

the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

ABA Model Rules of Professional Conduct Rule 3.3

2. Filing of Documents. Bankruptcy counsel is obligated, both ethically and as an officer of the court, not to file schedules and other disclosure documents that the counsel believes inaccurate.

a. Counsel must make reasonable inquiry to obtain reasonably accurate information or reasonably inform the debtor of how to get that information. 11 U.S.C. § 527(c).

b. Statutory Ethical Standards

(i) “A debt relief agency shall not . . . counsel or advise any assisted person . . . to make a statement in a document filed in a case or proceeding under this title, that is untrue and misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue or misleading.” 11 U.S.C. § 526(a)(2).

(ii) “A debt relief agency . . . shall provide each assisted person . . . reasonably sufficient information . . . on how to provide all the information the assisted person is required to provide under this title pursuant to section 521.” 11 U.S.C. § 527(c).



- c. Liability under 11 U.S.C. § 526(c)(2)-(5)
  - (i) Debt relief agencies are liable for actual damages, reasonable attorney's fees and costs for negligent or intentional failure to comply with any of §§ 526, 527 or 528. 11 U.S.C. § 526(c)(2)(A).
  - (ii) Debt relief agencies are liable if they negligently (or intentionally) fail to file a piece of paper required to be filed by the debtor under § 521, where said failure results in conversion or dismissal. 11 U.S.C. § 526(c)(2)(B).
  - (iii) Debt relief agencies are also liable if they negligently (or intentionally) disregard any other material requirement. 11 U.S.C. § 526(c)(2)(C).
  - (iv) Debt relief agencies are also exposed to civil penalties. 11 U.S.C. § 526(c)(5).
- d. Rule 9011 requires that at least one attorney of record sign "[e]very petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto."
  - (i) The signature acts as certification that "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Rule 9011(b)(3).
  - (ii) Sanctions are discretionary, and there is a safe harbor procedure for serving a sanctions motion and giving an opportunity to withdraw the offensive document before filing the motion. However, there is no safe harbor for filing a bankruptcy petition violating Rule 9011 standards, including as an electronic filing without an original debtor's signature, which warrants sanctions no matter what the perceived emergency. *See* Rule 9011(c).
  - (iii) Attorneys must protect and secure their Electronic Case Filing System password. The use of an ECF password serves as and constitutes the signature of the user, for purposes of Rule 9011 and all applicable laws, rules of ethics, and standards of conduct, on any document or pleading filed electronically using that user's password.

- (iv) Rule 1008 requires “[a]ll petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration.” Attorneys should ensure that their clients have reviewed and approved of all documents prior to filing them with the court.
- e. The 2005 Amendments to the Bankruptcy Code provide that by signing a bankruptcy petition in chapter 7 cases, the lawyer certifies that s/he has no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect. 11 U.S.C. § 707(b)(4)(D)
  - (i) The amendments incorporate into the Bankruptcy Code a variation on Bankruptcy Rule 9011 that is harsher than the former rule, and applies to every attorney’s signature on a petition, certification, pleading, or written motion. 11 U.S.C. § 707(b)(4)(C).
  - (ii) Among other things, the new Code language requires that all factual contentions be “well grounded” instead of having “evidentiary support,” and that all legal arguments be made in “good faith” instead of being “nonfrivolous.” *Compare* 11 U.S.C. § 707(b)(4)(C)(ii) *with* Rule 9011(b).
- f. Emergency filings. It is not uncommon for prospective clients to seek counsel just before a foreclosure or other deadline requiring immediate action. That situation has been held not to excuse the attorney from asking probing questions and demanding full and reasonably corroborated responses. As the Ninth Circuit BAP stated: “The importunities of a desperate client do not relieve an attorney of the affirmative duty of reasonable inquiry imposed by Rule 9011. The evident warning flags and the inadequate time available to make such inquiry should have impelled [the attorney] to consider the ever-present option of declining a questionable engagement.” *In re Villa Madrid*, 110 B.R. 919, 924 (B.A.P. 9<sup>th</sup> Cir. 1990).

3. During a Case. An attorney may discover that a client has committed perjury on the schedules and statement of affairs by concealing assets or asset transfers, or deliberately omitting creditors or misrepresenting important facts. Counsel also may learn that the client has lied in testimony, or misrepresented facts to the attorney that were the basis of positions taken on the debtor's behalf.
- a. The attorney must preserve client confidences, but not to the extent of implicitly sanctioning illegality. ABA Model Rules of Professional Conduct Rules 1.6, 3.3.
  - b. The attorney may not further the illegal purpose, even by suggesting concealment, nor may the attorney continue assisting in conduct discovered to be criminal or fraudulent. ABA Model Rules of Professional Conduct Rule 1.2.
  - c. The client must be warned that such actions may cause: (1) the discharge to be forfeited, (2) the client to be liable under the bankruptcy crimes statute or criminal perjury statute, or (3) a trustee to be appointed. 11 U.S.C. § 727. The client also must be warned that the attorney-client privilege does not protect criminal plotting or statements made to counsel about it, and that counsel may be obliged to turn over all books and records. ABA Model Rules of Professional Conduct Rules 1.6(c), 3.3.
  - d. The client should be counseled to rectify the situation as much as possible, such as by supplemental filings mailed to affected parties. ABA Model Rules of Professional Conduct Rule 3.3 Comment. If the client is unwilling to do so, the attorney must withdraw and, if necessary to remedy the situation, must reveal the misrepresentations to the court. ABA Model Rules of Professional Conduct Rules 1.6, 1.16, 3.3. Counsel may withdraw or disaffirm any misleading document, such as a disclosure statement, or fraudulent schedules and statements of affairs signed by the client. ABA Model Rules of Professional Conduct Rule 1.6 Comment.

*See In re Saturley*, 131 B.R. 509, 519 (Bankr. D. Me. 1991) (inform trustee that schedules are incomplete if concerned about client's candor, to prompt trustee investigation); *In re Matthews*, 154 B.R. 673, 680-81 (Bankr. W.D. Tex. 1993) (alert U.S. Trustee, court, or another interested party that schedules are incomplete or inaccurate; failure to withdraw contributed to debtor's dishonesty by not setting up early alarm that something was amiss).

4. Practice Tips:

- a. Counsel should check bankruptcy records via PACER or otherwise to confirm that the debtor's statements about prior bankruptcy cases are accurate.
- b. The lawyer cannot simply delegate schedule preparation entirely to a paralegal.
- c. The duty to disclose assets on schedules includes disclosure of all potential causes of action.
- d. The attorney must take care not to file a financial statement overlooking known assets, or a plan counsel knows the debtor cannot fund.
- e. The attorney must explain legal requirements to the extent reasonably necessary to permit the client to make informed decisions. Once that is done, the lawyer may not follow client instructions if they would operate to defraud.

## Sample Engagement Letter

PERSONAL & CONFIDENTIAL  
SUBJECT TO ATTORNEY/CLIENT PRIVILEGE

Re: Representation and Fee Agreement

Dear Client:

I appreciated the opportunity to talk with you earlier this week regarding our representation of Client Consulting Services, Inc. and you, as the assignee for the benefit of the creditors of Troubled Company, LLC (the “Debtor”). As I advised you, we are well qualified to assist you in this transaction. For your information, in addition to receivership and insolvency-related matters, our firm practices in a variety of business areas, including corporate and contract matters, business transactions, labor and employment matters, real estate matters and commercial litigation. This letter will set forth the terms of our engagement.

1. **Scope of Representation.** Specifically, you have engaged Well Qualified Law Firm (the “Firm”) to represent you and Client Consulting Services, Inc. will serve as an assignee for the Debtor, (collectively, the “Client”) in connection with the assignment for the benefit of the creditors of the Debtor pursuant to [state] law.
2. **Undertaking.** The most important point in this letter is that we will do our utmost to serve you effectively. We will always strive to represent your interests vigorously and efficiently. We will utilize other attorneys and/or legal assistants in our firm in the best exercise of my professional judgment. It is our policy, to the maximum extent compatible with the quality of our work product, to assign our personnel in a way designed to produce rapid and economical handling of matters. If at any time you have questions, concerns or criticisms, please contact me at once.
3. **Fees.** The Firm takes into account many factors in billing for services rendered and I will review all statements before they are issued to ensure that the amount charged is appropriate.
4. **The principal factor is our schedule of hourly rates, and the Firm’s statements for services are simply the product of the hours worked multiplied by the hourly rates for the attorneys and legal assistants who did the work.** It is understood that the Firm will bill the Client for work that includes, but is not limited to, the following: office conferences, telephone conversations, court appearances, reading and writing correspondence, preparing and reviewing pleadings and documents, analyzing financial records and reports, and travel to and from court or other destinations associated with this representation.
5. **Rates.** The Firm’s schedule of hourly rates for attorneys and other members of the professional staff is based on years of experience, specialization in training and practice, and level of professional attainment. My current rate is \$XXX.XX per hour. The Firm customarily increases hourly rates on an annual basis. The Firm will provide the Client with notice of any increase in hourly rates thirty (30) days prior to the increase.
6. **Costs.** It frequently is necessary for us to incur expenses for items such as travel, parking, lodging, meals, telecommunication expenses, (telephone, copier and facsimile), medical records, messenger services, process service fees, court reporter fees, witness and subpoena fees, and filing and court fees. Similarly, some matters require substantial amounts of costly ancillary services such as

photocopying, word processing, computerized legal research and staff overtime. These items are separately itemized on the Firm's statements as "disbursements" and will be the responsibility of the Client.

7. Billings. Our statements will be prepared and mailed during the month following the month in which services are rendered and costs advanced. We expect payment within thirty (30) days after the statement date. Any invoices which remain unpaid over 30 days accrue interest at 12% per annum.

8. Termination. You have the right to terminate our representation at any time. We have the same right, subject to an obligation to give you reasonable notice to arrange alternative representation.

9. Record Retention Policy. It is the Firm's policy that after the conclusion of a matter it is likely that the file with documents pertaining to this matter may eventually be stored in the Firm's off-site storage area and then later possibly subject to destruction. It is the Firm's policy that designated original documents (such as, an abstract, a stipulation and order for dismissal and a release) will be returned to you prior to or at the conclusion of the matter. Of course, if you wish to have your file transferred to you, or to another recipient that you designate, at any time after a matter has been closed and prior to its destruction, please notify us to make transfer arrangements. You will be responsible for all transfer costs and retrieval costs.

As you know, although licensed to practice law in [State], I continue to hold an active [State] law license. Therefore, I anticipate that I will be performing substantially all of the legal services in this matter; but for matters that do not require the rendering of legal services, I may, when necessary, use the assistance of other members of my firm who are not licensed in [State].

I have included in this letter a signature line to indicate your acceptance of these terms. If any of the information in this letter is not consistent with your understanding of our agreement, please contact me before signing this letter. Otherwise, please sign the enclosed copy of this letter and return the signed copy to me.

On behalf of the Firm, we look forward to the opportunity to work with you on this matter. If you have any questions regarding the terms of our engagement, or would like to discuss any legal issues, please feel free to contact me.

Very truly yours,  
Your Attorney

Agreed to and accepted this \_\_\_\_ day of \_\_\_\_\_, 2010.

CLIENT CONSULTING SERVICES, INC.

By: \_\_\_\_\_

Its: \_\_\_\_\_

## **Sample Termination Letter**

Dear Client,

Enclosed please find our bill for services rendered in [date]. This is the last bill that we will send you relating to this matter.

As of today, our representation of [client] has ended in the matter of [describe]. Because our representation has concluded, we have no further obligation to provide [client] with legal advice or services related to this matter, including any future legal developments that may have some relationship to this matter.

We will retain your files in accordance with our document retention policy. If you would like any of your documents returned to you, please so advise.

It has been our pleasure to work with you in this matter. If you need our assistance in the future, we would be happy to consider another engagement. Thank you.

Very truly yours,  
Your Attorney