

Ethics and Professional Responsibility

The Honorable Paul M. Black

Judge, United States Bankruptcy Court for the Western District of Virginia

Richard C. Maxwell, Esquire

Woods Rogers PLC

Melissa W. Robinson, Esquire

Glenn Robinson & Cathey PLC

A lawyer is a representative of clients . . . , an officer of the legal system and a public citizen having special responsibility for the quality of justice. . . .

As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. . . .

In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation.

Preamble, Virginia Rules of Professional Conduct

- An attorney cannot absolve himself of responsibility to ensure that the filing fee he collected from a client was paid to the Court by claiming that a paralegal inadvertently failed to pay the filing fee when she filed the case. *In re Alvarado*, 363 B.R. 484 (Bankr. E.D. Va. 2007) (Huennekens).
- An attorney filing documents or pleadings with the Court is required to make a reasonable inquiry about the information contained in those documents and when presenting them is certifying that they are being offered for a proper purpose and with evidentiary support.

An attorney has an affirmative duty to meet with and counsel his clients, answer any questions the client may have and explain the legal significance of their actions. *In re Smith*, Case No. 13-31565-KLP, 2014 WL 128385, 2014 Bankr. LEXIS 135 (Bankr. E.D. Va. Jan. 14, 2014) (Phillips).

- An attorney cannot assign work to a nonlawyer and then deliver it to a client without first taking steps to ensure its legal accuracy, completeness and professionalism. *In re Sheeran*, 369 B.R. 910 (Bankr. E.D. Va. 2007) (Adams).

- Bankruptcy Court has inherent power to control admission to its bar and to discipline attorneys. As officers of the court, attorneys have a special responsibility for upholding the quality of justice within the judicial process, and the Bankruptcy Court depends on the veracity, integrity and competence of attorneys that appear before it. The attorney signing the petition certified and represented to the Court that she had a factual or legal basis for the representations made in the petition and that such basis was formed after a reasonable inquiry. Bankruptcy Rule 9011 and Virginia Code section 8.01-271.1 each provide that an attorney's signature on a pleading constitutes a certification that the attorney believes, after reasonable inquiry, that there is a factual or legal basis for the pleading. *In re T.H.*, 529 B.R. 112 (Bankr. E.D. Va. 2015) (St. John).

Recent Case Law

Williams v. Lynch (In re Lewis), 611 F. App'x 134 (4th Cir. 2015).

Summary: The Bankruptcy Administrator moved for sanctions against debtor's counsel for violating the requirement of full disclosure of fees in bankruptcy cases, continuing to represent the debtor without court approval after conversion to chapter 11, violating the rule against ghost writing appeal documents for the debtor, and failure to maintain copies of filed documents that contain an original signature. The bankruptcy court entered an order suspending the attorney from filing new cases in the district, requiring monthly reports on existing cases, disgorging the undisclosed fees, and imposing a \$2,500 monetary sanction. The bankruptcy court also ordered his reinstatement conditioned on full compliance with the sanctions order and continuing heightened reporting requirements. Counsel appealed both orders. The district court affirmed, and counsel again appealed. The Fourth Circuit found no reversible error with either the bankruptcy court or the district court, concluding that the sanctions imposed on debtor's counsel were both within the bankruptcy court's authority and properly imposed.

In re White, 542 B.R. 762 (Bankr. E.D. Va. 2015).

Summary: Debtor's law firm filed a bankruptcy petition on behalf of herself and her husband. Female debtor, a bankruptcy attorney, subsequently substituted herself as counsel. The debtors filed multiple, unconfirmable plans and appeared to be improperly prolonging their case. The court found that the female debtor "used her familiarity with the Chapter 13 bankruptcy process to manipulate the system." Based on the egregious conduct of the debtors, the court converted the debtor's case, on motion of the U.S. Trustee, finding that it was in the best interest of the creditors.

In re Paciocco, Case No. 15-00305, 2015 WL 5178036 (Bankr. E.D. Va. Sept. 3, 2015).

Summary: Following his suspension by the state bar from the practice of law for three years, a suspended attorney sought out another lawyer, who was not familiar with bankruptcy, purportedly to take over his cases. The suspended-attorney, however, obtained a CM/ECF login in the other attorney's name. Using this login, the suspended-attorney was able to file petitions on behalf of debtors with whom he had met and counseled alone. The UST filed a motion to show cause why the suspended-attorney should not be sanctioned or further suspended for his behavior in three of the cases he filed during this time. The Court found that the suspended-

attorney engaged in the unauthorized practice of law and violated Federal Rule of Bankruptcy Procedure 9011, the Court's CM/ECF Policy, and Sections 110, 526, and 727 of the Bankruptcy Code. The Court ordered the return of all funds paid by the debtors in these cases and enjoined the suspended-attorney permanently from practicing before the Court, working as a staff member for one of the bar members of the Court, and working as a bankruptcy petition preparer.

In re T.H., 529 B.R. 112 (Bankr. E.D. Va. 2015).

Summary: The UST filed a motion to impose sanctions against an attorney and his firm alleging that the attorney filed a petition containing the debtor's electronic signature but without the debtor's authorization or wet signature. The Court found that the attorney violated Federal Rule of Bankruptcy Procedure 9011 in filing without authorization. The Court further found violations of the Virginia Rules of Professional Conduct 1.3, 1.4(a), 1.4(b), 3.1, and 3.3. The attorney was suspended for sixty days, and both the attorney and the firm were held jointly and severally liable for payment of a fine.

Virginia Innovation Sciences, Inc. v. Samsung Electronics Co., Ltd., et al., 983 F.Supp.2d 713 (E.D. Va. 2014).

Summary: An attorney has a continuing duty to advise the Court of any development which might conceivably affect the outcome of the litigation. The system can provide no harbor for clever devices to divert the search, mislead opposing counsel or the Court, or cover up that which is necessary for justice in the end. The general duty of candor and truth thus takes its shape from the larger object of preserving the integrity of the judicial system.

Lester v. Allied Concrete Co., 83 Va. Cir. 308 (City of Charlottesville Circuit Court 2011).

Summary: Virginia Code section 8.01-271.1 and Rule 3.3 were violated by an attorney falsely representing to the Court that a mistake of a paralegal and not his own misconduct caused an omission from a privilege log.

In re Budd, Case No. 14-61192, 2015 WL 4522591 (Bankr. W.D. Va July 24, 2015).

Summary: Local Rule 9072-1(C) provides that "Counsel's tender of an order containing the typed signatures of other counsel shall constitute a proponent counsel's representation that each counsel has reviewed an identical version of the order being tendered and consented thereto, or has objected thereto, in which case the fact of such counsel's objection shall be noted immediately above such counsel's name." Violation of this Local Rule is also a violation of Rule 3.3.

Parasidis v. Karageorge, Record No. 0714-15-4, 2015 WL 8193189 (Fairfax County Circuit Court Dec. 8, 2015).

Summary: Upon learning that his clients had testified untruthfully during a deposition, the attorney sent a letter to opposing counsel advising him of the correct facts. Rule 3.3(a)(2) provides that a lawyer shall not knowingly fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act of a client.

Failure to Respond to Allegations in Motions

- A. “Rule 8 F.R.Civ.P. applies in adversary proceedings.” Fed. R. Bankr. P. 7008. Under the Rule, “[a]n allegation – other than one relating to the amount of damages – is admitted if a responsive pleading is required and the allegation is not denied.” Fed. R. Civ. P. 8(b)(6). A motion requesting relief from the stay, however, is a contested matter to which Rule 8 does not apply, unless the court otherwise directs. Fed. R. Bankr. P. 9014(c). “The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply.” *Id.*
- B. “A motion for relief from an automatic stay provided by the Code . . . shall be made in accordance with Rule 9014” Fed. R. Bankr. P. 4001(a)(1). “In a contested matter not otherwise governed by [the Federal Rules of Bankruptcy Procedure], relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court directs otherwise.” Fed. R. Bankr. P. 9014(a). “Any written response to the motion shall be served within the time determined under Rule 9006(d).” Fed. R. Bankr. P. 9014(b). Rule 9006(d) provides, “any written response shall be served not later than one day before the hearing, unless the court permits otherwise.” Fed. R. Bankr. P. 9006.
- C. The U.S. Bankruptcy Court Western District of Virginia Local Rules clarify the effect of failing to file a response. Rule 9013-1(M) provides, in relevant part:

When any party in interest opposes the relief sought in any motion . . . filed pursuant to Bankruptcy Rule 9014 which has initiated a contested matter, such party shall file a written response to such motion, in the nature of an answer to a complaint in an adversary proceeding, which shall put the party having filed such motion on fair notice of any factual dispute with respect to the allegations contained in such motion and of any affirmative defenses and/or other legal contentions in opposition to such motion which such opposing party intends to present at any hearing thereon. . . . *Failure to file such a response will be cause for the Court to treat the motion as uncontested, to continue the hearing upon the motion, or to take such other action as may be appropriate to further the ends of justice.*

Bankr. W.D. Va. Loc. R. 9013-1(M) (emphasis added).

- D. Further, a pre-hearing order specific to a motion for relief may be instructive, such as the one in the Western District of Virginia. “If any Respondent opposes the relief sought in the Motion for Relief, such Respondent(s) shall file within fourteen (14) days from the date of this Pre-Hearing Order a pleading responsive to the allegations contained in the Motion” W.D. Va. Pre-Hearing Order on Motions for Relief from Stay.

Query: If an attorney is not able to speak with her client after a motion for relief from stay is filed, should the attorney:

1. Not file an answer.
2. File a general denial to the motion for relief.
3. Admit the arrearage, but deny that cause exists to terminate the automatic stay.
4. File an answer which says that the client will not call the attorney back, but don't grant relief.

Which of these actions meets the requirement of the Local Rules and the Pre-Hearing Order?

Would the filing of any of the above suggestions result in a violation of your duty of candor to the Court?

Candor to the Court

Query: What value should be placed on real estate in schedules, reaffirmation agreements, or other filings?

What constitutes a reasonable inquiry into the value of the real property?

What if your client had an appraisal done about a year ago that shows a value for the real property much higher than what the client wants to list as the value? And the listing of the real property at the appraisal value will result in a chapter 13 plan which cannot be confirmed? Have you violated your duty of candor to the Court if you don't use the appraisal value?

Applicable Rules and Code Sections

RULE 1.4 COMMUNICATION

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
- (c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

- (a) A lawyer shall not knowingly:
 - (1) make a false statement of fact or law to a tribunal;
 - (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, subject to Rule 1.6;
 - (3) fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel; or
 - (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
- (b) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
- (c) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.
- (d) A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

Comments to Rule 3.3

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, Section 8.01-271.1 of the Code of Virginia states that a lawyer's signature on a pleading constitutes a certification that the lawyer believes, after reasonable inquiry, that there is a factual and legal basis for the pleading. Additionally, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(c) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(c), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Misleading Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. Furthermore, the complexity of law often makes it difficult for a tribunal to be fully informed unless pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose controlling adverse authority in the subject jurisdiction which has not been disclosed by the opposing party.

False Evidence

[5] When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

[6] When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should

immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

Remedial Measures

[11] Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(c). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client, a lawyer shall not knowingly:

- (a) Make a false statement of fact or law; or
- (b) Fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed or retained or associated with a lawyer:

- (a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

- (2) the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

**RULE 9011. SIGNING OF PAPERS; REPRESENTATIONS TO THE COURT; SANCTIONS;
VERIFICATION AND COPIES OF PAPERS**

(a) SIGNATURE. Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) REPRESENTATIONS TO THE COURT. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

- (3) 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; and

- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) SANCTIONS. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

- (1) *How Initiated.*

- (A) *By Motion.* A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to

violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) *On Court's Initiative.* On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) *Nature of Sanction; Limitations.* A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) *Order.* When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) **INAPPLICABILITY TO DISCOVERY.** Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 7026 through 7037.

(e) **VERIFICATION.** Except as otherwise specifically provided by these rules, papers filed in a case under the Code need not be verified. Whenever verification is required by these rules, an unsworn declaration as provided in 28 U.S.C. §1746 satisfies the requirement of verification.

(f) **COPIES OF SIGNED OR VERIFIED PAPERS.** When these rules require copies of a signed or verified paper, it shall suffice if the original is signed or verified and the copies are conformed to the original.

11 U.S.C. § 707(b)

...

(4)(A) The court, on its own initiative or on the motion of a party in interest, in accordance with the procedures described in rule 9011 of the Federal Rules of Bankruptcy Procedure, may order the attorney for the debtor to reimburse the trustee for all reasonable costs in prosecuting a motion filed under section 707(b), including reasonable attorneys' fees, if--

(i) a trustee files a motion for dismissal or conversion under this subsection; and

(ii) the court--

(I) grants such motion; and

(II) finds that the action of the attorney for the debtor in filing a case under this chapter violated rule 9011 of the Federal Rules of Bankruptcy Procedure.

(B) If the court finds that the attorney for the debtor violated rule 9011 of the Federal Rules of Bankruptcy Procedure, the court, on its own initiative or on the motion of a party in interest, in accordance with such procedures, may order--

(i) the assessment of an appropriate civil penalty against the attorney for the debtor; and

(ii) the payment of such civil penalty to the trustee, the United States trustee (or the bankruptcy administrator, if any).

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

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

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

(I) is well grounded in fact; and

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

(1).

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

LOCAL RULE 5005-4 Electronic Filing of Petitions, Pleadings, Orders and Other Documents

...

B. Responsibility and Effect: The electronic filing of a document by or on behalf of a User of the Electronic Case Filing System shall constitute the signature of such User for all purposes under the Bankruptcy Code and Rules, including specifically FRBP 9011. A User is responsible for any document filed by anyone authorized by such User to effect electronic filings by means of such User's designated password. Such a filing shall further constitute such User's representation to the Court that the User is in possession of the paper original of such document duly signed (and, if applicable, under penalty of perjury) by all necessary parties prior to electronic filing of any document required under the Bankruptcy Code or Rules or this Court's Local Rules to bear the signature(s) of the party(ies) on whose behalf the document is filed, including specifically, the bankruptcy petition, schedules and statement of affairs. The User shall produce the duly signed paper originals of any such documents filed electronically within fourteen (14) days after the making of any written request thereof by the case Trustee or the Office of the United States Trustee or as may be otherwise directed by the Court.