Duties Related to Reasonable Inquiry and Due Diligence in Bankruptcy Preparation and Filing

1. Attorney's duty to provide accurate and truthful information to the Court.

2. Attorney's responsibility to educate the client on the consequences of providing false or misleading information and to encourage truthful, complete, and accurate information.

3. Attorney's responsibility to verify information provided by the debtor with outside sources.

4. Attorney's responsibility to review check stubs, bank statements and tax returns.

5. Attorney's responsibility to review the petition and schedules filed with the Court.

6. Attorney's responsibility to promptly amend schedules and statements errors when brought to their attention.

By G. Thomas Curran Jr.

How Much Diligence Is Due?

Defining an Attorney's Duty to Perform a Pre-Petition Inquiry

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With the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), it is more important than ever for us, as debtors' attorneys, to acknowledge the duties that we owe to our clients before filing a petition for bankruptcy relief. An attorney's duties of full disclosure and candor to the court are essential to maintaining the integrity of the bankruptcy system. Moreover, with the addition of 11 U.S.C. § 526(a)(2) (along with other pre-existing Bankruptcy Code provisions), a debtor's attorney who fails to disclose information on a petition or pleading risks civil penalties, attorneys' fees and costs, attorney disciplinary measures[1] or even criminal charges.[2]

The Bankruptcy Code has always emphasized an attorney's duty to truthfully disclose all known assets, liabilities and financial affairs in the debtor's schedules and pleadings. At least as early as the Bankruptcy Reform Act of 1978,[3] a debtor's attorney who signed a petition or other pleading certified that the attorney performed a reasonable investigation into the financial affairs of his or her client to ensure that the pleading was well grounded in fact.[4]

However, BAPCPA extended this duty through the enactment of 11 U.S.C. § 526(a)(2) to apply to any person who qualifies as a "debt relief agency,"[5] which aims to prevent abusive practices by bankruptcy professionals, as well as to ensure that all of a debtor's financial information is taken into account in administering his or her estate.[6] Although most debtors' attorneys make it a habit to review online court records, official records, property appraiser's reports and other available information, provisions like 11 U.S.C. §§ 526(a)(2) and 707(b)(4)(D), as well as Federal Rule of Bankruptcy Procedure 9011, may require additional probing prior to filing a bankruptcy petition.

The "Reasonable Inquiry" Standard under 11 U.S.C. § 526(a)(2)

Section 526(a)(2) of the Bankruptcy Code provides the following:

> A debt relief agency shall not ... make any statement, or counsel or advise any assisted person or prospective assisted person to make a statement in a document filed in a case or proceeding under this title, that is untrue or misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue or misleading.

The requirement that an attorney exercise reasonable care in determining the accuracy of the information contained in a debtor's petition and schedules is often referred to as the "reasonable inquiry" standard. Section 526(a)(2) makes the attorney or debt-relief agency liable to the client for erroneously omitting critical information without investigating the truth or falsity of the alleged facts. An attorney who fails to perform a reasonable inquiry can be subject to disgorgement of fees to the debtor and civil penalties, and can be required to pay the attorneys' fees and costs of either the debtor, the state or U.S. Trustee.[7]

In re Gutierrez: Application of a Traditional Negligence Standard

Since 2005, several courts have explored the scope of a debt-relief agency's duty to perform a reasonable inquiry under § 526. In *In re Gutierrez*, a debtor sought the full return of all fees paid to his attorney after alleging that the attorney failed to exercise reasonable care before filing his petition.[8] The debtor first met with the attorney on March 13, 2006. The attorney prepared the debtor's petition, schedules and statements, which disclosed a home owned by the debtor. After their first meeting, but before filing the petition, the debtor quit-claimed his interest in the home to his nonfiling spouse and recorded the deed. The debtor met with the attorney to file the petition almost two months after their first meeting, but the attorney did not ask whether any information had changed or become inaccurate since their last meeting, so the transfer was not disclosed.

The U.S. Bankruptcy Court for the Northern District of California held that the attorney did not violate 11 U.S.C. § 526(a)(2) by failing to ask whether the debtor's circumstances had changed prior to the filing.[9] The court applied a negligence standard, reasoning that the debtor would not have

1 Most states' rules regulating attorney conduct require an attorney to be candid with the court. *See, e.g.*, Model Rules of Prof'l. Conduct R. 3.3.
2 *See* 18 U.S.C. §§ 151-158.
3 S. Rep. No. 95-989 (1978).
4 *See, e.g.*, 11 U.S.C. § 707(b)(4)(C).
5 A "debt relief agency" includes any person who provides bankruptcy assistance to a consumer debtor for a fee, which generally includes attorneys. For a more complete discussion on whether attorneys are considered "debt relief agencies," *see Milavetz, Gallop & Milavetz PC v. U.S.*, 559 U.S. 229, 235-39 (2010).
6 *Id.* at 236 n.3.
7 11 U.S.C. § 526(c).
8 *In re Gutierrez*, 356 B.R. 496, 500 (Bankr. N.D.Cal. 2006).

told the attorney about the transfer even if the attorney had asked.[10] The debtor had more than one opportunity to tell the attorney about the transfer and still failed to do so. As a result, the debtor was not able to prove causation, a crucial element to any negligence claim.[11]

Comparing § 526(a)(2) to Rule 9011

Other courts have compared the reasonable-inquiry standard under § 526(a)(2) to the one set forth in Bankruptcy Rule 9011.[12] Rule 9011 similarly requires an attorney to perform an "inquiry reasonable under the circumstances" before signing or filing any petition or pleading. A party that violates Rule 9011 is subject to a fairly broad range of sanctions, including monetary and non-monetary sanctions, as well as attorneys' fees and costs.[13]

For example, in *In re Garrard*, a slip opinion from the U.S. Bankruptcy Court for the Northern District of Alabama, the court applied the Rule 9011 definition of "reasonable inquiry" to a violation of 11 U.S.C. § 526(a)(2).[14] In this case, an attorney's duty to perform a reasonable inquiry requires five things:

> (1) to explain the requirement of full, complete, accurate, and honest disclosure of all information required of a debtor; (2) to ask probing and pertinent questions designed to elicit [such disclosure]; (3) to check the debtor's responses in the petition and Schedules to assure they are internally and externally consistent; (4) to demand of the debtor full, complete, accurate, and honest disclosure ... before the attorney signs the petition; and (5) to seek relief from the court in the event that the attorney learns that he or she may have been misled by a debtor.[15]

If an attorney fails to meet one of these requirements, he or she has breached the duty to perform a reasonable inquiry. In other words, an attorney cannot turn a blind eye to potential inconsistencies in the debtor's petition and absolve himself or herself from liability. He or she must take an active role in the debtor's case to ensure that the documents are complete, accurate and honest.

Courts in the First Circuit have implemented a similar five-factor test to evaluate violations of 11 U.S.C. § 707.[16] Like the test in *Garrard*, the First Circuit requires an attorney to advise the debtor of the importance of full disclosure; check for internal consistency throughout the petition, schedules, and statements; and promptly correct information that he or she discovers to be inaccurate. However, in *In re Withrow*, the court also required the attorney to employ "external verification tools," such as title records, court records, lien searches and tax transcripts, as long as the tools that were used were not overly costly or time-consuming for the attorney.[17]

The courts in *Gutierrez* and *Garrard* agreed that a negligence standard should apply to violations of § 526. *Gutierrez* applied the typical "but-for" test to address the issue of causation, which prompted the court to ask whether a more detailed inquiry by the attorney would have revealed the undisclosed information. *Garrard*, on the other hand, defined a "breach." Comparing an offending attorney's conduct to that of a reasonably competent attorney measures whether the attorney breached his duty of reasonable care. Based on the language of the statute and the prevailing case law, a court should only find that a violation of § 526 exists after it fully analyzes the claim under a traditional negligence standard. Although no court has explicitly stated this, it can be inferred from its application.

The "Reasonable Investigation" Standard under 11 U.S.C. § 707

The "reasonable inquiry" standard is often compared to the "reasonable investigation" standard under 11 U.S.C.

17 *Id.*

continued on page 74

9 Even though the court absolved the attorney of violations under 11 U.S.C. § 526, it ultimately ordered the disgorgement of fees due to violations of 11 U.S.C. §§ 527 and 528 for failure to provide required notices and a fully executed copy of the fee agreement. *Id.* at 506.

10 *Id.* at 501-02.

11 *See also Conn. Bar Ass'n v. U.S.*, 620 F.3d 81, 103 n.22 (2d Cir. 2010) (stating that violation of 11 U.S.C. § 526 is not based on strict liability, but instead requires culpable state of mind by showing either negligence or intent).

12 *See In re Casavalencia*, 389 B.R. 496 (Bankr. S.D. Fla. 2008); *In re Garrard*, Nos. 13-40418-JJR13, 13-40419-JJR13, 2013 WL 4009324 (Bankr. N.D. Ala. 2013) (applying same five-factor "reasonable inquiry" test to violations of 11 U.S.C. §§ 526 and 707, and Rule 9011).

13 Fed. R. Bankr. P. 9011(c)(2).

14 *Garrard*, 2013 WL 4009324, at *4.

15 *Id.* (quoting *In re Thomas*, 337 B.R. 879, 892 (Bankr. S.D. Tex. 2006).

16 *In re Withrow*, 391 B.R. 217, 228 (Bankr. D. Mass. 2008) (holding that attorney who failed to list six bank accounts on Schedule B and claim any exemptions on Schedule C was subject to sanctions for failing to perform reasonable investigation under 11 U.S.C. § 707(b)(4)(C) and (D)).

§ 707(b)(4)(D).[18] Under § 707(b)(4)(D), an attorney who signs a petition certifies that he or she has no knowledge that the information contained in the client's petition is incorrect after performing an inquiry. Unlike § 526(a)(2), violations of § 707 usually result in the dismissal of the debtor's case. However, similar to § 526(c), if a debtor's attorney violates § 707(b), the court may also assess civil penalties and award attorneys' fees and costs.[19]

The Ninth Circuit noted this comparison in *In re Kayne*.[20] In *Kayne*, a debtor told her attorney prior to filing that she had filed a lawsuit against a third party to recover money that was owed under a promissory note. To make matters worse, the debtor provided the attorney with a binder of documents that included a copy of a settlement agreement on the note and a list of payments received by the debtor, which the attorney did not review. As a result, the attorney did not disclose the note on the Schedule B and failed to list payments received as income on the Schedule I. The attorney believed that the payoff on the note was approximately $7,000 (an amount that would have been protected by the debtor's exemptions), and he explained this to the chapter 7 panel trustee at the meeting of creditors. After reviewing the settlement agreement, however, the trustee discovered that there was actually $61,250 owed on the note. The attorney admitted that he should have conducted a more thorough investigation before filing the petition.

The Ninth Circuit Bankruptcy Appellate Panel held that the debtor's attorney did not conduct a reasonable investigation into the facts of the case prior to filing the petition.[21] The court applied the same "reasonable inquiry" standard to both violations of Rule 9011 and § 707(b)(4)(D). It reasoned that the "reasonable inquiry" standard is an objective one wherein the attorney's conduct should be compared to that of "a competent attorney admitted to practice before the involved court."[22] Because the attorney did not ask pertinent and probing questions or otherwise gather adequate information, the court imposed $20,000 in sanctions.

Other courts in the Ninth Circuit have looked favorably on the analysis in *Kayne*. In *In re Seare*, the U.S. Bankruptcy Court for the District of Nevada applied *Kayne*'s reasoning in holding that an attorney violated § 707(b)(4)(D) when he failed to investigate the dischargeability of a debt that arose from a judgment for fraud.[23] Even though the debtor's attorney filed the debtor's petition on an "emergency" basis to stop a garnishment, the court did not excuse him from compliance with § 707(b)(4)(D).[24] The attorney quickly reviewed the documents that the debtor provided to him prior to filing and made the incorrect determination that the debt underlying the garnishment would be dischargeable. The debtor did not have a copy of the judgment on the debt and therefore did not provide it to the attorney.

The court reasoned that if the attorney had reviewed the records on the court's PACER website and read the judgment prior to filing, he would have discovered that the debt was incurred due to the debtor's fraud upon the court and that the debt would be nondischargeable. The court concluded that an attorney cannot rely on the information that his or her client provides if it is clear that the information is "incomplete or inconsistent, or raises a 'red flag.'"[25] The existence of a judgment against the debtor should have alerted the attorney to the fact that a further inquiry was necessary. After that discovery, the attorney had an obligation to take an active role in the debtor's case and thoroughly review the judgment.

> **If a debtor fails to provide certain requested documents or cannot explain inconsistencies in his schedules, the attorney can wait to file the case, refuse to file altogether, or refuse to represent the debtor.**

Conclusion

Although various courts have different ways of defining "reasonable inquiry," they are generally aligned when determining what constitutes a violation. The standard is an objective one: An attorney cannot defend himself or herself by claiming that he or she was subjectively ignorant to the murky facts of the debtor's case. Allowing such a defense would promote purposeful ignorance and result in many unwelcome surprises for unsuspecting debtors. Although not every circuit has specifically defined "reasonable inquiry" as it applies to § 526, the current trend suggests that an attorney should apply the Rule 9011 standard in the absence of such a definition.

As debtors' attorneys, we should always review relevant court records, online title and lien searches, tax transcripts, and other readily available documents. We have a clearly defined duty to ask probing questions that elicit honest and accurate answers, resolve internal and external inconsistencies by conducting a cost-effective investigation, and verify information provided by clients by requesting pertinent documents. If a debtor fails to provide certain requested documents or cannot explain inconsistencies in his schedules, the attorney can wait to file the case, refuse to file altogether, or refuse to represent the debtor. A brief and effective investigation before filing a petition can help prevent the potential costs of a violation of § 526 or Rule 9011. Even more importantly, it can facilitate the successful administration of a debtor's case. abi

18 The "reasonable investigation" language actually derives from § 707(b)(4)(D)'s sister statute, 11 U.S.C. § 707(b)(4)(C), which provides that an attorney's signature certifies that he or she "performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion."

19 11 U.S.C. § 707(b)(4)(A) and (B).

20 453 B.R. 372 (B.A.P. 9th Cir. 2011).

21 *Id.* at 380.

22 *Id.* at 382 (quoting *Smyth v. City of Oakland (In re Brooks-Hamilton)*, 329 B.R. 270, 283 (B.A.P. 9th Cir. 2005)).

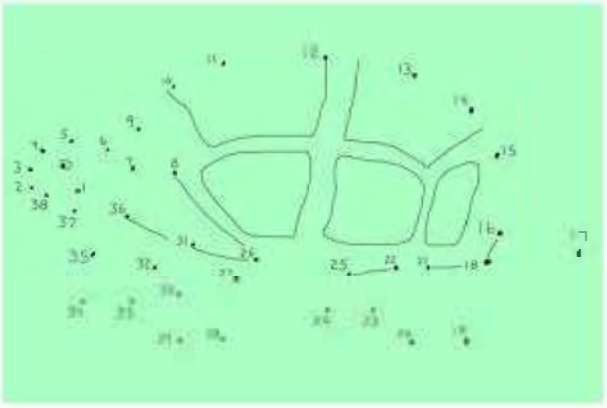
23 *In re Seare*, 493 B.R. 158 (Bankr. D. Nev. 2013).

24 *Id.* at 212.

25 *Id.*

Filing Bankruptcy Petitions: Playing Connect the Dots

By Cathy Moran, Esq. Filed Under: Before filing, Start Here



I almost took the client at her word and filed schedules that told half the story.

Well, maybe it was 3/4 of the story, but the client who, to my consternation, seemed to enjoy nit picking the draft schedules, told me about the cabin on the lake that they rent out, but omitted from the questionnaire the rental income, the management fee, the utilities and any provision for maintenance on the property .

If I had simply typed in and presented for signature the information given me, the schedules would have been misleading. And the job I would have done would have been no better than that of a petition preparer.

There are probably analogies to lots of different games that describe what we (should) do: whether it's

- connect the dots;
- fill in the blank;
- what's missing from this picture,

They all capture the idea that we earn our keep by looking at the information presented and asking, Is that everything? Does that tell the whole story?

Keep your eyes peeled for clues to what isn't there in your client's information.

Five Steps To Due Diligence

By Cathy Moran, Esq.

Our professional well being and the successful outcome of the client's case may well depend on how well we, as attorneys, have done our due diligence. "I asked the client", you say. Perhaps not good enough, say the cases.

Well done bankruptcy schedules require a substantial amount of information, much of it interrelated. Part of the strategy of the drafters of BAPCPA was to scare off debtors and attorneys was increased complexity and a parade of horribles if they didn't get it right.

The flip side of the practical problem is that bankruptcy work is generally done on narrow margins. In most consumer cases, there is neither time nor money to exhaustively validate the information the client gives you. How, then, do we proceed?

I attended a presentation last weekend by Fredrick Clement and Lorraine Crozier that offered the *Withrow* case as a guide. In re Withrow, 391 B.R. 217 (Bankr. Mass. 2008) *Withrow* sets out a five step analysis that the court used to determine if the attorney had fulfilled his duty to exercise due diligence.

1. **Educate the debtor:** did the attorney impress upon the debtor the critical importance of accuracy?
2. **Review of debtor's documents:** did the attorney request and review the documents available to the debtor that could verify the information provided?
3. **Verify with outside sources**: did the attorney use external sources that are not time or cost prohibitive to double check?
4. **Analyze documents & schedules for inconsistency:**was there anything that should have alerted the attorney that the debtor's information could not be accurate?
5. **Correct inaccuracies promptly:** did the attorney act to amend any inaccurate information in the filed documents?

The theme that runs through this list is the continuing, active processing of the information that you collect from the client. It's not enough just to gather and publish the client's information. The attorney who wants to keep his/her

license to practice has to think about the information provided. Does the client understand what you need? Have you checked out those things for which there are online data bases? Does this make sense? Is today's information consistent with the tax returns, or can you explain why it isn't?

If this isn't daunting enough, you can dip your toe in the article on best practices for debtor's attorneys at 64 Bus. Law. 79 (2008).

Go forth and be skeptical.

Reasonable Inquiry and the Preparation of Bankruptcy Schedules

I. Guiding Principles- Outlining a discussion of an attorney's responsibility to make factual inquiries or engage in investigation as to underlying facts when assisting Debtors in the completion of Bankruptcy Schedules and Statement of Financial Affairs

Integrity of Bankruptcy Schedules and Statements of Financial Affairs is fundamental to the bankruptcy process.

Misrepresentations on the Schedules and Statement of Financial Affairs can lead to significant negative consequences for Debtors and/or principals of Debtors both civilly and criminally. *See, i.e.,* 11 U.S.C. § 727; 11 U.S.C. § 523(a)(3); 18 U.S.C. §152; and 18 U.S.C. §157.

"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." *West Virginia Rules of Prof'l Conduct*, Preamble ¶ 1 (2015).

The Rules of Professional Conduct require a lawyer to act with commitment and dedication to the interests of the client.

Attorneys are professionals. Individuals place their financial lives, and more, in their attorney's hands. Attorneys have ethical obligations to their clients regardless of the economic pressures which might exist.

Lawyers are professionals that owe fiduciary duties to their individual clients and must continue to represent them even if initially rosy predictions turn sour.

Attorneys are officers of the court, as well as professionals. As such, they are held to a high standard regarding their knowledge of Court Rules and Administrative Procedures. In the absence, therefore, of very extenuating circumstances, an attorney may not plead ignorance to procedural rules.

It is well established that a court has the inherent authority to sanction and discipline these attorneys who appear before it.

The bankruptcy court possesses broad authority, pursuant to 11 U.S.C. § 105, to issue any order necessary or appropriate to carry out the provisions of the Bankruptcy Code.

The purpose of attorney disciplinary proceedings is not to punish the attorney, but rather protect the public, maintain the integrity of the legal profession, and protect the administration of justice from reproach.

II. Sources of the Duty to Make Reasonable Inquiry

West Virginia Rules of Professional Conduct

Rule 1.1 – Competence - A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.3—Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4—Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0 (e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 3.1—Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Rule 3.4—Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonable diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

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 to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employer retained by 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 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 remedial action.

Bankruptcy Code and Rules

11 U.S.C. § 707(b)(4)—enforcement of Federal Rule of Bankruptcy Procedure 9011

11 U.S.C. §§ 526(a)(2) and 527(b)—debt relief agency's duties of diligence, competence, communication and candor

Federal Rule of Bankruptcy Procedure 1008—petitions and schedules verified under penalty of perjury

Federal Rule of Bankruptcy Procedure 9011—attorney's duty to conduct reasonable inquiry prior to filing and certification of same

III. Common Issues and Illustrative Cases

A. Whose job is it to explain bankruptcy?

If you are Debtor's counsel, its primarily yours-

As described by Judge St. John in *In re T.H.*, 529 B.R. 112, 143 (Bankr. E.D. Va. 2015)

> An attorney has an obligation to appropriately counsel a client and appropriately explain the law to allow the client to make informed decisions. Virginia Rule of Professional Conduct 1.4(b) provides: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." This obligation is all the more critical in bankruptcy representations where the debtor may lack a sophisticated understanding of the intricacies of the bankruptcy process and the legal effect of certain actions. *See In re Smith*, 2014 WL 128385, at *6 ("Bankruptcy clients rely on their attorneys to explain an unfamiliar and complicated process so that they can make informed, appropriate decisions.") (*citing In re Alvarado*, 363 B.R. at 487). The decision whether to file bankruptcy is a monumental, personal, and important decision in any potential debtor's life. *In re Tran*, 2014 WL 5421575, at *6. It is the responsibility of the bankruptcy attorney to counsel and advise a potential debtor of the consequences and effects of this important decision and to assist the individual in determining whether

> filing is an appropriate and desired course of action. *See In re Smith*, 2014 WL 128385, at *6 (*citing In re Daw*, No. 09–00690–TLM, 2011 WL 231362, *4 (Bankr.D. Idaho Jan. 24, 2011) (slip copy)). As explained by Judge Phillips, "[A]n attorney has an affirmative duty to meet with his clients and counsel them regarding the legal significance of their actions." *Id.* (*citing In re Dalton*, 95 B.R. 857, 860 (Bankr.M.D.Ga.1989)).

B. And When the Pointing of Fingers Starts…

Courts have inherent power to police the conduct of attorneys as officers of the court. When the court sanctions an attorney for violating a court order, a finding of bad faith is not required. Bankruptcy practitioners must abide by all the rules set forth in the Bankruptcy Code and Federal Rules of Bankruptcy Procedure and also with all state ethical rules for the jurisdiction in which they practice.

Rule 4.1 of West Virginia's Rules of Professional Conduct requires that in the course of representing a client a lawyer shall not knowingly make a false statement.

West Virginia Rule of Professional Conduct 1.3(a) states: "A lawyer shall act with reasonable diligence and promptness in representing a client." Comment 3 to Rule 1.3 reads:

> Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed.

Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

C. A series of ethical failings and violations leads to a hearing on Rule 9011 sanctions.

Long story short: Debtor's counsel filed a case without first having the male debtor obtain credit counseling. Male debtor was dismissed from case. In response to a U.S. Trustee inquiry, attorney's staff filed a credit counseling

certificate with what proved to be a handwritten alteration of the date of the counseling. Male debtor was only advised that the case had been dismissed when the notices of deposition were served.

In *In re Massie*, Case No. 07-50751 (April 23, 2008). Judge Krumm found as follows:

(1) [Debtor's counsel] violated Rule 1.1 of the Virginia Rules of Professional Conduct by not providing competent representation to the Debtors by prematurely filing the Debtors' bankruptcy petition before the male Debtor had the opportunity to complete pre-petition credit counseling, [debtor's counsel] and his office rendered the male Debtor ineligible to be a debtor under the Bankruptcy Code.

(2) Rule 1.3 of the Virginia Rules of Professional Conduct requires that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." [Debtor's counsel] failed to diligently represent his clients by neglecting to review all documents related to their bankruptcy petition before filing them and by allowing the Debtors' petition to be filed before the male Debtor had the opportunity to complete the credit counseling course. [Debtor's counsel] failed to act with reasonable promptness in informing his client as to why the male Debtor's case was dismissed. Furthermore, [Debtor's counsel] did not act with reasonable promptness by delaying the refiling of the male Debtor's case until the fees owed under the original fee agreement had been paid in full.
(3) [Debtor's counsel] violated Rule 1.4 of the Virginia Rules of Professional Conduct by failing to keep the Debtors reasonably informed about the status of their case. The Debtors testified that they did not understand why it was that the male Debtor was dismissed from their joint bankruptcy filing until they received the U.S. Trustee's request to take their deposition regarding [debtor's counsel] representation. [Debtor's counsel's] mistake in filing the Debtors' petition before the male Debtor received pre-petition credit counseling was not conveyed to the Debtors; in fact, the Debtors had been told that [debtor's counsel] would only refile the male Debtor's case after the female Debtor had paid the remaining fees under the original fee agreement.

(4) By not reasonably ensuring that his staff's conduct was compatible with his professional obligations, [debtor's counsel] violated Rule 5.3 of Virginia's Code of Professional Conduct. According to [debtor's counsel],

his secretary altered the male Debtor's certificate of credit counseling. By altering a certification to the court, [debtor's counsel's] secretary violated many professional obligations required of [debtor's counsel] as an officer of the court, a member of the Virginia State Bar, and a member of the bankruptcy bar. By not reviewing papers prepared for filing by his secretary, [debtor's counsel] failed to reasonably ensure that his staff's conduct was compatible with his professional obligations. Pursuant to Rule 5005-4 of the United States Bankruptcy Court for the Western District of Virginia Local Rules, "[t]he 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." 7

And, finally, the court finds cause for a determination of whether sanctions should be imposed pursuant to Bankruptcy Rule 9011(c)(1)(B) for presenting a petition to the court and representing that the claims were warranted and that the factual allegations had evidentiary support. See Fed. R. Bankr. P. 9011(b).

IV. Hypothetically Speaking…

A. Does One Size Fit All?

1. Facts: Debtors met with their attorney briefly during the initial consultation and then not again until their meeting of creditors. As a result of this limited interaction, debtors' counsel failed to appreciate that the garnishment which the debtors were anxious to quash stemmed from a judgment which was foreseeably going to form the basis of an objection to discharge. *In re Seare*, 493 B.R. 158, 181 (Bankr. D. Nev. 2013)

2. Maybe One Size Does Not Fit All: The root problem is a view of legal practice as a mass consumer good rather than a relationship founded on trust and individualized attention. The practice of law is a professional service, not a prepackaged, one-size-fits-all product. *In re Seare*, 493 B.R. 158, 181 (Bankr. D. Nev. 2013)

3. One Size Does Not Fit All: Attorney failed to appreciate the importance of understanding debtors' individual goals and needs. His boilerplate forms and standardized approach belie a manner of legal practice that is all too common in consumer bankruptcy—an approach which may suffice for a lot of people, a lot of the time, but is prone to failing clients with circumstances that do not fit the mold of the prototypical consumer debtor.

"Competent handling of a legal matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners." ABA MODEL RULE 1.1 cmt. 5. "The level of competency heightens as the complexity and specialized nature of the matter increase." *In re Seare*, 493 B.R. at 181.

4. Bankruptcy clients rely on their attorneys to explain an unfamiliar and complicated process so that they can make informed, appropriate decisions. 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. *Robbins v. Delafield, et al. (In re Williams)*, 2018 WL 32 (Bankr.W.D.Va.)

B. How Important is it to Reconcile the Information in the Schedules?

1. Facts: On the Statement of Financial Affairs, the debtors disclosed payments made within 90 days of the filing. Further, the disclosure indicated that the individuals referenced as having received the payments were still owed money. None of the individuals were listed as creditors. *In re Hart*, 540 B.R. 363 (2015).

2. Lawyers Should Check that the Information Contained in Schedules is Internally Consistent: The firm's practice of having their untrained, unsupervised clerical staff prepare all documents, with the attorneys then spending, at most, a few minutes with the clients to sign the paperwork, is one cause of the repeated problems. Likewise, this Court has admonished the firm's attorneys that their review of client information must also be more than perfunctory. *In re Hart*, 540 B.R. 363 (2015) (*citing Bergae,* 2014 WL 1419586, at *5). When the attorneys actually review documents, they often fail to compare information on related documents or double check the accuracy of the information provided even when the information on its face appears suspect. *Id. (citing Carter,* 2014 WL 4802919, at *6–7) (zero value listed for commercial building should have raised red flag and caused firm attorney to make further inquiry). Initial mistakes are often compounded by the failure of the firm's attorneys to take responsibility for their errors and to promptly file corrected documents. *Id.*

3. Maybe It's Okay to Blame the Debtor? The *Hart C*ourt rejected this argument, stating that if a debtor was "responsible not only to provide information about her financial affairs to her attorneys but also to explain to them how to prepare the legal documents, then the attorneys provided no more than a typing service." *Id. at 369.*

Not only is not okay to blame the debtor, attorneys cannot ignore unpleasant facts and have an ethical duty to inquire further. As noted in *In re Pigg*, 2015 WL 7424886 * 27 (Bankr. W.D. Mo.)(referencing the Missouri Rules of Professional Conduct and explaining the interplay with 11 U.S.C. § 704):

> Attorneys who learn of previously undisclosed assets or transfers may not simply turn a blind eye. Setting aside for a moment the attorney's

duty to reasonably investigate assets and the attorney's signature as a certification that he has performed that duty under § 704(b), ethical duties are implicated as well. Debtors filing Chapter 7 bankruptcies are generally seeking a discharge of their debts, maximization of the assets they may keep, and a "fresh start." In keeping with those objectives, it is unethical for an attorney to ignore undisclosed assets or transfers since to do so limits the scope of what the debtor hopes to achieve in a bankruptcy representation under MRPC 4–1.2.

In addition to the attorney's § 704(b) statutory duties, the debtor's attorney is ethically obligated to explain the ramifications to the client "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." MRPC 4–1.4(b). Thus, upon discovery of this information, the debtor's attorney not only must conduct a further investigation, but must explain the ramifications in a manner sufficient to allow the debtor to make an informed decision about what to do.

4. Leaving it to a lay person to meet with the client, go over the petition and schedules, verify their accuracy, explain the ramifications, answer questions, and obtain the signature is beyond the pale in this Court. This is unacceptable practice, and this practice shall stop. *Williams,* 2018 WL 832894 at *32-33 (Bankr. W.D. Va.).

C. Who Really Checks this Stuff Anyway?

1. Lawyers Should Use Readily Available Tools to Verify Information? "…Case law amply supports a higher investigative obligation when an attorney has special knowledge of a fact or issue. *In re Dean,* 401 B.R. 917 (sanctioning attorney for not checking status of lien on motor home title after referring them to an attorney to place a lien on the title noting that…(the attorney) did not adequately inquire as to the accuracy of the information reported by Debtors in the schedules as required by § 707(b)(4)(D). Moreover, in failing to protect his clients' interests in the motorhome from Trustee's reach, [the attorney] did not satisfy applicable Idaho standards of professional responsibility to represent his clients diligently and competently. Because of his lack of diligence, while debtors obtained a discharge of their debts, they lost a critical asset in connection with the bankruptcy case.); *In re Parikh,* 508 B.R. 762 (citing

counsel's failure to review a previous, recently- filed chapter 13 petition and schedules when filing a new chapter 7 petition); *In re Alessandro*, 2010 WL 3522255 (Bankr. S.D.N.Y. 2010) (ordering disgorgement of attorney who accepted debtor's word and failed to check PACER to find client's five previous bankruptcy filings prior to filing an emergency new case to stop a foreclosure).

2. Once the Case is Filed, Should it Be Fixed? **Yes**. As the *Alessandro* court noted: The duty of reasonable inquiry imposed upon an attorney requires the attorney ... to seek relief from the court in the event that the attorney learns that he or she may have been misled by a debtor." *In re Thomas*, 337 B.R. 879, 892 (Bankr. S.D. Tex. 2006); *In re Robinson*, 198 B.R. 1017, 1024 (Bankr.N.D.Ga.1996). The court in *In re Robinson* acknowledged that "[s]ometimes ...inquiry is not possible until the case is filed, usually where the Debtor's attorney has little time to investigate while preparing a case for filing in a short period of time to protect the Debtor's rights...." *In re Robinson*, 198 B.R. at 1024. The *Robinson* court, however, observed that Debtor's attorney knew within the first ten days after the filing of the case that Debtor had no intent to reorganize, concluding that "Debtor's attorney should have immediately attempted to persuade the debtor to voluntarily dismiss the case. If the debtor adamantly refused to dismiss, the attorney could have sought to withdraw for cause." *Id.*

3. *In re Mosley-Ridley* (Case No. 14-60323, Doc. 28) (Bankr. W.D. Va. 2015) (Connelly, J)

In her motion to review attorney's fees, the U.S. Trustee asserts that [debtor's counsel] violated Virginia Rules of Professional Conduct 3.3 and 4.1. An attorney licensed by the Virginia State Bar has the ethical obligation not to make false statements to a tribunal or other persons in the course of representing a client. Specifically, Rule 3.3(a), Candor Toward the Tribunal, provides that "[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal . . . or. . . offer evidence that the lawyer knows to be false." Va. Rule of Prof'l Conduct 3.3(a). (footnote omitted).

Duty of candor to the tribunal requires professional conduct of an attorney analogous to the conduct expected by bankruptcy practitioners under Federal Rule of Bankruptcy Procedure 9011. *See* Fed. R. Bankr. P. 9011; *see also In re T.H.*, 529 B.R. 112, 144 (Bankr. E.D. Va. 2015) (finding

that Rule 9011 "similarly provides that an attorney's signature on a pleading filed in this Court constitutes a representation that the attorney had a good faith basis in fact or in law for filing the pleading"). Rule 9011 substantially conforms to Federal Rule of Civil Procedure 11, and thus this Court "may look to case law interpreting Rule 11." *In re Tucker*, 516 B.R. 340, 345 (Bankr. W.D. Va. 2014) (quoting *In re Babcock*, 258 B.R. 646, 651 (Bankr. E.D. Va. 2001)). In the Fourth Circuit, a judge must use "an objective standard of reasonableness. . . . [T]he court must derive the signer's purposes from objective evidence of the signer's motive in filing the document." *McGahren v. First Citizens Bank & Trust Co. (In re Weiss)*, 111 F.3d 1159, 1171 (4th Cir. 1997). The Court also "may consider circumstantial facts that surround the filing as evidence of the signer's purpose." *Id.*

b. Duty of truthfulness

Similarly, Rule 4.1, Truthfulness in Statements to Others, provides that "[i]n the course of representing a client a lawyer shall not knowingly . . . make a false statement of fact or law." Va. Rule of Prof'l Conduct 4.1. "A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false." Va. Rule of Prof'l Conduct 4.1, cmt. 1. The duty of truthfulness in statements to others requires that an attorney not knowingly make false factual statements to third persons; this "state of mind . . . may be inferred from the surrounding circumstances and encompasses careless and recklessly negligent conduct." *Ausherman v. Bank of Am. Corp.*, 212 F. Supp. 2d 435, 445 (D. Md. 2002). This rule governing the duty of truthfulness is worded almost identically to the duty of candor to the tribunal and should be interpreted similarly. *See id.* at 446.

And, in synthesizing the ethical obligations with those contained in the Bankruptcy Code, the Court noted:

"Bankruptcy Code section 707(b)(4)(D) provides that "[t]he 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 . . . is incorrect." *Id.* § 707(b)(4)(D); *see In re Smith*, No. 13-31565-KLP, 2014 WL 128385, at *6 (Bankr. E.D. Va. Jan. 14, 2014) (finding a violation of section 707(b)(4)(D) and Rule 9011 when attorney failed to "make the reasonable inquiry necessary to determine that the information

contained in the Exhibit D he filed with the Court was accurate"). Bankruptcy Code section 707(b)(4)(C) provides that "[t]he signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has—(i) performed a reasonable investigation . . . and (ii) determined that the petition, leading, or written motion—(I) is well grounded in fact." *See* 11 U.S.C. § 07(b)(4)(C). It could hardly be more clear that an attorney has a duty to verify that the information disclosed in the bankruptcy schedules is accurate and substantiated." *In re Mosley-Ridley*, Case No. 14-60323, Doc. 28, page 10 (Bankr. W.D. Va. 2015) (Connelly, J.)

V. Bankruptcy Code Section 704(b)(C) and (D)

A. 11 U.S.C. § 707(b)(4)—

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

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

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

(I) is well grounded in fact; and

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

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

B. The legislative intent behind §707(b)(4)(C) and (D) has been described as follows:

[D]ebtors' counsel are to exercise significant care as to the completeness and accuracy of *all* recitations on their clients' schedules, after they have made a factual investigation and legal evaluation that conforms to the

> standards applicable to any attorney filing a pleading, motion, or other document in a federal court. The content of a debtor's petition and schedules is relied on and should have the quality to merit that reliance. *In re Robertson*, 370 B.R. 804, 809 n. 8 (Bankr. D. Minn. 2007).
>
> Courts have observed that Congress intended § 707(b)(4)(C) and (D) be read together, such that the requirement of a reasonable investigation should apply to the information in the petition as well as the schedules and statements. *See Orton v. Hoffman (In re Kayne),* 453 B.R. 372, 381–82 (9th Cir.B.A.P.2011).

C. The BAP equated the analyses under Section 707(b)(4)(C) and Rule 9011—" 'a debtor's attorney has a duty, *equivalent to that under [Rule] 9011* to perform a reasonable investigation into the circumstances giving rise to the documents before filing them in a Chapter 7 case' " *Id.* at 381 (quoting *In re Withrow,* 405 B.R. 505, 511–12 (1st Cir. BAP 2009) (emphasis added) ["*In re Withrow* (BAP)"], *aff'g In re Withrow,* 391 B.R. 217 (Bankr.D.Mass.2008) ["*In re Withrow* (Bankr.Ct.)"]). In other words, Rule 9011 is "enhanced" by the BAPCPA additions of Section 707(b)(4)(C) and (D), and "evinces a policy that a debtor's attorney exercise independent diligence and care in ensuring that there is evidentiary support for the information contained in the client's bankruptcy schedules." *In re Kayne,* 453 B.R. at 385 (citing *In re Dean,* 401 B.R. 917, 924 (Bankr. D. Idaho 2008)). Likewise, the attorney must exercise independent diligence to investigate the facts underlying the client's desire to file for bankruptcy to comply with Section 707(b)(4)(C). The "reasonable investigation" required under Section 707(b)(4)(C) is coterminous with the "reasonable inquiry" required under Rule 9011. *See id. Seare, 493 B.R. at 209.*

D. Cases Discussing "reasonable inquiry"

1. *In re Robinson*

"The duty of reasonable inquiry imposed upon an attorney by the Federal Rules and by virtue of the attorney's status as an officer of the court owing a duty to the integrity of the system requires that the attorney (1) explain the requirement of full, complete, accurate, and honest disclosure of all information required of a debtor; (2) *ask probing and pertinent questions designed to elicit full, complete, accurate, and honest disclosure of all information required of a debtor;* (3) check the debtor's responses in the petition and schedules to assure they are internally and externally consistent; (4) demand of the debtor full, complete, accurate, and honest disclosure of all information required before the attorney signs and files the petition; and (5) seek relief from the court in the event that the attorney learns that he or she may have been misled by a debtor." (emphasis added).

Notably, the second requirement places an affirmative duty on the attorney to take steps to ensure that the client is providing complete and accurate information. Merely relying on what the debtor provides is insufficient. The attorney must engage with the client and not just take a passive role; "attorneys must exercise not only supervision, but, more importantly, professional judgment that derives only through *personal involvement in the case and evaluation of the client's needs.*" (emphasis added). *In re Robinson,* 198 B.R. 1017, 1024 (Bankr.N.D.Ga.1996))

2. *In re Withrow*

In addition, under new §§ 707(b)(4)(C) and (D) (as revised by BAPCPA), a debtor's attorney has a duty, equivalent to that under Bankruptcy Rule 11, to perform a reasonable investigation into the circumstances giving rise to the documents before filing them in a chapter 7 case. For example, under new § 707(b)(4)(C), attorneys are subject to an automatic certification of meritoriousness, based upon a reasonable investigation, as to any "petition, pleading, or written motion" signed by them. *See* 11 U.S.C. § 707(b)(4)(C). Furthermore, under new § 707(b)(4)(D), an attorney's signature on a client's bankruptcy petition is deemed a representation that "the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is

incorrect." *See* 11 U.S.C. § 707(b)(4)(D). *In re Withrow*, 405 B.R. 505, 512 (1st Cir. BAP 2009).

3. *In re Seare*

To summarize, Section 707(b)(4)(C) serves as an enhancement to Rule 9011. The "reasonable investigation" under this section is indistinct from the "reasonable inquiry" under Rule 9011. To comply with Section 707(b)(4)(C), the attorney must perform an objectively reasonable investigation into the circumstances giving rise to the petition, assessed at the time the petition was filed. 11 U.S.C. § 707(b)(4)(C) (2012). The attorney cannot take all of the client's assertions at face value nor rely solely upon the information provided by the client. The attorney may rely on her client's objectively reasonable assertions, but where the client-provided information is internally (or externally) inconsistent, materially incomplete, or raises "red flags," the attorney is obligated to probe further—by asking questions, obtaining additional documents, or by some other means. Again, the attorney is the expert and cannot rely upon a client's limited understanding of what constitutes the "complete" or "necessary" information that the attorney must have nor what information is or is not relevant to the client's particular situation. *Seare at 211.*

There is clear consensus, however, that an attorney cannot solely rely on the information provided by a client if such information is reasonably apparent to be incomplete or inconsistent or raises a "red flag."

4. *In re Moffett*

The Court rejected an attorney's attempt to blame his client for not providing complete information:

What [the attorney] misses, however, is that the Debtor provided exactly what she was told she had to provide to get her case filed. The fault for the lack of complete information rests with [the attorney] for not insisting that clients he represents be told—and required—to bring in all necessary information before a case will be filed. He cannot absolve himself of the duty to conduct a reasonable investigation [under § 707(b)(4)(C)] by affirmatively allowing clients to bring in only the bare minimum of information and then claiming that it is not his fault that he did not have sufficient information to review. *In re Moffett,* 2012 WL 693362, at *3 (Bankr. C.D. Ill.).

5. *In re Varan*

A defense of zealous advocacy in the face of allegations of failure to full disclosures will be met with the following:

… "[A] lawyer's duty of candor to the court must always prevail in any conflict with the duty of zealous advocacy." *United States Dep't of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Mgmt. of Va., Inc.*, 64 F.3d 920, 925 (4th Cir.1995); *see also Cleveland Hair Clinic, Inc. v. Puig*, 200 F.3d 1063, 1067 (7th Cir.2000) (noting that the comment to Rule 3.3 of the Rules of Professional Conduct for the Northern District of Illinois Rule 3.3 of the Rules of Professional Conduct for the Northern District of Illinois states that a lawyer's task of maintaining client confidence "is qualified by the advocate's duty of candor to the tribunal"). This interpretation does not denigrate a lawyer's duty to zealously represent his or her clients, for that duty is always understood to mean zealous representation within the bounds of the law and ethical conduct. *In re Varan*, 2014 WL 2881162 * 10 (Bankr. N.D. Ill. 2014).

VI. 11 U.S.C. § 526(a)(2)

A. Section 26(a)(2) provides:

(a) A debt relief agency shall not--

(1) fail to perform any service that such agency informed an assisted person or prospective assisted person it would provide in connection with a case or proceeding under this title;

(2) make any statement, or counsel or advise any assisted person or prospective assisted person to make a statement in a document filed in a case or proceeding under this title, that is untrue or misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue or misleading;

(3) misrepresent to any assisted person or prospective assisted person, directly or indirectly, affirmatively or by material omission, with respect to –

(A) the services that such agency will provide to such person; or

(B) the benefits and risks that may result if such person becomes a debtor in a case under this title…

B. Case Law under Section 526

1. Section 526(a)(2) is violated when a debt-relief agency "counsel[s] or advise[s] any assisted person" to make a fraudulent or misleading statement in a document in a bankruptcy case. The statute says nothing about whether the document containing that statement also must then be filed. Section 7206(2), however, punishes anyone who "counsels or advises *the preparation or presentation*" of a tax return or other document (emphasis added). In other words, § 7206(2) targets the improper counseling of the completed act (preparing or presenting a false return), whereas § 526(a)(2) targets making a false statement *or* advising an assisted person to make a false statement in a bankruptcy document. 770 F.3d 719, 723 (8th Cir. 2014).

2. A debt relief agency may not mislead an assisted person about the services it will provide. *See, e.g., Jonak v. McDermott,* 511 B.R. 586, 601 (D. Minn. 2014) (use of the business name the "Affordable Law Center" was a misrepresentation because the defendant was not an attorney); *McDow v. Am. Debt Free Ass'n (In re Spence),* 411 B.R. 230, 241 (Bankr. D. Md. 2009) (it was misleading to suggest the debt relief agency would file a bankruptcy case when an outside firm filed the petition). A material omission that misleads the assisted person is a misrepresentation. *See* 11 U.S.C. § 526(a)(3).

VII. 11 U.S.C. § 527(b)

A. Section 527(b) provides:

(b) A debt relief agency providing bankruptcy assistance to an assisted person shall provide each assisted person at the same time as the notices required under subsection (a)(1) the following statement, to the extent applicable, or one substantially similar. The statement shall be clear and conspicuous and shall be in a single document separate from other documents or notices provided to the assisted person:

"IMPORTANT INFORMATION ABOUT BANKRUPTCY ASSISTANCE SERVICES FROM AN ATTORNEY OR BANKRUPTCY PETITION PREPARER.

"If you decide to seek bankruptcy relief, you can represent yourself, you can hire an attorney to represent you, or you can get help in some localities from a bankruptcy petition preparer who is not an attorney. THE LAW REQUIRES AN ATTORNEY OR BANKRUPTCY PETITION PREPARER TO GIVE YOU A WRITTEN CONTRACT SPECIFYING WHAT THE ATTORNEY OR BANKRUPTCY PETITION PREPARER WILL DO FOR YOU AND HOW MUCH IT WILL COST. Ask to see the contract before you hire anyone.

"The following information helps you understand what must be done in a routine bankruptcy case to help you evaluate how much service you need. Although bankruptcy can be complex, many cases are routine.

"Before filing a bankruptcy case, either you or your attorney should analyze your eligibility for different forms of debt relief available under the Bankruptcy Code and which form of relief is most likely to be beneficial for you. Be sure you understand the relief you can obtain and its limitations. To file a bankruptcy case, documents called a Petition, Schedules, and Statement of Financial Affairs, and in some cases a Statement of Intention, need to be prepared correctly and filed with the bankruptcy court. You will have to pay a filing fee to the bankruptcy court. Once your case starts, you will have to attend the required first meeting of creditors where you may be questioned by a court official called a 'trustee' and by creditors.

"If you choose to file a chapter 7 case, you may be asked by a creditor to reaffirm a debt. You may want help deciding whether to do so. A creditor is not permitted to coerce you into reaffirming your debts.

"If you choose to file a chapter 13 case in which you repay your creditors what you can afford over 3 to 5 years, you may also want help with preparing your chapter 13 plan and with the confirmation hearing on your plan which will be before a bankruptcy judge.

"If you select another type of relief under the Bankruptcy Code other than chapter 7 or chapter 13, you will want to find out what should be done from someone familiar with that type of relief.

"Your bankruptcy case may also involve litigation. You are generally permitted to represent yourself in litigation in bankruptcy court, but only attorneys, not bankruptcy petition preparers, can give you legal advice."

(c) Except to the extent the debt relief agency provides the required information itself after reasonably diligent inquiry of the assisted person or others so as to obtain such information reasonably accurately for inclusion on the petition, schedules or statement of financial affairs, a debt relief agency providing bankruptcy assistance to an assisted person, to the extent permitted by nonbankruptcy law, shall provide each assisted person at the time required for the notice required under subsection (a)(1) reasonably sufficient information (which shall be provided in a clear and conspicuous writing) to the assisted person on how to provide all the information the assisted person is required to provide under this title pursuant to section 521, including--

(1) how to value assets at replacement value, determine current monthly income, the amounts specified in section 707(b)(2) and, in a chapter 13 case, how to determine disposable income in accordance with section 707(b)(2) and related calculations;

(2) how to complete the list of creditors, including how to determine what amount is owed and what address for the creditor should be shown; and

(3) how to determine what property is exempt and how to value exempt property at replacement value as defined in section 506.

(d) A debt relief agency shall maintain a copy of the notices required under subsection (a) of this section for 2 years after the date on which the notice is given the assisted person.

B. *In re Santos,* 2020 WL 1304142 *13 (Bankr. N.D. Tex.) held that Section 527 requires:

(1) Attorneys must provide "clear and conspicuous written notice" advising the debtor that all information disclosed in the required filings and schedules must be "complete, accurate, and truthful" and that failure to comply may result in dismissal and/or sanctions;

(2) Attorneys must provide prospective debtors with a copy of the statement included in Section 527(b), which is intended to enable prospective debtors to make an informed decision whether or not to file; and

(3) Attorneys must either obtain accurate information that their debtor clients are required to disclose or supply their debtor clients with enough directions on how to acquire all the information that they need in order to file.

VIII. Federal Rule of Bankruptcy Procedure 1008

A. Federal Rule of Bankruptcy Procedure 1008 provides:

All petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 U.S.C. § 1746.

B. 28 U.S.C. § 1746: The impact of unsworn declarations under penalty of perjury is as follows:

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)".

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)".

C. Efficacy of Rule 1008:

1. Debtor: Under Rule 1008, the debtor must sign "all petitions, lists, schedules, statements and amendments thereto" as a means of (i) authorizing the filing of the documents, (ii) verifying, under penalty of perjury, that the debtor has reviewed the information, and (iii) verifying that the information is "truthful and accurate to a degree that only the debtor [*herself*] could verify." *Briggs v. LaBarge (In re Phillips*), 317 B.R. 518, 523 (8th Cir. BAP 2004).

2. Attorney: an attorney *"who files schedules and statements on a debtor's behalf* makes a certification regarding the representations contained therein"—one which constitutes an "endorsement" formed after a reasonable inquiry. *In re Withrow*, 405 B.R. 505, 512 (1st Cir. BAP 2009).

3. "The verification requirement under Bankruptcy Rule 1008 relates to Bankruptcy Rule 9011(b) because, by failing to obtain the debtor's verification as to the accuracy of the documents he files, an attorney falsely represents to the court that 'the allegations and other factual contentions have evidentiary support.'" *In re Futreal*, 2016 WL 2609644 (Bankr. W.D. Va.) *citing In re Bradley*, 495 B.R. 747, 779 (Bankr. S.D. Tex. 2013).

IX. Rule 9011 of the Federal Rules of Bankruptcy Procedure (and Rule 3.3 of the Rules of Professional Conduct)

As highlighted and emphasized by Judge St. John in *In re T.H.* 529 B.R. 112 (Bankr. E.D. Va. 2015):

> Virginia Rule of Professional Conduct 3.3 provides, in part, that an attorney shall display candor towards the Court and will not make a false statement of fact or law to this Court. Va. Rule of Prof'l Conduct 3.3. "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 or legal basis for the pleading." Va. Rule of Prof'l Conduct 3.3, cmt. 3 (*citing* Va. Code § 8.01–271.1). Federal Rule of Bankruptcy Procedure 9011 similarly provides that an attorney's signature on a pleading filed in this Court constitutes a representation that the attorney had a good faith basis in fact or in law for filing the pleading. Fed. R. Bankr. P. 9011. 529 B.R. at 144.

A. 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.

B. Case Law regarding Rule 9011

1. As noted by Judge Black in *In re Panthera Enterprises, LLC:*

> At a minimum, Rule 9011(b)(3) places on attorneys a duty to make some affirmative investigation into the facts represented in documents submitted to the court. *In re Obasi*, No. 10–10494 SHL, 2011 WL 6336153 at *5 (Bankr. S.D.N.Y. Dec. 19, 2011). While "the investigation performed by a signatory need not be to the point of certainty to be reasonable," a "signer must explore readily available avenues of factual inquiry." *Id.* Though an attorney may generally rely on objectively reasonable client representations, the attorney must independently verify publicly available facts to determine if the client representations are objectively reasonable. *Hadges v. Yonkers Racing Corp.* 48 F.3d 1320, 1329 (2d Cir. 1995). 2021 WL 1235788 *5 (Bankr. N.D. WV).

2. The failure to cross check information provided in answer to SOFA questions with information provided for a debtor's schedules does not constitute the type of reasonable inquiry required by Rule 9011. And the failure to question suspicious or obviously inaccurate information also falls well short of the required standard. *In re Hart*, 540 B.R. 363, 369 (Bankr. C.D. Ill. 2015) (*citing Carter,* 2014 WL 4802919, at *6).

3. The duty of reasonable inquiry imposed upon an attorney requires the attorney (1) to explain the requirement of full, complete, accurate, and honest disclosure of all information required of a debtor; (2) to ask probing and pertinent questions designed to elicit full, complete, accurate, and honest disclosure of all information required of a debtor; (3) to check the debtor's responses in the petition and schedules to assure they are internally and externally consistent; (4) to demand of the debtor full, complete, accurate, and honest disclosure of all information required before the attorney signs and files the petition; and (5) to seek relief from the court in the event that the attorney learns that he or she may have been

misled by a debtor ...*In re Thomas,* 337 B.R. 879, 892-893 (Bankr. S.D. Tex. 2006) (*citing In re Robinson,* 198 B.R. 1017 (Bankr.N.D.Ga.1996)).

When one or more attorneys allow one or more clients to abuse the system, the harm which devolves is not limited to the affected creditors. By example and word of mouth, the "technique" spreads until it is no longer perceived by the Bar and by debtors as an abuse but as a permissible manipulation of the system. In the meantime, respect for the bankruptcy system, including attorneys who wish to assist honest debtors, deteriorates. When public respect for any part of the legal system falters, it harms everyone involved in the system, which must rely on honest participation. *Id.* (*citing In re* Armwood*,* 175 B.R. 779 (Bankr.N.D.Ga.1994)).

4. The required representations in a complete bankruptcy filing are numerous, including representations of the debtor's assets, liabilities, creditors, income, and expenses. Federal Rule of Bankruptcy Procedure 9011 requires attorneys sign all documents filed in a case to certify "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that "the allegations and other factual contentions have evidentiary support. *Emergency circumstances do not obviate this requirement.* Even in the case of filing a "skeleton petition," Rule 9011 mandates the attorney certify the veracity of the pleadings and make certain basic representations, including that the debtor is eligible to file under a particular chapter and that the filing is appropriate for the debtor's circumstances. *In re T.H.,* 529 B.R. 112, 139-140 (Bankr. E.D. Va. 2015) (citations omitted) (emphasis added). As noted above, Judge St. John properly equates violations of this requirements with also failing to meet an attorney's duty of candor to the tribunal in violation of Rule 3.3.

X. West Virginia Attorney Disciplinary Cases

Lawyer Disciplinary Bd. V. Burke (2012): Admonishment

Attorney violated Rules 1.3 and 1.4(a) and (b), as well as Rule 1.15, when a medical malpractice case in which the Debtor was the Plaintiff was settled and proceeds were distributed without participation by or notice to the Chapter 7 Trustee. The attorney withdrew from representation post-petition in the medical malpractice case which was filed before the client filed for bankruptcy. The

attorney was contacted by the Chapter 7 Trustee before his withdrawal and well before co-counsel settled the case. Attorney did not submit a notice or motion of withdrawal in the bankruptcy case. Attorney's lack of selfish motive and expression of remorse prevented a harsher penalty.