Bankruptcy Planning – Obligations and Risks to Attorneys

What are the ethical duties of an attorney when advising a debtor about the protection of assets?

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Concealment and Fraudulent Conduct Issues

Under the Missouri Rules of Professional Conduct, an attorney may not counsel a debtor to conceal assets, nor may an attorney assist the debtor in any way in such concealment. ***Missouri Rule of Professional Conduct 4-1.2(d)***, entitled ***"Scope of Representation,"*** states as follows:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences or any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

The concealment of assets from an estate is made criminal by 18 U.S.C. § 152, entitled "Concealment of assets; false oaths and claims; bribery." This section reads as follows:

> A person who--
> (1) knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;
> (2) knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11;
> (3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11;
> (4) knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, in a personal capacity or as or through an agent, proxy, or attorney;
> (5) knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11;
> (6) knowingly and fraudulently gives, offers, receives, or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in any case under title 11;
> (7) in a personal capacity or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against the person or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation;
> (8) after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor; or
> (9) after the filing of a case under title 11, knowingly and fraudulently withholds

from a custodian, trustee, marshal, or other officer of the court or a United States Trustee entitled to its possession, any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor,

shall be fined under this title, imprisoned not more than 5 years, or both.

Using Rule 4-1.2(d), it is an ethical violation for an attorney to counsel a debtor to conceal assets or to assist in concealing assets. Additionally, an attorney may be subject to criminal prosecution under 18 U.S.C. § 152, especially if the attorney prepares pleadings/schedules which he or she knows omits assets. See Coghlan v. United States, 147 F.2d 233 (8th Cir. 1945) for an example of a criminal prosecution of an attorney who assisted in the concealment of assets.

Confidentiality

If the attorney finds out that the debtor has concealed assets in the past or plans to conceal assets in the future (without the assistance of the attorney), it is doubtful that the attorney can ethically disclose this information to the court. ***Missouri Rule of Professional Conduct 4-1.6***, entitled ***"Confidentiality of Information,"*** reads as follows:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defenses on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Even though concealment is criminal and could be prevented by disclosure, an attorney cannot ethically disclose the concealment because such concealment will not result in death or substantial bodily harm.

The question arises as to what an attorney should do if he or she discovers the debtor is concealing assets. The ***Comment to Rule 4-1.6 (Confidentiality)*** states as follows:

Withdrawal. If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosures of the clients' confidences, except as otherwise provided in Rule 1.6. Neither this Rule nor Rule 1.8(b) prevents the lawyer from giving notice of the fact of withdrawal , and the lawyer may also withdraw or disaffirm any opinion, document, affirmation or the like.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indication in Rule 1.13(b).

Other Ethical Principles and Rules Involved in Pre-Bankruptcy Planning and Bankruptcy Disclosures

RULE 4-1.1 - 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 4-3.3 – Candor Toward the Tribunal

A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client . . . .

RULE 4-4.1 Transactions with Persons Other Than Clients

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

(a) make a false statement of material fact or law to a third person; or

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