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Caught in the Crossfire: The (Supposedly) Innocent Attorneys Who Represent Accused Fraudsters

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Editor's Note: *This article is the second in a series calling for a more aggressive response to bankruptcy and other fraud. The first in the series was initially published in the May 2009 issue, entitled "A Call to Arms: A Bankruptcy Fraud Superfund."*

In law school, we were taught that when representing a person accused of committing a crime, we're never to ask, "did you do it?" From "innocent until proven guilty" to "representation for all," the axiom was not to know whether the client "did it," but instead to protect the rights of the accused, even if they did do it. While this ideology is arguably consistent with the will of our forefathers, recall that the context is criminal defense. What's more, the ideology is not without obvious limits in its application, criminally or civilly. Based on my personal experience, many civil lawyers honor the principle of "don't ask, don't tell" to an extreme—and in so doing, have exceeded the limits and crossed the boundary line of ethical conduct.


Neal H. Levin

Before digging too deep into the ethics, though, let's consider a particular criminal defense attorney. The case was an involuntary bankruptcy under §303, and my creditor client successfully obtained the appointment of a gap trustee, more elusive than The Loch Ness Monster herself. The gap trustee and my client then secured an *ex parte* order for an unannounced inspection of the target's offices. After forcing the target and his staff out the door for a spell, the target hurriedly brought in both bankruptcy and criminal defense counsel. At the conclusion of the hearing that resulted in the denial of a motion to reconsider the judge's order to allow the inspection, the just-hired criminal defense counsel quipped in the hallway outside the courtroom, "sheesh, I guess you guys don't have due process in bankruptcy courts."

Well, yes, as a matter of fact we do, but when counsel starts going on about how innocent his client is, how we're "making a big mistake" because his client has no money and that his client is due to be nominated for outstanding citizen of the year, then due process is no longer the issue. Rather, the issue is how counsel justifies an abandonment of "don't ask don't tell" in favor of rants about wholly unsupported facts and declared innocence without so much as five minutes of due diligence. In my humble opinion, this is *not* what the forefathers had in mind...nor my law school professors, for that matter.

At first blush, this may not seem like an ethics issue. So what's wrong with a little zealous advocacy on behalf of your client? What's wrong with spending five minutes with him, hearing him profess his innocence and then stepping before the judge to argue against mounds of evidence and a several-month investigation by creditor's counsel? Is it really so troublesome or anything worthy of all this space? The short answer is "unequivocally." Let's finally look at the relevant rules of ethics.

Model Rule of Professional Conduct 1.1 (Competence)

> …Competent representation requires the legal knowledge, skill, thoroughness *and preparation* reasonably necessary for the representation. (emphasis added)

Model Rule of Professional Conduct 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 in law and fact for doing so that is not frivolous....

Model Rule of Professional Conduct 3.3(b) and (c) (Candor Toward the Tribunal)

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

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Feature

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conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Model Rule of Professional Conduct 8.4(c) (Misconduct)

It is professional misconduct for a lawyer to...(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

Though all too few and far between, courts and ethics boards have applied these rules in disciplining attorneys who make statements that, without conducting proper due diligence, turn out to be false. For example, the Louisiana Supreme Court in *In re Zohdy*[2] upheld a three-year suspension where an attorney, among other things, submitted a claim form in connection with a class action stating that his client's dead husband was diagnosed with bladder cancer.[3] In fact, the attorney ignored the death certificate, autopsy report and other medical records, which established that the man actually died from a different, non-compensable medical condition.[4] The judge in the underlying case found that the attorney's representations "were not only unsupported by any medical evidence or admissible medical opinion but were, in fact, directly contradicted by all medical evidence."[5] In his own defense during the ethics hearing, the attorney "attempted to cloak his conduct in the guise of 'zealous advocacy,'" but the court found that, in reality, his actions "went far beyond such advocacy."[6]

In another example, in *Ansell v. Statewide Grievance Committee,*[7] the appellate court of Connecticut affirmed a reprimand issued by the grievance committee where the attorney in that matter alleged during a hearing that opposing counsel improperly engaged in *ex parte* communication with a potential witness.[8] However, a prior deposition of the potential witness already showed that the *ex parte* communications were not improper.[9] Despite having the time and opportunity to research and correct her position on the issue, the attorney continued to make statements that she could not support with evidence.[10] The appellate court upheld the finding that she made the statements recklessly and that the statements constituted misrepresentations in violation of Rules 3.4 and 8.4.[11] The court "failed to see how effective representation will be undermined by requiring attorneys to have evidence to substantiate claims brought before the court."[12]

Ethics aside, attorneys should not allow themselves to become the tools in a fraudster's arsenal. Fraudsters are highly intelligent, primordial beings whose reality is premised on the notion of "kill or be killed." They do not play by normal rules (or laws) and will do whatever it takes to conquer.

Clearly, the authority embraces the concept of constructive knowledge.[13] In other words, the conduct of a fraudster's attorney is to be assessed on what she or he *should* know. This is something well beyond "don't ask, don't tell." It requires due diligence into the claims by creditors, trustees, receivers and the government.[14] It requires gathering facts and evidence before setting off to profess a client's innocence (let us leave the "not guilty" plea in a criminal case for a later discussion). It requires a determination of whether the client intends to, is or has engaged in fraudulent conduct as alleged or as might be the subject of the investigation. It certainly does *not* leave open the option to simply march into court screaming that the claims are malicious or even without merit.[15] Specifically, comment 3 to Model Rule 3.3 states that "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." (emphasis added)

What's more, Model Rule 3.3 goes so far as to contemplate affirmative disclosure of information, including attorney/client privileged communications, where such information or communications reveal the past, present or intended fraudulent conduct of the fraudster.[16] Additionally "[l]awyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process...."[17]

Not all attorneys limit their strategy to unsupported rants of innocence, however. Rather, it seems that all too often the strategy is to delay, frustrate and otherwise muddy-up the litigation in an attempt to gather time for the fraudster to re-tool.[18] As I've said time and time again, a fraudster's greatest asset is time, and given enough of it, money mysteriously disappears, documents mysteriously fade away and computers mysteriously lose their data. Fraudsters can accomplish spectacular feats in very short periods of time once the chase is on. For counsel to willingly undertake dilatory tasks on behalf of an accused fraudster requires a complete indifference to the facts of the case. It is the norm that the greatest education a fraudster's attorney gets is from the entity attorney pursuing the fraudster, not from his own client, all the while executing a plan that is nothing more than frivolous garbage

2 892 So.2d 1277 (2005).
3 892 So.2d at 1280.
4 *Id.* at 1280-81.
5 *Id.* at 1281.
6 *Id.* at 1289 n. 15.
7 865 A.2d 1215 (Conn. App. Ct. 2005).
8 865 A.2d at 1217.
9 *Id.*
10 *Id.* at 1221.
11 *Id.* at 1221-23.
12 *Id.* at 1222.
13 *See also* Model Rule 1.0(f) (defining "knowingly," "known" or "knows" as denoting actual knowledge of fact in question that "may be inferred from circumstances"); *Romero-Barcelo v. Acevedo-Vila*, 275 F.Supp.2d 177, 191 (D. P.R. 2003) ("The prohibition against false statements has been interpreted to include those statements that are knowingly false, as well as statements which, with ordinary care, would have been known to be false."); *Office of Disciplinary Counsel v. Price*, 732 A.2d 599, 604 (Pa. 1999) (*prima facie* violation of Rule 8.4(c) when misrepresentation is "knowingly made or made with reckless ignorance of the truth or falsity of the representation," *i.e.,* "deliberate closing of one's eyes to facts that one had a duty to see or stating as fact things of which one was ignorant").
14 *See* Model Rule 1.1; Model Rule 1.1 cmt. 5 ("Competent handling of a particular 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. It also includes adequate preparation."); Model Rule 3.1; Model Rule 3.1 cmt. 2 (providing that lawyers are required to "inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good-faith arguments in support of their clients' positions"); *see also Thompson v. Haynes*, 36 F.Supp.2d 936, 939 (N.D. Okla. 1999) ("An attorney has a duty of absolute candor to the Court [and] [o]ne aspect of this duty of candor is the attorney's obligation to reasonably investigate the facts before making representations to the court.").
15 *Thompson*, 36 F.Supp.2d at 940 ("When an attorney fails to make a reasonable investigation before making representations to the Court, the attorney undermines the discovery process and appropriate sanctions should be imposed to both rectify any prejudice caused by the attorney's conduct and also to deter the attorney and others from such conduct in the future.").
16 As stated at Model 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 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." In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. Model Rule 4.1 cmt. 3. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Model Rule 1.6. *Id.*
17 Model Rule 3.3 cmt. 12.
18 Model Rule 3.2 may be implicated. This rule involves expediting litigation and states: "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." "Dilatory practices bring the administration of justice into disrepute...[and] a failure to expedite [will not] be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose." Model Rule 3.2 cmt. 1.

that unravels the fabric of our judicial system—definitely not what the forefathers had in mind.

Take, for instance, this gem from a case in Texas. The fraudster, a debtor in bankruptcy, and his wife, the alleged keeper of the family's wealth (wink wink), were the subjects of a motion to compel production of computers for examination by the trustee and lead creditor. Not too surprisingly, when the forensic examiners showed to mirror three computers, they had been wiped clean with a commercial grade data shredder. At the hearing on the motion for contempt, the wife's newly-hired counsel spent several hours attempting to justify what might have happened to the data. Counsel's million dollar theory was that the computer had been dropped, but according to the judge, if it weren't for the fact that the wife was in court with her two month-old baby, the wife would have been put in jail.

More troubling than the computer destruction, though, is the attorney's conduct. This utter indifference to fact and reason is a blight on our judicial system—even more so than the actions of another Texas bankruptcy lawyer, who marched her client down the hall to a corporate attorney to have a new entity formed in which the debtor could continue his business operations, the debts for which he was attempting to have discharged in his personal bankruptcy. That attorney is the subject of an entirely different set of rules and should be disbarred or charged with bankruptcy fraud at once (unfortunately, she wasn't, though she was at least wise enough to withdraw the minute this little piece of tomfoolery was unearthed).[19]

More subtle and closer to the grey zone is the case of the fraudster's bankruptcy counsel, who helped to prepare loan documents for the debtor pre-petition in order to evidence otherwise undocumented loans from the debtor's brother over a year prior to his engagement. The attorney shielded himself from any suggestion of wrongdoing at the 341 meeting by vehemently disclaiming any actual knowledge of the loan transactions. Rather, he was merely documenting a transaction that the debtor told him had occurred.

Undeniably, our judicial system is adversarial and not informational. If we wanted to get to the bottom of the facts, then none of this conduct would be possible. Instead, the system supports the likelihood that when confronted with fraud claims, a fraudster will hire counsel that will buy into the fraudster's scheme without any questions asked. This "ostrich head in the sand" engagement is not only a vast distance away from the axiom of "don't ask, don't tell," but is also forbidden by the Rules of Professional Conduct; such conduct should be identified and punished by our system in order to restore integrity and send a message that fraudsters should not expect the assistance of counsel in perpetrating their fraud upon creditors and the courts.

Ethics aside, attorneys should not allow themselves to become the tools in a fraudster's arsenal. Fraudsters are highly intelligent, primordial beings whose reality is premised on the notion of "kill or be killed." They do not play by normal rules (or laws) and will do whatever it takes to conquer. Just like in the days of the caveman, this requires the engagement of others, all of whom the fraudster believes are inferior to himself yet necessary to his cause. They are charming, charismatic, chronic liars and will tell counsel only that which they believe counsel needs to hear. Like Woody Allen says, "Just because I'm paranoid doesn't mean that they aren't still coming after me."[20] Before running into court and professing the innocence of any person, reason and the Rules of Professional Conduct require that attorneys pull their heads out of the sand long enough to remember this axiom, also taught in law school: Just because they say that they are innocent, doesn't mean that they are. ■

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19 Falling in the same class is the attorney who helped form a new entity for a fraudster, which the fraudster used to pay off a large loan at discount, purporting to bail out the allegedly penniless fraudster from the obligation. Perhaps, you might say, the attorney didn't realize the purpose behind this new entity, but that might not reconcile with the fact that he facilitated both the original wire transfer into the new entity's account as well as the negotiations with the bank for the payoff.

20 Some believe that he stole this line from Lenny Bruce.