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CONSUMER BANKRUPTCY

Proposed Attorney Discipline Program Spells Further Anxiety for Counsel

by Craig D. Robins, Esq.

Perhaps the biggest concern that most consumer bankruptcy attorneys have about the new bankruptcy laws is that they impose a tremendous responsibility and potential liability on the practitioner. It now appears that a resolution adopted by the American Bar Association may create even greater attorney liability as it seeks to have the Federal Rules of Bankruptcy Procedure amended to make it easier for the Bankruptcy Court to discipline attorneys.

Proponents of the New Laws Previously Asserted that Attorneys Were Guilty of Misconduct

The proponents of the Bankruptcy Amendment Act of 2005 ("BAPCPA") argued that consumer bankruptcy attorneys were guilty of misconduct by neglecting to take reasonable steps to ensure the accuracy of the information that was filed in the petitions. They also asserted that both the bankruptcy bar and bench failed to address this alleged attorney misconduct. Consequently, the new bankruptcy

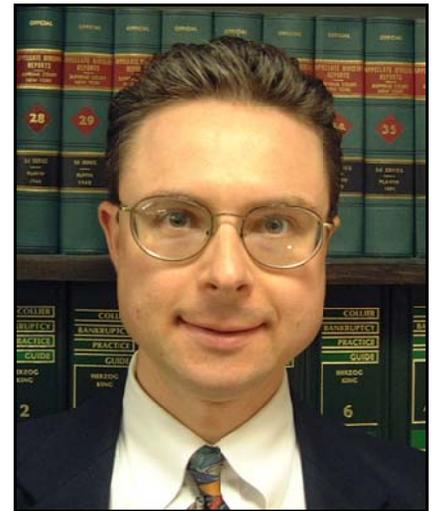
laws impose strict requirements on counsel to certify the accuracy and propriety of their clients' bankruptcy petitions and schedules.

In particular, the 2005 Act requires that the attorney conduct a reasonable investigation to verify the accuracy of the information provided by the client. In addition, the attorney must determine that the petition and all other information provided to the court and the trustee is well-grounded in fact. Finally, the attorney must certify that the petition is not an abusive filing.

These highly controversial new requirements initially led to some attorney anxiety as the penalties for violating the new liability provisions appeared to be strict, and included fee disgorgement, actual damages, attorney's fees and costs, and possible civil penalties.

ABA Proposes Attorney Disciplinary Program

However, it now appears that the lobbyists and proponents of the new laws may have been



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influential in persuading the American Bar Association to create an ad hoc Committee to address how bankruptcy attorneys are disciplined. Apparently, the Bankruptcy Courts are supposed to police the new law's requirements on counsel. However, most Bankruptcy Courts do not have local bankruptcy rules or general orders establishing bankruptcy attorney disciplinary processes and procedures. The ABA has sought to address this supposed problem.

ABA Conclusions

The ABA's task force committee reached several conclusions. First, they believe that state bar disciplinary procedures are

not designed to police the kinds of attorney due diligence obligations that BAPCPA imposes, nor address such problems in the context of high volume consumer bankruptcy practices.

Second, the task force concluded that Bankruptcy Courts have not established separate attorney disciplinary rules and procedures. Third, the only reports of systematic and effective disciplinary proceedings came from those few Bankruptcy Courts that had in fact implemented their own disciplinary procedures with the blessing of their respective District Courts. The ABA is also concerned that bankruptcy attorneys practice before the Bankruptcy Court, while it is the United States District Court which handles attorney admissions and certain disciplinary matters.

ABA Believes that Federal Rules of Bankruptcy Procedure Should Contain Disciplinary Provisions

The ABA believes that an effective bankruptcy attorney disciplinary process requires an amendment to the Federal Rules of Bankruptcy Procedure to clarify the authority of Bankruptcy Courts to discipline attorneys engaging in a pattern of misconduct. The ABA believes that this is necessary because there is usually no adversary to raise the issue before the Bankruptcy Court. However, this conclusion does not appear to be correct as the case trustee and the Office of the United States Trustee are both charged with the obligation of bringing attorney misconduct to the attention of the Court. The ABA also points out that most consumer debtors lack the resources and sophistication to protect their rights and that many disciplinary issues arise in connection with large volume practices.

ABA's Proposed Attorney Discipline Amendments to the Bankruptcy Rules

Several months ago, the ABA drafted proposed amendments to the Federal Rules of Bankruptcy Procedure. Some of the key provisions are as follows.

Rule 9029 would be amended to provide that the Court may commence disciplinary proceedings at its own request or at the request of an aggrieved person. Cause would include diversion or failure to account for client or estate property; failure to avoid conflicts of interest; lack of diligence; lack of competence; lack of candor; false statements, fraud or misrepresentation; abuse of the legal process; discipline by other courts; incapacity; unauthorized practice; or other violations of the Rules of Professional Conduct adopted by the highest court of the state in which the Bankruptcy Court sits.

Rule 9011 would be amended to provide that the Court may on its own initiative or at the request of an aggrieved person, enter an order describing the specific conduct that appears to be part of a pattern of misconduct in multiple bankruptcy cases.

Investigation would be done by counsel designated by the Court, or the Court can appoint the state bar's disciplinary agency. If counsel recommends a formal disciplinary hearing, then the Court shall designate up to three bankruptcy judges in the district to serve on a disciplinary panel.

With regard to the disciplinary hearing, the United States Trustee would have the right to appear and participate in the presentation of the case. Discipline shall only be imposed upon clear and convincing evidence.

Determination of discipline would require findings of fact, conclusions of law, and recommendations for the imposition of private or public discipline as may be appropriate under the circumstances after due consideration of the profession duty

violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating factors. Discipline may include disbarment or suspension from practice before the Bankruptcy Court, reprimand, admonition, probation, monetary sanctions or restitution, limitation upon practice, required completion of professional responsibility or other professional educational training, or any other sanction deemed appropriate.

There is a requirement that the Bankruptcy Court clerk maintain the files of all disciplinary proceedings conducted by the Bankruptcy Court and make them available to the public after a determination of probable cause exists. This sharply contrasts with the confidentiality maintained by the Grievance Committees in the State of New York.

Will the ABA Disciplinary Amendments Become Law?

At this time, the proposed amendments are merely a proposal from just another lobbying organization, albeit the American Bar Association. It is quite possible that they can be implemented in one way or another. Even if they do not make it into the official Bankruptcy Rules, it is quite possible that local jurisdictions, such as our Eastern District of New York, can adopt them into the local rules.

*Editor's Note (revised 2008):
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