

THE UNKNOWN ETHICAL QUAGMIRE UNDER THE NEW BANKRUPTCY LAW

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California lawyers are governed by a variety of rules when it comes to legal ethics. Primarily, most California lawyers measure their ethical conduct under the *California Rules of Professional Conduct*, adopted by the Board of Governors of the State Bar of California and approved by the Supreme Court of California pursuant to *Business & Professions Code* §§6076 and §6077. However, beyond those *Rules*, are statutes within the *Business & Professions Code* and the *Government Code* that provide additional guidance to attorneys practicing law in California.¹

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, not only overhauls the *Bankruptcy Code*, having a dramatic impact on consumer and business bankruptcy cases, but creates an uncharted maze of ethical challenges for attorneys practicing as “Debt Relief Agencies” to “Assisted Persons.” In addition to the multiplicity of new rules that practitioners will need to apply in providing consumer bankruptcy legal services, attorneys will also need to understand and beware of the landscape under which their conduct will be measured for ethical violations and sanctions.

BAPCPA establishes a new paradigm for consumer debtor attorneys, establishing new roles for such practitioners as “Debt Relief Agencies” providing services to “Assisted Persons.” The ethical perils lie largely in the definitions and roles set out under the new scheme, and the possible conflict that arises between the principles underlying BAPCPA, on the one hand, and the statutory obligations governing attorneys practicing law in California, on the other.

In their article for the American Bankruptcy Law Journal, *9 Traps and One Slap: Attorney Liability Under The New Bankruptcy Law*, Catherine Vance and Corinne Cooper outline a number of the immediate pitfalls that attorneys face given the

revisions of Bankruptcy Code.² The traps identified by those authors are generally (and paraphrasing):

1. The broad definitions of “debt relief agency”;
2. The regulations governing advertising and representations by “debt relief agencies.”
3. The risks of liability based on “information” rather than “contracts”.
4. The rigorous controls over how a debt relief agency needs to document compensation structures and methods.
5. The contradiction between a debt relief agency providing an assisted person with “reasonably sufficient information” on, for example, replacement valuation and the more rigorous written disclosure requirements for complete and accurate disclosure in documents filed to commence a debtor proceeding.
6. The risks to creditor’s counsel for “abuse of the abuse provisions” of *Section 707(b)*.
7. The risks to pro bono practice under certain of the rules.
8. The risks for representing “serial filers.” and
9. The risk that attorneys provide services on behalf of a trustee on a volunteer basis given the shift in priorities for debt obligations.

As a general matter, each of the “nine traps” identified by Vance & Cooper focus on the overbroad drafting and vague language, and especially the often-contradictory provisions, found in the revised Bankruptcy Code. From an ethics risk perspective, the “traps” fall into four categories directly affecting a California practitioner: (1) solicitation and advertising, (2) confidentiality, (3) competency, and (4) loyalty. On the surface, the objectives between the *Rules of Professional Conduct* governing these four general topic areas appear consistent with the revised Bankruptcy Code. The accompanying chart identifies, generally, the *Rules of Professional Conduct* and statutory provisions governing California lawyers

¹ The authors wish to thank Serena A. Spencer for her insightful research and analysis in assisting them in writing this article.

² Please see Vol. 79, American Bankruptcy Law Journal, p. 283-332.

and their related counter part in the Bankruptcy Code. However, the resemblance appears to be superficial, on closer review.

A simple example and potential area of risk arises on the issue of confidentiality. California law requires attorneys to maintain client confidences and secrets at all peril to themselves. The definition of confidences and secrets extends far beyond mere “attorney-client communications” and certainly seems to butt up against the requirements under the new Bankruptcy Code for more rigorous investigation and disclosure by a consumer debtor attorney. To further complicate matters, the 9th Circuit Bankruptcy Appellate Panel added a further wrinkle to the entangled knot of rules governing an attorney’s conduct. In *Price v. Lehtinen* (U.S. Bap. Bk. No. 03-46972, October 11, 2005 D.J. DAR 12828). The 9th Circuit recognized that while the State Bar of California standards control the general subject of attorney discipline, attorney’s conduct should also be measured against the ABA standards and the factors therein to determine reasonable disciplinary sanctions.³

The perils that exist under the current landscape arise because attorneys are subject to three or four different sets of rules, whose application and interpretation may or may not coincide or compliment each other, under a revised Bankruptcy Code that appears to require a fundamental policy shift away from the core duties of confidentiality imposed by California law on practitioners in this state. Where California law has delineated circumstances for State Bar discipline for violating the *Rules of Professional Conduct*, and for liability for failing to adequately represent a client or for violating a fiduciary duty of loyalty or confidentiality, the revised Bankruptcy Code appears to impose broader sanctions, contradictory and often indefinable obligations on the lawyers practicing before the Bankruptcy Courts that far exceed the defined and existing standards under the State Law precedence. There is no clear resolution or path to navigating the perils at this early stage in the application of BAPCPA.

³ In particular, the 9th Circuit looked at the ABA standards 9.21 and 9.22 (Aggravating Factors for Degree of Discipline), 9.31 and 9.32 (Mitigating Factors) and specific ABA Standards that may apply to the particular discipline contemplated by the Bankruptcy Court.

ETHICAL ISSUE	CALIFORNIA RULES OF PROFESSIONAL CONDUCT	BUSINESS & PROFESSIONS CODE (B&P)	BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005 ("BAPCPA")
<p>SOLICITATION/ ADVERTISING</p>	<p>1-310 Partnership with Non-Lawyer (e.g., CPA)</p> <hr/> <p>1-320 Financial Agreements with Non-Lawyers</p> <hr/> <p>1-400 Advertising and Solicitation (cross Ref with 2-100) requiring <i>inter alia</i>, truth in contents of "communication" and "solicitation".</p> <hr/> <p>4-200 Fees for Legal Services (agreements re charging or collecting an illegal or unconscionable fee); factors include experience, skill/difficulty involved in representation and time and labor required.</p> <hr/> <p>4-210 Payment of Personal or Business Expenses Incurred by or for a Client</p>	<p>B& P § 6068 Re duty of attorney "never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed."</p> <hr/> <p>B& P § §6146-6149.5 Re Fee Agreements</p> <hr/> <p>B& P § § 6150- 6156 Re Unlawful Solicitation</p> <hr/> <p>B& P § §6157-6159.2 Re Legal Advertising</p> <hr/> <p>B& P §6401(h) Re Exceptions to Chapter Application as relates to "Legal Document Assistant" or "self-help" assistant who provides ministerial function specifically excludes from application of chapter 6400 "a person who provides services that are regulated by federal law."</p>	<p>BAPCPA § 226(a)(1)(2)(3) [11 U.S.C. § 101(3)(4)(12)] re Chapter 7 filings -- Requires compliance with BAPCPA'S regulation of advertising for any Debt Relief Agency providing services for an Assisted Person.</p> <hr/> <p>BAPCPA § 229(a) [11 U.S.C. § 528(a)] re advertisement (must be stated in "clear and conspicuous" detail). Additional regulation regarding advertising to the general public by Debt Relief Agency if the advertisement:</p> <ul style="list-style-type: none"> (a) Describes Bankruptcy Assistance; (b) Contains misleading language as to whether debt counseling or bankruptcy assistance is being provided; and/or (c) Includes within its' scope assistance with other aspects of debts, foreclosures and evictions. <hr/> <p>Re Chapter 13 filings and "clear and conspicuous" advertising restrictions, see BAPCPA 229(a) [11 U.S.C. § 528(b)(1)(A)].</p> <hr/> <p>The four types of ads permitted are:</p> <ul style="list-style-type: none"> (a) Explicit Bankruptcy ads (re assistance provided and/or benefits of bankruptcy). BAPCPA 229(a) [11 U.S.C. § 528(a)(3)]; (b) Ads re Chapter 13 bankruptcy BAPCPA 229(a) [11 U.S.C. § 528(a)(3)]; (c) Ads re "Debt Counseling." BAPCPA 229(a) [11 U.S.C. § 528(b)(1)(B)]; and (d) Ads re "Credit Assistance." BAPCPA 229(a) [11 U.S.C. § 528(b)(2)]. <hr/> <p>If attorney fails to comply with advertising requirements and such results in harm to debtor, debtor may seek and recover:</p> <ul style="list-style-type: none"> - all fees and charges received by attorney; - actual damages; and - attorneys' fees and costs. BAPCPA 227(a) [11 U.S.C. § 526(c)(2)].

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<p>CONFIDENTIALITY</p>	<p>3-100 Confidential Information of Client</p> <hr/> <p>3-200 Prohibited Objectives of Employment (re circumstances when client's objective is to bring/defend an action without proper cause or in violation of law). Compare to BAPCPA'S provisions re certification of filings and the "means tests," disclosures.</p>	<p>B& P § 6068 (e) (1): Duty to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.</p> <hr/> <p>B& P § 6068 (e)(2): Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.</p>	<p>The required disclosures, if false, expose attorney to potential liability (which may impinge upon whether attorney is capable of defending self if defense is based upon client's confidences). See BAPCPA 102(a)(2)(C) [11 U.S.C. § 707(b)(4) and (b)(5)(A)].</p>

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<p>COMPETENCY</p>	<p>3-110 Failing to Act Competently</p> <hr/> <p>3-200 Prohibited Objectives of Employment (re circumstances when client's objective is to bring/defend an action without proper cause or in violation of law). Compare to BAPCPA'S provisions re good faith basis assessment of required assistance and related certification provisions for filing (including sanctionable activities).</p> <hr/> <p>3-500 Communication (Re requirement to keep client reasonably informed about developments and responding to requests for information.)</p> <hr/> <p>5-200 Trial Conduct (Re conduct in presenting matter to tribunal – cross refer to certification requirements and sanctions under BAPCPA.)</p>	<p>B& P §6068 (a) Duty to "support the Constitution and laws of the United States and of this state."</p> <hr/> <p>B& P §6068 (b) Duty to "maintain the respect due to the courts of justice and judicial officers."</p> <hr/> <p>B& P §6068 (c) Duty to "counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense."</p> <hr/> <p>B& P §6068 (d) Duty to "employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law."</p> <hr/> <p>B& P § 6068 (f) Duty to "advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged."</p> <hr/> <p>B& P § 6068 (g) Duty "not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest."</p> <hr/> <p>B&P §6068 (m) Duty to respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.</p>	<p>BAPCPA § 102(a)(2)(C) [11 U.S.C. § 707(b)(4)] re sanctions for attorneys representing consumer debtors in Chapter 7 bankruptcy cases which resemble Federal Rule 11 certification requirement and sanctions imposition by putting attorney to good faith test of reasonable investigation of merits of filing.</p> <hr/> <p>REQUIRED DISCLOSURES TO CLIENT/ "ASSISTED PERSON" (Subject to penalties for noncompliance BAPCPA 227(a) [11 U.S.C. § 526(b) and (c)]):</p> <ul style="list-style-type: none"> - Description of relief available and potential criminal liability. BAPCPA 228(a) [11 U.S.C. §527(a)(1)] and BAPCPA 315(b) [11 U.S.C. § 521(a)(1)(B)(iii)] and BAPCPA 104 [11 U.S.C. § 342(b)]; - Specific information advice about potential criminal liability. BAPCPA 228(a) [11 U.S.C. § 527(a)(2)(D)]; - That the attorney is required to provide a written contract. BAPCPA 229(a) [11 U.S.C. § 528(a)(1) and (2)]; - Disclosures coextensive with consumer protection statutes BAPCPA 228(a) [11 U.S.C. § 527(b)]; and - Provide "reasonably sufficient information" regarding how the A/P is to perform specific things related to the filing (e.g., value assets). BAPCPA 228(a) [11 U.S.C. § 527(c)]. Failure to perform any agreed/informed service and/or misrepresentation of material information may result in client's ability to seek disgorgement, damages and fees and costs. BAPCPA 227(a) [11 U.S.C. § 527(c)(1) and (c)(2)(A)]. <hr/> <p>Attorney cannot advise debtor to incur any additional debt (e.g. taking a loan or paying attorney's fee with credit card). BAPCPA 227(a) [11 U.S.C. § 526(a)(4)].</p>

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LOYALTY	<p>1-600 Legal Services Programs</p> <hr/> <p>3-300 Avoiding Interests Adverse to Client</p> <hr/> <p>3-310 Avoiding the representation of adverse interests</p>	<p>B& P § 6068 (e) (1): Duty to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.</p> <hr/> <p>B& P § 6068 (e)(2): Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.</p>	<p>Upon initial consultation and prior to accepting agreement to represent an "Assisted Person," it appears that the potential client could assert that the attorney-client relationship exists. See BAPCPA 226(a) [11 U.S.C. § 101 (4)(a) and (12A).</p> <hr/> <p>Attorney cannot advise debtor to incur any additional debt (e.g. taking a loan or paying attorney's fee with credit card). BAPCPA 227(a) [11 U.S.C. § 526(a)(4)].</p>