A Response: Is It Really a Chapter 11 Debtor Counsel's Duty to Rat?

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In this column, we continue a discussion over the extent to which the chapter 11 debtor-in-possession (DIP) counsel's fiduciary duty to the chapter 11 estate might require the disclosure of confidences or privileges, or what **Chip Bowles** and Prof. **Nancy Rapoport** recently called it in the February 2010 Straight & Narrow column: a "duty to rat."[1] Their article suggested that there were other—and perhaps better—ways to deal with the problem of debtor principals acting or intending to act against the interests of the estate, but ultimately they argued that if all other measures failed, debtor's counsel should be required to disclose. We think this conclusion is questionable.

Michael P. Richman

The current well-developed ethical structure of Rules 1.6 and 1.13 of the ABA Model Rules of Professional Conduct permits disclosures in certain circumstances (where other remedies have failed), but do not compel it. In our view, this structure sensibly protects the attorney-client privilege, whereas a mandatory disclosure rule would seriously undermine it, thereby undermining the trust and loyalty between an attorney and a client that is so essential to the representation.

Case law trends do appear to strongly support the imposition on debtor's counsel of a fiduciary duty to the estate. However, we believe that neither this fiduciary duty, nor the "exceptionalism" of bankruptcy law and practice, should result in an obligation to break the longstanding traditions and ethical imperatives of attorney-client confidentiality and privilege. Instead, we believe that when confronted with facts indicating that debtor principals are acting contrary to the interests of the estate, debtor's counsel should first exhaust all internal means of overcoming the problem, and if unsuccessful, should withdraw (unless the attorney has concluded, within the rules, that the permitted disclosures should be made). The policy and ethical interests in maintaining attorney-client confidentiality, in our view, demand such a result, and are consistent with the precedent and practice in non-bankruptcy areas.

Straight & Narrow

The Case for Strong Recognition of Attorney-Client Confidentiality

Bowles and Rapoport argue that the exceptionalism of DIP representation, among all other forms of legal representation, might justify a different approach, including the duty to rat. However, this must be balanced against the harm that a permeable attorney-client privilege would cause to the administration of bankruptcy cases. Attorney-client confidentiality is one of the oldest precepts of the legal profession, having originated in Roman law, and it found its way into English case law as early as 1577.[2] This duty of confidentiality between the attorney and client is justified by both professional ideals as well as more pragmatic considerations: In addition to upholding the grand notions of loyalty and trust that embody the very essence of professionalism, courts routinely understand that the purpose of attorney-client confidentiality is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[3] In other words, "sound legal advice or advocacy serves public ends and...such advice or advocacy depends upon the lawyer's being fully informed by the client."[4]

We acknowledge that developing law in bankruptcy has done much to muddy the lines of who "the client" is and where DIP counsel's ultimate loyalty rests (if it even rests with any single party). In a commercial case, the client is the corporate debtor and not the individual officers or directors, but the principal officers are the mouthpiece and the brain, and they provide the instructions and directions to counsel. They must expect privilege, and *they* must decide (not the lawyer) whether privilege is to be waived.[5] If the principal officers directing the DIP are not free to address every issue candidly with counsel for the DIP for fear that a disagreement may cause their communications to be disclosed (because counsel has some different duty to the estate), there would likely be severe and adverse effects on the administration of bankruptcy cases. Officers might well conceal information that counsel needs to assure appropriate action for the benefit of the estate. Ultimately, no matter the harm of the information, we believe it is better for it to be provided to counsel where counsel has the opportunity to act on it than to have it concealed for fear that if counsel disagrees it will set off a chain reaction that might lead to disclosure.

Look to the Rules

The obligation for attorney-client confidentiality is embodied by Rule 1.6 of the ABA Model Rules of Professional Conduct, Confidentiality of Information, which states:

1 C.R. "Chip" Bowles, Jr. and Prof. Nancy Rapoport, "Debtor Counsel's Fiduciary Duty: Is There a Duty to Rat in Chapter 11?" 29 *Am. Bankr. Inst. J.* 1 (February 2010).

2 Christopher B. Mueller and Laird C. Kirkpatrick, Evidence §5.8 (3d ed. 2003) (*citing Berd v. Lovelace*, (1577) 21 Eng. Rep. 33 (Ch.); *Dennis v. Codrington*, (1580) 21 Eng. Rep. 53 (Ch.)).

3 *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

4 *Id.*

5 *See In re Eddy*, 304 B.R. 591, 599 (Bankr. D. Mass. 2004) (finding that in chapter 11 case that is converted to chapter 7, chapter 7 trustee assumes powers of DIP, including power to waive attorney-client privilege with respect to communications incident to performance of DIP duties).

continued on page 56