

SUPREME COURT DISBARS LAWYER FOR LACK OF CANDOR TO THE BANKRUPTCY COURT

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Like all practitioners, litigators sometimes experience tension between a client's instructions and the attorney's ethical requirements. This tension, and the attorney's failure to favor his ethical obligations over his client's instructions, prompted the Court to disbar an experienced New Hampshire bankruptcy practitioner.

In a recent decision authored by Justice Lynn, the New Hampshire Supreme Court adjudicated an attorney discipline case involving a bankruptcy practitioner who, in accordance with specific instructions from his client, omitted to state spousal income in papers filed with the bankruptcy court. See *Clark's Case*, ___ N.H. ___, LD-2011-006 (January 13, 2012). Instead of disclosing that income, the attorney attempted to withhold this information from the Court by entering zeroes in an income schedule which specifically required disclosure of spousal income "in all cases . . . by every married debtor, whether or not a joint petition is filed, unless the spouses are separate and a joint petition is not filed." *Id.*, slip. op. at 2. "On the line reserved for 'other monthly income' of the debtor, the [attorney] entered '\$2,195.00' in the appropriate field and wrote 'contributions from spouse' on the corresponding line." *Id.* In another form, the attorney also entered zeroes for spousal income "except on line 7, where he entered \$365.83 in the spousal income column for" amounts paid regularly by another person in the household. *Id.* The client's spousal income well exceeded \$365.83.

After the client failed to establish her disposable income to the bankruptcy trustee's satisfaction, the client converted the Chapter 13 filing to a Chapter 7 bankruptcy. The trustee moved to dismiss the Chapter 7 proceeding "based, in part, upon [the client's] failure to disclose her husband's income." *Id.* The client later withdrew the bankruptcy petition.

It is unclear from the Court's opinion how the Professional Conduct Committee ("PCC") learned of the attorney's action. The PCC, however, initiated disciplinary proceedings, held a hearing, and petitioned the New Hampshire Supreme Court for disbarment, citing a violation of Rule 3.3(a)(1) of the New Hampshire Rules of Professional Conduct, which prohibits a lawyer from "knowingly . . . mak[ing] a false statement of fact or law to a tribunal." N.H. R. Prof. Conduct 3.3(a)(1).

The Court first addressed the sufficiency of evidence supporting a violation of Rule 3.3(a)(1). The attorney defended his actions by arguing

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that he did not “knowingly” make false statements because (1) he in fact reported the spousal income, and (2) “bankruptcy law is unsettled on the issue of what effect spousal income has in a bankruptcy case.” The Court rejected both arguments. Spousal income, the Court reasoned, is a threshold consideration in adjudicating a Chapter 13 action. The Court equated the specific instructions on the income schedule to a direct question posed to each new filer by the Bankruptcy Court. While acknowledging that the attorney had disclosed spousal “contributions,” the Court also recognized the attorney’s failure to accurately characterize these “contributions” as “income.” The only spousal income disclosed as such was the \$365.83, which itself was untrue because the spouse in fact received “significantly more income.” Clark’s Case, slip. op. at 5. Finally, the Court rejected the contention that the attorney’s “software did not allow him to explain, within the four corners of the form,” his reasoning in filling out the schedules. Id., n.2. In the Court’s view, the attorney could and should have submitted a “separately-written document . . . explaining his reasoning.” Id.

With respect to the state of the law regarding disclosure of spousal income, the Court distinguished the only two cases cited by the attorney. Both cases centered upon whether and to what extent spousal income should be considered in Chapter 13 filings. Thus, neither case “suggests that something less than full disclosure of the non-filing spouse’s income is permitted.” Id., slip. op. at 4. In a footnote, the Court addressed the attorney’s alternative argument: “that the official bankruptcy forms are inconsistent with the Code in calling for the disclosure of more information than the Code requires.” Id., slip. op. at 5 n.1. Whatever merit this argument might have, which the Court did not address, “the appropriate manner of raising such a challenge to the forms would have been through the filing of an appropriate motion in the bankruptcy court, not by supplying false information on the forms.”¹ Id.

Having concluded that sufficient evidence supported the PCC’s finding that the attorney “knowingly” violated Rule 3.3(a)(1), the Court turned to the appropriate sanction. Under the framework set forth in the ABA Standards, the Court determined that the baseline sanction was disbarment given the importance of the duty violated, the “knowing” state of mind, the actual injury to his client, and the potential injury to the integrity of the Bankruptcy Court.² No mitigating factors modified this baseline sanction. The Court briefly mentioned, in a single sentence, two aggravating factors: (1) prior disciplinary history, and (2) substantial experience in the practice of law (the attorney was admitted to the bar in 1971).

Clark’s Case illustrates several important professional ethics lessons for attorneys practicing before a tribunal. Instructions from the client will not

¹Though not expressly mentioned in the Court’s analysis, the Conduct Rules compel attorneys to obey rules established by a tribunal “except for an open refusal based on an assertion that no valid obligation exists.” N.H. R. Prof. Conduct 3.4(c). The “open refusal” doctrine is discussed further below.

²The Court characterized this as “actual injury,” but the discussion of the injury is predicated on what would have happened “[h]ad the court accepted as true” the attorney’s representations. Clark’s Case, slip. op. at 6.

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sanitize ethical misconduct. Attorneys must counsel clients that unethical means cannot be used to accomplish the objectives of the representation. Conduct Rule 1.4(a)(5) requires that an attorney “consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct.” If the client persists, then the lawyer must withdraw under Conduct Rule 1.16(a)(1).

Clark’s Case also serves as an important reminder to attorneys to pause and seriously consider whether they are truly operating in a legal grey area that will shield them from later disciplinary sanctions for close calls on candor issues. The attorney in Clark’s Case took positions and actions that later proved unjustifiable. Presumably, at the time of making the disclosures, the attorney satisfied himself that his actions, if questioned, could take advantage of either strained case law interpretations or (unexpressed) views on the proper scope of Court-drafted income schedules. Whatever legal merit might have resided in these positions, the hindsight review during the professional disciplinary process is likely to be skeptical of fringe or post-hoc legal arguments, especially where the client was harmed during the representation. Attorneys, moreover, cannot keep secret their legal justifications for choosing to disobey Court rules. Instead, the Conduct Rules require that attorneys “openly refuse” to follow Court rules by way of “an assertion that no valid obligation exists.” N.H. R. Prof. Conduct 3.4(c).

Finally, the sanction in Clark’s Case signals intent by the PCC and the Court to impose harsh sanctions for candor-related violations, even where, as here, the bankruptcy trustee and/or the Court discovered the attorney’s failure to disclose the client’s spousal income prior to entering a final order in the case.

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