Message from the Chair

William D. Johnston
Chair, Business and Corporate Litigation Committee

I hope that, by the time you are reading this message, you have had a joyous holiday season, have rung in the New Year, and have started to look forward to Spring (whether Spring skiing or Spring flowers or both).

This message is to invite and encourage three things:

- Accepting leadership positions within the Committee.
- Attendance at meetings;
- Joining one or more of our Committee’s subcommittees; and
- Joining one or more of our Committee’s task forces.

Meetings. While we continue to explore how we can be in touch with one another as fellow committee members between meetings (whether by phone, e-mail listserv, webcasts, etc.), there is no real substitute for in-person interaction at ABA meetings. It is at those meetings that we can most effectively get to know one another and share CLE and other content with one another. Please give every consideration to attending the upcoming Business Law Section Spring Meeting in Boston (April 13-16) and the ABA Annual Meeting in Toronto (August 4-8). And please consider attending the 2011 Global Business Law Forum in London (September 22-23). The Forum will reprise the successful conference hosted by the Section in Frankfurt in May 2008. As in Frankfurt, the London conference will include networking opportunities and fifteen CLE programs presented by Section committees.

The Spring Meeting in Boston will include the always-enjoyable Diversity Networking Reception on Wednesday, April 13. Thursday, April 14, will feature two outstanding CLE programs sponsored by our Committee ("Dodd-Frank: Will Increased Federal Regulation of Corporate Governance Improve Corporate Performance?" and "The 2011 Annual Review of Developments in Business and Corporate Litigation"). Bret Cohen's law firm, Mintz Levin Cohn Ferris Glovsky and Popeo P.C., will host a cocktail reception, followed by our Committee Dinner in the Wine Room at Lucca Restaurant - North End. Friday, April 15, will start with a "coffee with the chair" meet and greet for all current and prospective Committee members. Next will be one CLE program sponsored by our Committee ("Managing Electronically Stored Information Before, During and After Litigation: Views from the Trenches and the Benches") and two CLE programs co-sponsored by the Committee ("Establishing a Culture of Excellence in your Organization: Beyond Diversity and Inclusiveness" and "The Future of Paperless Loan Processing: MERS Role in the Foreclosure"). Also on Friday, we’ll have the Section Lunch, our meeting of Committee leaders, the Women’s Business and Commercial Advocates Reception, and the Section Dinner. Last, through Saturday, April 16, our Committee’s more than thirty subcommittees and task forces will be meeting.

Subcommittees and task forces. Which brings us to subcommittees and task forces. If you are not already a member of a subcommittee or task force, please consider joining (the list appears later in this newsletter). And, in all events, please know that you are welcome to visit any of the meetings and to share your thoughts without any commitment on your part! Subcommittees and task force participation can be a great means of gaining substantive knowledge while having the opportunity to get to know Committee members in a smaller group setting and having the opportunity to develop and refine writing and program ideas.

Committee leadership positions. Finally, a hallmark of our Committee always has been its inclusiveness and the opportunity the Committee affords for leadership no matter a member’s level of seniority. That leadership can take the shape of serving as a chair or vice chair of a subcommittee or task force. It also

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**Featured Article**

In re Blue Pine Group, Inc.: Sanctions Imposed on Attorney Who Succumbed to "Butler-Style" Client Representation

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**Subcommittee Updates**

- Appellate Litigation
- Business Courts Subcommittee
- Employment Law Subcommittee
- International Litigation
- Partnership and Alternative Business Entities Subcommittee
- Pro Bono and Public Service Subcommittee

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**2011 Business Law Section Spring Meeting**

April 14 - 16, 2011
Boston, MA
includes those Committee members who serve as judicial designees, as the Business Law Section Advisor, as Business Court Representatives, and as liaisons to numerous other committees within the Business Law Section and to the ABA Litigation Section. In keeping with Section policy, we ask that Committee leaders stay in one position for no longer than three years. The practical upshot is that orderly “turnover” provides leadership development opportunities for all and gives those who have turned over positions new leadership opportunities within the Committee and/or within the Section.

So, if asked to serve in a leadership position, please give every consideration to doing so. I am certain that you will find the service to be worthwhile and enjoyable.

* * *

As always, if you have any questions or comments, or if I can be of assistance in any way, please contact me at 302.571.6679 or wjohnston@ycst.com. Hope to see you in Boston!

Bill Johnston is a partner in the Wilmington, Delaware-based law firm of Young Conaway Stargatt & Taylor, LLP. He is a past chair of the firm’s Corporate Counseling and Litigation practice group.

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**Congratulations to Mitch Bach for Receiving the 2010 Wells Fargo Fidelity Award!**

Five attorneys who worked to make Philadelphia's Commerce Court become a reality have been named the recipients of the 2010 Wells Fargo Fidelity Award. The award was presented at the Annual Meeting Luncheon on Tuesday, Dec. 7.

The recipients were Mitchell L. Bach, a member of Eckert Seamans Cherin & Mellott, LLC; Edward G. Biester III, a partner with Duane Morris LLP; Gregory H. Mathews of Effective Dispute Resolution Services, LLC; Darryl J. May, a partner with Ballard Spahr LLP; and Marc J. Sonnenfeld, a partner with Morgan, Lewis & Bockius LLP.

"They all worked together for a number years to get Commerce Court started," explained Wells Fargo Fidelity Award Committee Chair Jane Leslie Dalton. "Commerce Court has become not just prominent in Pennsylvania but nationally famous. Businesses don't mind going there because they know they are going to get judges who are used to dealing with business problems," the former Chancellor said.

The criteria for the award are significant accomplishments in improving the administration of justice (preferably in Philadelphia); the absence of prior recognition for this work by the Philadelphia Bar Association; distinguished service consistently rendered over a considerable period of time or a single outstanding achievement in a particular year. (The fact that this single achievement may have occurred some years ago is not material so long as it has not been recognized.); the accomplishment must arise from voluntary activities rather than for service rendered as a paid professional; and it is preferred that the recipient be a member of the Philadelphia Bar Association not now in public office or directly involved with court operations or any other public service activity.

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**Special Report - Employment Law**

**New York Enacts Law Enhancing Employer Wage Notice Requirements and Imposing Steeper Penalties for Failure to Pay Wages**

Michael Arnold of Mintz Levin reports that in April 2011, the New York Wage Theft Prevention Act will go into effect. This Act amends the New...
York Labor Law by (1) requiring employers to provide employees with certain information regarding their wages and hours on their earnings statements and in written notices, (2) requiring employers to maintain payroll information for a longer period of time, (3) strengthening the penalties imposed on employees failing to comply with wage and hour requirements, and (4) extending the reach of the Labor Law's anti-retaliation prohibitions. This continues New York's trend of offering greater protections to employees against wage and hour violations than federal law currently provides and will force employers to revisit and revise their existing payroll and document retention policies and procedures. For further information on this new law, please visit: http://www.mintz.com/newsletter/2010/Advisories/0830-1210-NAT-ELB/web.htm

Featured Article

In re Blue Pine Group, Inc.: Sanctions Imposed on Attorney Who Succumbed to "Butler-Style" Client Representation
By Gregory W. Fox

It is axiomatic that attorneys are officers of the courts in which they practice in addition to being advocates for their clients' interests. As an officer of the court, an attorney cannot robotically advocate a client's litigation position without making an effort to independently verify facts provided by that client. This is especially true when there are clear indications that a client's version of the facts is inaccurate. Failure to conduct an appropriate inquiry can result in the attorney advocating a meritless and frivolous position, which, in turn, can potentially leave the attorney with no defense to sanctions by the court. A Nevada attorney recently learned this lesson the hard way when Judge Bruce Markell of the United States Bankruptcy Court for the District of Nevada imposed a $109,528 sanction on him for filing and prosecuting a bankruptcy case that was not properly authorized by the debtor corporation. See Memorandum Imposing Sanctions, In re Blue Pine Group, Inc., Case No. 09-13274 (Bankr. D. Nev. Oct. 7, 2010). The Blue Pine case, which is summarized below, offers a valuable lesson to attorneys: "Lawyers are not given the privilege of assuming that their clients or other lawyers are unfailingly truthful." Id. at 10, n.8.

More...

Subcommittee Updates

Appellate Litigation Subcommittee
Kendyl Hanks and Mark Trachtenberg, Chairs

The Appellate Litigation Subcommittee sponsored two very successful programs in 2010, and has more exciting projects in the works.

At the 2010 Annual Meeting in San Francisco, the Subcommittee, along with the Dispute Resolution Committee of the Business Law Section, sponsored a program and panel discussion entitled "The Cutting Edge of Arbitration: What You Need to Know." Subcommittee Co-Chair Mark Trachtenberg, a partner in the appellate practice group...
of Haynes and Boone, LLP in Houston, TX, moderated a panel consisting of (1) Rob Friedman, a partner with Littler Mendelson P.C. in Dallas, who successfully argued the Rent-a-Center case before the Supreme Court; (2) F. Peter Phillips, an arbitrator, mediator and consultant practicing through Business Conflict Management LLC in Montclair, New Jersey, and vice-chair of the ADR Committee; and (3) Deborah Rothman, a mediator and arbitrator based in Los Angeles, California. The program - which included a discussion of recent United States Supreme Court arbitration cases, drafting tips for arbitration clauses, and the use of arbitration consultants - was very well-attended and earned excellent reviews from both judges and practitioners.

On November 19, 2010, at the Business Law Section's Fall Meeting in Washington, D.C., the Appellate Subcommittee sponsored a program entitled: "Oyez! Oyez! Oyez! - Significant Supreme Court Trends and Decisions for Business Lawyers and Their Clients." Subcommittee Co-Chair Kendyl Hanks, a partner in the appellate practice group of Haynes and Boone, LLP in New York City, moderated a panel of experienced Supreme Court practitioners and scholars, including (1) Thomas Hungar, Co-Chair of Gibson, Dunn & Crutcher, LLP's Appellate and Constitutional Law Practice Group in Washington, D.C., and previously a United States Deputy Solicitor General who has argued 24 cases before the Court; (2) Andrew Pincus, a partner with Mayer Brown's appellate practice in Washington, D.C., Co-Director of the Yale Law School's Supreme Court Advocacy Clinic, and a former General Counsel of the United States Department of Commerce who has argued 20 cases before the Court; and (3) Professor Mark Tushnet, an esteemed scholar on the history of the Supreme Court, a professor of law at Harvard Law School and professor emeritus at Georgetown Law School. The panel discussed recent and anticipated decisions from the United States Supreme Court affecting business lawyers and their clients, and contextualized the Court's recent decisions in the broader history of the Court and in light of its recent reputation as "pro-business." The program provoked thoughtful questions and comments from a standing-room audience, and earned excellent reviews. In light of the significant business cases currently pending before the Court, and the popularity of this panel, the Subcommittee hopes to arrange a repeat performance at a future meeting.

The Appellate Litigation Subcommittee has big plans for 2011 as well. Subcommittee Co-Chairs Kendyl Hanks and Mark Trachtenberg have prepared a comprehensive review of 2010 Supreme Court trends and decisions in cases affecting business lawyers and their clients. This review will be published as the Appellate Chapter in the ABA Section of Business Law's popular Annual Review of Litigation publication, which is scheduled to be released in the spring of 2011. The Chapter will summarize and analyze the major Supreme Court business cases decided in 2010 or currently pending before the Court - providing both a review of the Court's recent path and a preview of where the Court is headed on a variety of topics of interest to all business lawyers. The Subcommittee always has an eye on major appellate developments of interest to Business Law Members, and hopes to present new and innovative programming at 2011 ABA meetings. The Appellate Subcommittee is always looking for new members, creative ideas for programming, and opportunities for co-sponsorships with other committees and, possibly, sections. Join us for our Subcommittee meeting at the Spring 2011 meeting in Boston, where we will talk about major developments and programming opportunities going forward. The Subcommittee meeting will take place on Friday, April 15, 2011 from 3:00-4:00 at the Boston Marriott Copley Place. Please sign up online, or contact either of the Subcommittee Co-Chairs, Kendyl Hanks (e-mail: Kendyl.Hanks@haynesboone.com or Mark Trachtenberg (Mark.Trachtenberg@haynesboone.com). For more information, visit our Subcommittee website at: http://www.abanet.org/dch/committee.cfm?com=CL150009.
Cory Manning, Chair

The Subcommittee's membership increased slightly over the last year to 146. The Subcommittee is co-sponsoring with the Corporate Counseling and Litigation Subcommittee and the Electronic Discovery and Trial Technology Subcommittee a program at the Spring Meeting in Boston, entitled "Managing Electronically Stored Information Before, During, and After Litigation: Views from the Trenches and the Benches." The program will feature judges, e-discovery experts, and client representatives from around the United States. This year saw a change in the Subcommittee's leadership with Cory Manning assuming the Chair. It is with sincere appreciation of the efforts of Rick Gross and Lee Applebaum (Subcommittee Co-Chairs for the last several years) that Cory takes the Chair. He has been assured that Mr. Gross and Mr. Applebaum are always available for advice. In his efforts to make the Subcommittee's website more active as a resource, Lee has continued to populate the website with links to useful information on American and international business and commercial courts, including court websites, articles, and reports.

And for the eighth year, Lee coordinated the Business Courts chapter in the Annual Review of Developments in Business and Corporate Litigation, which includes a number of Subcommittee members as authors.

Employment Law Subcommittee
Bret A Cohen, Chair; Bradford Newman, Vice-Chair

The Employment Law Subcommittee is finishing its work preparing the Employment Law Chapter for the Annual Review. As this year-long project wraps up, we actively seek Section members to get involved generally, and more specifically, want Section members to assist us with formulating our break-out meeting Agenda for the Spring Meeting. If you are passionate about Employment Law, or just want to get more involved with the Section, please reach out to us. You will find yourself warmly welcomed by a group of experienced and engaged Subcommittee members consisting of Employment Attorneys from around the Country, and that include in-house and government attorneys. Don't wait another year.

Join us, get involved, and meet other Subcommittee members in Boston later this year.

International Litigation Subcommittee
Peter J. Lukasiewicz, Chair; Deborah Templer, Vice-Chair

The International Litigation Subcommittee, still a relatively young subcommittee of the Business and Corporate Litigation Committee, held its annual meeting at the Business Law Section Spring Meeting in Denver, Colorado, on April 23, 2010. As it has done in the past, our Subcommittee joined with the Business Courts and Class and Derivative Actions Subcommittees in holding a joint subcommittee meeting and program on "Comparative Judicial Perspectives on Derivative Actions in the U.S. and Canada." Guest speakers included the Honourable Donald Parsons, Vice Chancellor, Delaware Court of Chancery, Bruce Jameson of Prickett Jones & Elliot, and Kelley McKinnon of Gowling Lefleur Henderson.

Our Subcommittee continues to contribute to the Annual Review of Developments in Business and Corporate Litigation, having just submitted our chapter for the 2011 edition - this year, focusing on investor protection under NAFTA's Chapter 11. The Subcommittee welcomes new or existing members who would like to contribute to our chapter in next year's edition of the Annual Review.

Finally, we welcome new members to the Subcommittee. We will have
a Subcommittee meeting at the Business Law Section Spring Meeting in Boston and we encourage any attorneys with an interest in international litigation to join us.

Partnership and Alternative Business Entities Subcommittee
DominickGattuso,Chair;JasonJowersandSteveBrauerman,Vice-Chairs

The Partnership and Alternative Business Entities Subcommittee is approximately 104 members strong. We are looking to grow our membership this year and need your support to do it. Why join us?

Limited liability companies have been the go-to entity choice for the past several years, outpacing the formation of new corporations by a ratio of almost 3 to 2. Our subcommittee covers cutting-edge issues relating to limited liability companies, limited partnerships and other non-corporate business entities. What does that mean to you? Our subcommittee and its members possess a wealth of experience and knowledge about some of the hottest business entities out there. We would like to share that knowledge and experience with you. How? By joining us at our subcommittee meetings, picking up a copy of the latest edition of the Annual Review of Developments in Business and Corporation Litigation, or simply contacting us to express interest and ask some questions. Our members include judges, business litigators, transactional attorneys and in-house counsel from around the country. If your interest is piqued or you are a member that has not been able to attend a Spring Meeting in the last few years, please join us at our break-out meeting at the Spring Meeting in Boston, where you can meet other members of the subcommittee, assist us in planning our agenda for the year, and discuss some of the interesting partnership and alternative business entity decisions from 2010 and early 2011. We look forward to seeing you in Boston in April.

Please contact the Partnership and Alternative Business Entities Subcommittee Chair, Dominick Gattuso, via email: dgattuso@proctorheyman.com. You can also contact the subcommittee's Vice Chairs, Jason Jowers and Steve Brauerman, by email: jjowers@morrisjames.com and sbrauerman@bayardlaw.com.

Pro Bono and Public Service
KristinGoreandVictoriaMitchell,Chairs

The Pro Bono and Public Service Subcommittee is partnering with Junior Achievement during the Business Law Section's Spring Meeting in Boston for its pro bono public service project. On Wednesday, April 13 from 3:30 p.m. to 5:30 p.m., volunteers from the Business Law Section will meet with Junior Achievement students from local high schools to present on the topic of business ethics. If you would like to volunteer as a guest speaker for this project, please contact Kristin Gore at kgore@carltonfields.com or Victoria Mitchell at victoria.mitchell@hklaw.com for more information.

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In re Blue Pine Group, Inc.: Sanctions Imposed on Attorney Who Succumbed to “Butler-Style” Client Representation

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It is axiomatic that attorneys are officers of the courts in which they practice in addition to being advocates for their clients’ interests. As an officer of the court, an attorney cannot robotically advocate a client’s litigation position without making an effort to independently verify facts provided by that client. This is especially true when there are clear indications that a client’s version of the facts is inaccurate. Failure to conduct an appropriate inquiry can result in the attorney advocating a meritless and frivolous position, which, in turn, can potentially leave the attorney with no defense to sanctions by the court. A Nevada attorney recently learned this lesson the hard way when Judge Bruce Markell of the United States Bankruptcy Court for the District of Nevada imposed a $109,528 sanction on him for filing and prosecuting a bankruptcy case that was not properly authorized by the debtor corporation. See Memorandum Imposing Sanctions, In re Blue Pine Group, Inc., Case No. 09-13274 (Bankr. D. Nev. Oct. 7, 2010). The Blue Pine case, which is summarized below, offers a valuable lesson to attorneys: “Lawyers are not given the privilege of assuming that their clients or other lawyers are unfailingly truthful.” Id. at 10, n.8.

I. Facts of Blue Pine:

This case involves Blue Pine Group, Inc. (“Blue Pine”), a joint venture between Humitech of Northern California, LLC (“Humitech”) and M&G Group Enterprises, Inc. (“M&G”). After disputes arose among the owners of Humitech and M&G over corporate governance, operation, and finances, Humitech filed a California state court lawsuit against Blue Pine, M&G, and the individual owners of M&G, alleging conversion and fraud. In retaliation, one of the owners of M&G hired an experienced bankruptcy attorney (the “Attorney”) to commence a chapter 7 bankruptcy petition on behalf of Blue Pine. The Attorney hastily initiated a chapter 7 petition for Blue Pine, blindly relying on assertions from his client and another attorney representing his client that (i) Humitech did not own 50% of Blue Point, (ii) the owners of Humitech were misappropriating Blue Pine’s assets, and (iii) Blue Pine had passed a corporate resolution authorizing a bankruptcy filing. Local bankruptcy court rule mandate that a corporate bankruptcy petition be accompanied by a copy of a board resolution authorizing the filing. Prior to initiating the case, the Attorney did not see a copy of the purported resolution authorizing a bankruptcy filing but only relied upon the client’s assertion that such authorization exists.

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Upon learning of the chapter 7 filing, Humitech’s counsel sent a letter to the Attorney objecting to the filing, also alerting him that the bankruptcy petition was unauthorized because (i) Humitech owned 50% of Blue Pine, (ii) the owners of Humitech were directors whose authorization was required in order for Blue Pine to be put into bankruptcy, and (iii) the Humitech directors never voted in favor of a bankruptcy filing. Enclosed with the letter was a copy of Blue Pine’s articles of incorporation, which provided that the approval of all of the members of the board of directors (i.e., the owners of both Humitech and M&G) was required for Blue Pine to file for bankruptcy.

After receiving this letter, the Attorney received from his client a copy of what purports to be the resolution authorizing the bankruptcy filing. The resolution was not signed by any of the Humitech directors. In explaining the absence of the Humitech directors’ signatures, the client told the Attorney that the Humitech owners had been previously removed as directors. The Attorney, however, never independently verified the client’s assertion about the removal of these directors. Such removal action would have required a properly noticed meeting of the board of directors attended by enough directors to constitute a quorum (neither of which requirements were met).

Despite the objections from Humitech’s counsel and the fact that his client’s story contradicted Blue Pine’s articles of incorporation, the Attorney proceeded to file papers with the court in support of the chapter 7 case without further investigation into whether the bankruptcy petition was authorized. In addition, without consulting the trustee appointed in the chapter 7 case, the Attorney commenced an adversary proceeding in the bankruptcy court against Humitech and its owners making many of the same allegations made against M&G and its owners in the California state court lawsuit.

Humitech promptly filed a motion to dismiss the chapter 7 case based on the fact that Blue Pine’s board of directors never authorized the bankruptcy filing. In granting that motion, the court found that the Humitech directors were never given notice of the shareholders’ meeting at which they were purported to have been removed as directors. The lack of proper notice made their removal invalid. Accordingly, the court found that the Humitech directors were never removed and that the bankruptcy resolution without their signatures was ineffective to authorize Blue Pine’s filing.

II. Ruling on Sanctions:

In addition to dismissing the case, Judge Markell invited Humitech to move for sanctions against the Attorney for his improper conduct in both filing and refusing to dismiss Blue Point’s chapter 7 petition. The court subsequently granted Humitech’s motion and imposed a substantial sanction on the Attorney in the amount of $109,528.

In awarding sanctions, the court found that the Attorney had not performed a reasonable inquiry into whether the allegations of the bankruptcy petition had evidentiary support, which is required under Federal Rule of Bankruptcy Procedure 9011(b). Bankruptcy Rule 9011 (which is based on Federal Rule of Civil Procedure 11) “provides for the imposition of sanctions when a filing is frivolous, legally unreasonable, or without factual foundation, or is brought for an improper purpose.” Id. at 6 (citation omitted).
Indeed, the court found the Attorney’s behavior to be frivolous within the meaning of Rule 9011. In addition to the Attorney’s failure to verifying the evidentiary foundation of the petition’s allegations prior to commencing the bankruptcy case, the court was especially displeased by the fact that the Attorney continued to advocate his client’s position even after he had an opportunity to conduct further investigation into the allegations. The court found that the Attorney’s “‘later advocating’ of an untenable position (and the corresponding failure to take corrective action, such as removing his inaccurate filings from the docket) was [the Attorney’s] primary failing in this matter and forms the basis for the restitutionary award to Humitech.”  Id.[emphasis added] at 10.

The court also rejected the Attorney’s defense that his actions were premised on his reliance on the client’s and the client’s other attorney’s advice. Specifically, the court stated that the Attorney “cannot rely on another lawyer’s advice with impunity,” and “[l]awyers are not given the privilege of assuming that their clients or other lawyers are unfailingly truthful.”  Id. at 10 n.8. The Court further admonished the Attorney by stating that:

“To act on such frivolous claims, then, without independent investigation, was to succumb to the so-called ‘butler-style’ of representation, under which the sequaciously servile lawyer does whatever the client wants and then cites that client’s command as a shield to the improper actions. This style of lawyering, however, has no place in bankruptcy court or, for that matter, in any court.”  Id. at 10.

The amount of sanction awarded, $109,528, equals the cost Humitech incurred to defend against the improper bankruptcy filing and adversary proceeding.  Id. at 14.

III. Conclusion:

The Blue Pine case is a somewhat extreme example of an attorney’s pursuit of a meritless position without proper investigation. It is obvious that before filing a bankruptcy petition (on behalf of a corporation, a partnership, an individual, or any other potential debtor) an attorney must ensure that the debtor-to-be has indeed authorized the filing. Nevertheless, this case provides an eye-opening lesson to attorneys about the potential pitfalls of relying on a client’s assertions without carefully investigating the facts underlying those assertions. Bankruptcy lawyers and litigators alike must temper their zealous advocacy when necessary to satisfy their ethical duty and refrain from advocating claims that are not supported by law or facts. As shown in Blue Pine, attorneys cannot blindly trust their clients without an independent factual investigation or hide behind their clients when it turns out that a proper investigation would have revealed that the client’s story was false.