



AMERICAN
BANKRUPTCY
INSTITUTE

2019 Northeast Bankruptcy Conference and Northeast Consumer Forum

Northeast Consumer Forum

Access to Bankruptcy Justice: Expanding Opportunities (Ethics Panel)

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Accessibility Efforts by the Bankruptcy Courts.

This is a partial listing and does not include all policies and procedures various courts have adopted to increase access for remote, indigent, and/or disabled parties.

I. All of the bankruptcy courts in the First Circuit, Connecticut, New York – Eastern District, New York – Western District, and Vermont have materials on their websites regarding bankruptcy basics, pro se guides, forms, unclaimed funds, and fee waiver/poverty guidelines.

II. Additional resources on various courts' websites.

- A. United States Bankruptcy Court for the District of Connecticut
<https://www.ctb.uscourts.gov/>

1. Mediation Program (Hartford County).
2. Notice to Debtors Re Removal of bankruptcy from credit report.
3. Application process for pro bono services.

- B. United States Bankruptcy Court for the District of Maine.
<http://www.meb.uscourts.gov/>

1. Accommodations Policy.

The United States Bankruptcy Court for the District of Maine is committed to making reasonable accommodations to people who need them, including any individual who is disabled, pregnant, or nursing. These accommodations may include flexibility in the scheduling or conduct of trials or hearings, as well as a private space for nursing or pumping. To request an accommodation, please contact one of the court staff listed below:

Lori Stocker - Courtroom Deputy-Bangor (207) 922-6408

Mary-Ellen Paione - Courtroom Deputy-Portland (207) 274-5959.

2. CARE information.

Note: The courts are equipped with adaptive aids for people with hearing impairment.

- C. United States Bankruptcy Court for the District of Massachusetts.
<http://www.mab.uscourts.gov/mab/>

1. Obtaining legal advice in a bankruptcy case.

2. Foreclosure assistance information.
3. Nursing Policy.

The United States Bankruptcy Court for the District of Massachusetts promulgates this policy to facilitate reasonable accommodations for attorneys, legal support staff, litigants, witnesses, law students, and others who are currently nursing and have business at the court, but who are not employees of the court (hereinafter the “Qualified Individual”). This policy does not apply to jurors, who will be provided the same reasonable accommodation as nursing court employees.

1. A Qualified Individual who requires an accommodation to nurse or express breast milk while appearing before this court should contact the courtroom deputy and/or any one of the following case administrator supervisors/deputies in charge forty-eight hours prior to a scheduled visit:

- a. Boston: Stefanie Landry (617-748-5319)*
- b. Worcester: Joanne Ryan (508-770-8921)*
- c. Springfield: Sheila Smith (413-785-6910)*

2. The Qualified Individual should provide the following information:

- a. The date(s) they will invoke the policy;*
- b. The approximate time(s) during the day they will need to nurse/express; and*
- c. The estimated amount of time they will need to nurse/express.*

3. The court representative will inform the judge of the proposed date(s) and time(s) and the approximate duration of the break(s). The judge will address the request as the judge determines appropriate.

4. The court representative will meet the Qualified Individual at the entrance of the building and bring the Qualified Individual to a private room prior to the hearing to store any equipment. The private room will be available to the Qualified Individual during any break(s).

5. The court is unable to provide refrigeration.

Date: October 26, 2018

4. Disability Accommodations Information. (Alerting parties that the courts are handicap accessible and have assistive listening devices.)

Note: the court also provides some translation assistance.

D. United States Bankruptcy Court for the District of New Hampshire.

<https://www.nhb.uscourts.gov/>

E. United States Bankruptcy Court for the Eastern District of New York.

<https://www.nyeb.uscourts.gov/>

1. Local bar association course offerings.

2. Obtaining Assistance from the Pro Se Law Clerk.

3. Foreclosure information.

4. Services Provided to the Hearing Impaired and other Persons with Communication Disabilities.

In accordance with Judicial Conference policy, the U.S. Bankruptcy Court for the Eastern District of New York must provide sign language interpreters or other auxiliary aides and services to participants in federal court proceedings who are deaf, hearing-impaired or have communication disabilities and may provide these services to spectators when the court deems appropriate. The Court will honor a participant's choice of auxiliary aid or service, unless it can show that another equally effective means of communication is available, or that use of the means chosen would result in a fundamental change in the nature of the court proceeding or an undue financial or administrative burden.

"Participants" in court proceedings are generally defined as parties, attorneys and witnesses of in-court or out-of-court events. "Court proceedings" include in-court events, such as trials, hearings, ceremonies, and other public programs or activities conducted by a judicial officer. Section 341(a) Meetings (First Meeting of Creditors) are presided over by the United States Trustee and are not considered "court proceedings."

Written requests for any services identified above must be submitted to the local Access Coordinator at least two (2) weeks in advance of the court proceeding. Application to Provide Services to the Hearing Impaired or Other Persons with Communication Disabilities forms are available at the public counter and on our web site (click here to view application). The local Access Coordinator is:

Amy Stewart

U.S. Bankruptcy Court, EDNY
271-C Cadman Plaza East
Suite 1595
Brooklyn, NY 11201-1800
(347) 394-1700

Rev. 3/1/2019

- F. United States Bankruptcy Court for the Western District of New York.
<https://www.nywb.uscourts.gov/>

1. Interpreter Services Request.

LANGUAGE INTERPRETER:

The Bankruptcy Court may provide and pay for, a language interpreter for a party who speaks only or primarily a language other than English, only when the bankruptcy court proceeding is instituted by the United States. For proceedings not instituted by the United States, the parties are responsible for procuring interpreter services unless they are deaf, hearing-impaired or have other communication disabilities.

To request a language interpreter for court proceedings before Chief Judge Bucki, Judge Kaplan or Judge Warren, complete an [Application to Provide Language Interpreter Services](#).

SIGN LANGUAGE INTERPRETER:

The Bankruptcy Court may provide and pay for a sign language interpreter or other auxiliary aids and services to a participant in a federal court proceeding that is deaf, hearing-impaired or has communication disabilities, whether or not the proceeding is instituted by the United States.

The Bankruptcy Court will give primary consideration to a participant's choice of auxiliary aid or service, unless another equally effective means of communication is available, or that use of the means chosen would result in a fundamental alteration in the nature of the court proceeding or an undue financial or administrative burden.

To request a sign interpreter or other communication equipment and/or service for court proceedings before Chief Judge Bucki, Judge Kaplan or Judge Warren, complete an [Application to Provide Services to the Hearing-Impaired or Other Persons with Communication Disabilities](#).

GENERAL NOTES:

Submit interpreter applications by mail at least three (3) weeks before the date of the court proceeding to:

*U.S. Bankruptcy Court, WDNY
ATTN: Melissa Frieday
Robert H. Jackson U.S. Courthouse
2 Niagara Square
Buffalo, NY 14202*

The Bankruptcy Court is not authorized to pay for language interpreters, sign language interpreters or other auxiliary aids and services for Section 341 meetings (meeting of the creditors) as these meetings are not considered court proceedings and are not considered to be instituted by the United States.

Please contact Melissa Frieday at (716) 362-3200 with any questions relating to interpreter requests.

G. United States Bankruptcy Court for Puerto Rico.

<http://www.prb.uscourts.gov/>

1. Translation services, including sign language.
2. Youtube video series re bankruptcy basics (Spanish and English).
3. CARE information.

H. United States Bankruptcy Court for Rhode Island.

<https://www.rib.uscourts.gov/>

1. Bankruptcy video series (Spanish and English).
2. Emotional support and counseling services.
3. Foreclosure prevention assistance.
4. Pro se information for creditors and debtors.
5. Free or low-cost bankruptcy assistance.
6. Free Bankruptcy Legal Clinic: <https://www.rib.uscourts.gov/clinic> (staffed by volunteer attorneys who provide a 30-minute consultations).

Note: The Clerk's office utilizes an iPad at the front counter with Google translator on it to communicate back and forth with visitors if different languages are required to transact business or answer basic questions. The office also created several videos on our website about court services and credit counseling, which we produced in both English and Spanish. http://www.rib.uscourts.gov/bankruptcy_video_series%20. In addition, the court also provides assisted listening headphones for the hearing impaired, as well as handicap accessibility.

I. United States Bankruptcy Court for Vermont.

<https://www.vtb.uscourts.gov/>

1. Vermont Law Help sponsored by Legal Services of Vermont and Vermont Legal Aid.

2. Discharging Student Loan Debt:

If you seek to discharge student loan debt and believe you may be eligible for a free attorney, you can contact Vermont Law Help at (800) 889-2047 or visit vtlawhelp.org

III. Guide to Judiciary Policy

A. Vol. 4: Court and Case Management, Ch. 8: Bankruptcy Case Policies

<http://jnet.ao.dcn/policy-guidance/guide-judiciary-policy/volume-4-court-and-case-administration/ch-8-bankruptcy-case-policies>

§ 810 Overview

This chapter contains national judiciary policies regarding bankruptcy cases that were adopted either by the Judicial Conference of the United States or by the Director of the Administrative Office of the U.S. Courts (AO). They include:

- Procedures adopted by the Judicial Conference regarding the chapter 7 fee waiver provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) (see: § 820, below); and
- Director's Guidance Regarding Tax Information under 11 U.S.C. § 521 (see: § 830).

Note: This guidance is available on uscourts.gov, to which local courts should direct the public and members of the local bar.

§ 815 Applicability

This chapter applies to the bankruptcy courts. Guide to Judiciary Policy, Vol. 4, Ch. 8 Page 2

§ 820 Chapter 7 Fee Waiver Procedures

The Judicial Conference promulgated these procedures to assist district courts and bankruptcy courts with implementing the fee waiver provisions set forth in Section 418 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Pub. L. No. 109-8, 199 Stat. 23), and codified at 28 U.S.C. §§ 1930(f)(1)-(3). JCUS-SEP 13, pp. 8-9.

§ 820.10 Filing Fee Waiver Application and Initiation of the Chapter 7 Case

(a) In lieu of paying the prescribed chapter 7 filing fee or filing an installment application, an individual debtor may, along with the bankruptcy petition, file an application to waive the filing fee.

(1) Federal Rule of Bankruptcy Procedure 1006(c) requires that the application conform substantially to Official Form 103B.

(2) A defective or otherwise deficient waiver application should be processed according to the court's standard operating procedures for processing deficient pleadings and papers.

(b) When a chapter 7 petition in an individual debtor case is accompanied by an application to waive the filing fee, the court should initiate and process the case in the same manner as other individual chapter 7 cases.

§ 820.20 Judicial Determination of Filing Fee Waiver Applications

(a) Standard of Eligibility

(1) Under 28 U.S.C. §§ 1930(f)(1-3), the district court or bankruptcy court may waive the chapter 7 filing fee for an individual debtor who:

(A) has income less than 150 percent of the income official poverty line applicable to a family of the size involved; and (Note: Since the Office of Management and Budget has never issued official poverty thresholds, these procedures interpret this statutory language to refer to the poverty guidelines updated periodically in the Federal Register by the Department of Health and Human Services (DHHS) under the authority of 42 U.S.C. § 9902(2). The Secretary of Health and Human Services is required to update the poverty guidelines annually, and defines guidelines separate for the 48 contiguous states and the District of Columbia, Alaska, and

Hawaii. The DHHS does not define poverty guidelines for Puerto Rico, the U.S. Virgin Islands, American Samoa, Guam, the Republic of the Marshall Islands, the Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, and Palau. For these areas, the guidelines for the 48 contiguous states and the District of Columbia may be used. See: DHHS guidelines.)

(B) is unable to pay that fee in installments.

(2) The DHHS does not publish a standard definition of income, leaving the determination of that definition to individual program administrators.

(A) These procedures adopt a definition that is reasonable in the bankruptcy context.

(B) The income for comparison to the poverty guidelines is the “Total Combined Monthly Income” as reported (or as will be reported) on Schedule I.

(C) Amounts received as non-cash government assistance must be deducted from the total amount reported on Schedule I for fee waiver consideration.

(3) “Family size” may be defined as the debtor(s), the debtor’s spouse (unless the spouses are separated and a joint petition is not being filed), and any dependents listed on Schedule I.

Note: The DHHS uses the term “family unit” instead of “family size” but does not publish a standard definition of “family unit.”

(4) The district court or bankruptcy court should consider the totality of the circumstances in determining whether the debtor is unable to pay the fee in installments as provided in 28 U.S.C. §1930(f)(1). Official Form 103B elicits information relevant to this determination.

(5) A debtor may qualify for a waiver of the filing fee even if the debtor has paid or promised to pay a bankruptcy attorney, bankruptcy petition preparer, or debt relief agency in connection with the filing.

Note: In 2008, Fed. R. Bankr. P. 1006(b)(1) was amended to delete the sentence requiring a statement in the installment fee application that the debtor has not paid an attorney or other person in connection with the case. In the installment fee application, debtors must certify they will not

make additional payment or transfer any additional property to an attorney or other person for services in connection with the case until the filing fee is paid in full.

(b) Initial Court Procedures

(1) Filing Fees, Fee Waiver Application, Notice

(A) “Filing fee” as defined at 28 U.S.C. 1930(f)(1), means the filing fee required by § 1930(a) or any other fee prescribed by the Judicial Conference under §§ 1930(b) and (c) that is payable to the clerk upon the commencement of a case under chapter 7. This includes Items 8 and 9 of the Bankruptcy Miscellaneous Fee Schedule.

(B) The court should promptly determine whether the fee waiver application should be granted, denied, or set for early hearing, on notice to the United States trustee or bankruptcy administrator, the case trustee, the debtor, and, if applicable, the attorney for the debtor.

(C) The order on the fee waiver should be transmitted to the United States trustee or bankruptcy administrator, the case trustee, the debtor, and, if applicable, the attorney for the debtor.

(2) Denial of Fee Waiver

(A) Any order denying a filing fee waiver application may give the debtor a reasonable time in which to either pay the fee in full or begin making installment payments.

(B) The order denying the fee waiver application should set forth an installment payment schedule.

(C) It also should advise the debtor that failure to pay the fee or make timely installment payments may lead to dismissal of the case.

(D) A standard order is included with the Official Form.

(3) Conversion to Chapter 7

If a case is converted from another chapter to chapter 7, the court may waive any unpaid balance on the filing fee if the conditions described in section (a)(1) are satisfied.

§ 820.30 Developments in the Case

(a) Conversion to Another Chapter

(1) If the filing fee for an individual chapter 7 debtor is waived and the debtor's case is later converted to a case under another chapter, the debtor must pay the full filing fee required for that chapter.

(2) The conversion order should give the debtor a reasonable time in which to either pay the fee in full or begin making installment payments.

(b) Fee Waiver Request After Installment Payment Application

If a debtor files an application to pay the filing fee in installments and later applies for a waiver of the filing fee, the court may waive any unpaid balance of the filing fee, if the circumstances warrant.

(c) Revocation or Vacation of Order on Fee Waiver

(1) The court may vacate or revoke an order waiving the filing fee if developments in the case or the administration of the estate demonstrate that the waiver was unwarranted.

(A) The court may also vacate or revoke an order denying a request to waive the filing fee if developments in the case or administration of the estate demonstrate either that the factors leading to the denial of the waiver no longer exist or that denial of the waiver was not warranted.

(B) The court may make these determinations either on motion by a party in interest or sua sponte. See: Fed. R. Bankr. P. 9023, 9024; 11 U.S.C. § 105(a).

(2) If the fee waiver is revoked or vacated, it is the debtor's obligation to pay the filing fee pursuant to the court's order. If the debtor does not pay the filing fee in accordance with the court's order, the case may be dismissed.

§ 820.40 Waiver of Additional Individual Debtor Fees

(a) In addition to fees due at filing, other fees scheduled by the Judicial Conference under 28 U.S.C. §§ 1930(b) and (c) may be waived, in the discretion of the court, for an individual debtor whose filing fee has been waived, or for whom the totality of circumstances during the pendency of the case and appeal warrant such waiver upon request.

(b) Courts may consider whether to extend a waiver of filing fees to all fees under 28 U.S.C. §§ 1930(b) and (c) for the duration of the case and any initial appeal from a decision of the bankruptcy court or to limit any waiver accordingly.

(1) An order granting such waiver should set forth the extent of the waiver.

(2) If a debtor moves to extend a fee waiver to other fees under 28 U.S.C. §§ 1930(b) and (c), the debtor must show that he or she still meets the standard of eligibility defined in Guide, Vol. 4, § 820.20(a)(1).

(c) If the filing fee has not been waived, a debtor may still move to seek a waiver of other fees under 28 U.S.C. §§ 1930(b) and (c) by demonstrating that he or she meets the standard of eligibility defined in Guide, Vol. 4, § 820.20(a)(1).

(d) Courts may establish local rules to address the application of a fee waiver to other fees under 28 U.S.C. § 1930(b) and (c).§ 810 Overview

B. Vol. 5: Court Interpreting

Chapter 1: Overview

<http://jnet.ao.dcn/policy-guidance/guide-judiciary-policy/volume-5-court-interpreting/ch-1-overview>

(Applies to the federal courts as defined in 28 U.S.C. § 610. It does not apply to the Supreme Court of the United States.)

Chapter 2: Appointment and Payment Authorities

<http://jnet.ao.dcn/policy-guidance/guide-judiciary-policy/volume-5-court-interpreting/ch-2-appointment-and-payment-authorities>

Chapter 3: Court Management and Responsibility

<http://jnet.ao.dcn/policy-guidance/guide-judiciary-policy/volume-5-court-interpreting/ch-3-court-management-and-responsibility>

Chapter 4: Funding, Contracting, and Paying Contract Court Interpreters

<http://jnet.ao.dcn/policy-guidance/guide-judiciary-policy/volume-5-court-interpreting/ch-4-funding-contracting-and-paying-contract-court-interpreters>

Chapter 5: Special Interpretation Services

<http://jnet.ao.dcn/policy-guidance/guide-judiciary-policy/volume-5-court-interpreting/ch-5-special-interpretation-services>

C. Vol. 7: Defender Services.

<http://jnet.ao.dcn/policy-guidance/guide-judiciary-policy/volume-7-defender-services>

(Possible Criminal Justice Act representation for pro se parties facing incarceration.)

ENSURING EQUAL ACCESS TO PUBLIC ACCOMMODATIONS FOR PEOPLE WITH DISABILITIES¹

Places of public accommodations have an obligation to ensure equal access for people with disabilities. Public accommodations are places that provide goods, services, facilities, and entertainment that people use to get things done and enjoy life. People with disabilities have extensive rights to be free from discrimination by public accommodations. Although there are several federal and state laws that prohibit discrimination against people with disabilities, Title III of the Americans with Disabilities Act, along with its regulations, is the most detailed law that directly impacts businesses such as law offices.

The Americans with Disabilities Act

The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq., is the principal federal statute that prohibits discrimination based on a disability. Title III of the ADA, together with its implementing regulations, prohibits discrimination against people with disabilities in places of public accommodations. *See* 42 U.S.C. §§ 12181-2189. In September 2010, the Department of Justice (DOJ) amended the ADA Title III regulations set forth at 28 C.F.R. Part 36.² The revised final rules went into effect on March 15, 2011. In August 2016, DOJ revised Title II and III regulations to implement the requirements of the ADA Amendments Act of 2008, an Act meant to clarify the meaning and interpretation of the ADA definition of “disability” to ensure that the definition of disability is broadly construed and applied without extensive analysis.³ The Title III regulation was again revised on November 21, 2016, when DOJ signed a final rule that further clarified a public accommodation’s obligation to provide appropriate auxiliary aids and services for people with disabilities.⁴

Under Title III of the ADA, a “place of public accommodation” is defined as “a facility operated by a private entity, whose operations affect commerce.” These businesses are generally open to

1 Supplemental Information for Access to Bankruptcy Justice: Expanding Opportunities (Ethics Panel) - Marlene Sallo, Esq., Executive Director, Disability Law Center, Massachusetts’s Protection & Advocacy Agency.

2 “Nondiscrimination on the Basis of Disability in Public Accommodations and Commercial Facilities,” accessed May 15, 2019, https://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.htm.

3 “Final Regulatory Assessment, Final Rule - Amendment of ADA Title II and Title III Regulations to Implement ADA Amendments Act of 2008,” accessed May 16, 2019, https://www.ada.gov/regs2016/final_rule_adaaa.html.

4 “Movie Captioning and Audio Description Final Rule,” accessed May 16, 2019, https://www.ada.gov/regs2016/movie_captioning_rule_page.html.

the public and fall in at least one of twelve categories listed in the ADA.⁵ A “private entity” can be a restaurant, movie theatre, or a doctor’s office. The “office of an accountant or lawyer” is included in the “private entity” definition at 42 U.S.C. § 12181(7)(F).

The ADA Title III regulations directed at “public accommodations” prohibit three general forms of discrimination:

1. A public accommodation may not deny a person with a disability the right to participate in or benefit from such public accommodation. **For example**, a doctor’s office cannot refuse to treat a patient after they have requested an ASL interpreter or demand that they bring their own interpreter.
2. A public accommodation may not provide services or accommodations that are not equal to those provided to others. **For example**, a movie theater should provide access to captioning of screenings through open captioning or closed captioning.
3. A person with a disability or class of individuals with disabilities may be provided a different or separate benefit or service **only** when necessary to provide opportunities as effective as those provided others; in general, the law requires the provision of goods and services in the most integrated setting appropriate to the needs of the individual. **For example**, a museum can provide tours for individuals who are deaf/Deaf.

A public accommodation **cannot** deny the right to participate in a regular program.

See 42 U.S.C. § 12182(A), (b)(1); 28 C.F.R. §§ 36.201-.203.

Auxiliary Aids and Services

The ADA statute and regulations set forth several specific prohibitions and requirements. They also take aim at one specific type of barrier that has historically been a source of discriminatory treatment of people with disabilities: communications barrier.⁶ Public accommodations are required to communicate effectively with people who have disabilities affecting their hearing, vision, or speech. Under 42 U.S.C. § 12182(b)(2)(A)(iii), public accommodations must provide effective auxiliary aids and services to ensure effective communication unless doing so would fundamentally alter the nature of what they offer or would be an undue burden, which means significant difficulty or expense.

The regulations include examples of auxiliary aids and services, such as:

- Qualified ASL/CDI/cued speech interpreters
- CART services
- Assistive listening devices
- Amplified phones and headsets

⁵ 28 C.F.R. pt. 36, app. C, § 36.104

⁶ Stanley J. Eichner et al., eds., *Legal Rights of Individuals with Disabilities*, 2nd edition 2015 (Boston, MA: Massachusetts Continuing Legal Education, 2015), chap. 8.

- Note-taking services
- Providing written material
- Phones compatible with hearing aids
- Other effective methods of making aurally delivered materials available to individuals with hearing loss

See 28 C.F.R. § 36.303(b).

Who is financially responsible for communication access?

The fee that the consumer pays the provider for services is **NOT** the determining factor when it comes to communication access. *The person providing the service is responsible for providing auxiliary aids and services i.e., the lawyer, doctor, etc.*

Undue Burden Exception

- A public accommodation can avoid providing and paying for auxiliary aids and services *if they can prove that providing such services would **fundamentally alter the service itself** or that it **would be an undue burden***
- Undue burden = significant difficulty or expense when considered in light of a variety of factors, including the nature and cost of the auxiliary aid or service, and **the overall financial and other resources of the business.**

Undue burden is NOT measured by the amount of income the business is receiving from a client, patient or customer with a disability - it is measured by the financial impact on the entity.

Clients with Disabilities⁷

Assisting clients with disabilities requires attorneys to adapt their usual approach to the client-attorney relationship in order to respect their client's needs.

It is important to understand that individuals with hearing disabilities will self-identify differently and as a result will have differing communication access needs.

Self-Identification Categories

- **Culturally Deaf** – A person who is culturally Deaf has been brought up in an environment where American Sign Language (ASL) is the dominant preferred mode of communication. Clients who identify as culturally Deaf will use ASL and will require ASL interpreters in all their communications.
 - *Communications Access for Deaf Individuals*

⁷ This portion of text has been taken from a Disability Law Center presentation for the 6th Annual Legal Services Conference 2018 called *Communication Needs of Deaf and Hard-of-Hearing Individuals* presented by Caitlin Parton, Esq. (May 14, 2018).

- Video Relay Service (VRS), Mobile VRS, VideoPhone(VP) – VRS is funded by the FCC. Note: There are many different providers. Usually, a Deaf individual will prefer a specific service. VRS utilizes certified interpreters to interpret between a Deaf person on a videophone and a hearing person using a telephone.
 - ASL and CDI (Certified Deaf Interpreter)
 - Email and other written communication based on client preference
- **Oral Deaf** – An oral deaf person is someone who was born deaf or became deaf very young, and was brought up with speechreading, speech therapy, auditory training. This person will frequently have hearing aids or cochlear implants.
 - *Communications Access for Oral Deaf Individuals* - Depending on the individual, and on the success of whatever methodology is chosen, s/he may grow up to need minimal assistance, but may still rely on reasonable accommodations like:
 - Oral transliterator⁸
 - Signed English
 - CART⁹
 - Notetaker
 - ASL interpreter
 - The individual may also use assistive listening devices
- **Hard of Hearing** – Post-lingual onset of hearing loss. S/he will usually be verbal, have few if any issues reading and writing, but may have difficulty understanding in complex auditory situations and environments.
 - *Communications Access for Hard of Hearing Individuals*
 - Many hard of hearing individuals will benefit to some extent from hearing aids, but they will never restore hearing fully in most people.
 - Situations with significant background noise or multiple speakers can be very difficult even with hearing aids.
- **Late Deafened** – Total post-lingual hearing loss. Often speak normally but cannot benefit from hearing aids or assistive listening systems alone due to the severity of hearing loss.

8 A transliterator is one that transliterates between sign language and spoken language in both sign-to-voice and voice-to-sign.

9 CART is used by hard of hearing and deaf people who use English as their first language and/or their language of instruction. Most often, the hard of hearing or deaf person can voice for him or herself (expressive communication) and uses CART to understand what others are saying, especially in meetings, classrooms or large events (receptive communication).

- *Communications Access for Late Deafened*
 - Many late deafened people turn to cochlear implants in order to regain some of their hearing.
 - Communication Access Realtime Translation (CART) is in high demand.

Other Facts on d/Deafness

- ASL is used in Canada and the U.S.
- Facial expressions, head movements, and eye gaze in ASL is primarily grammatical
- In Deaf Culture, when you arrive late to a meeting it is expected that you stop and explain why you were late.
- How would you get a Deaf person's attention? Simply wave to the person or touch the person.
- What would you do if you need to pass between two people signing? It is socially appropriate to walk between the signers. As you are doing so, slightly bow your head and sign "excuse me." If it is a group of people signing, it is best to go around the group.

Best Practices for Deaf Clients

- Arrange for an ASL interpreter. If the client requests, arrange for a CDI, as well. Be aware: you will need to arrange an interpreter at least a month in advance; if it is an emergency, try freelance list.
- Meet in a quiet, private area with enough space for the interpreter. The interpreter will be seated next to you, allowing the client to look at both you and the interpreter at the same time.
- ALWAYS - Speak directly to the client and NOT the interpreter.
- Ask the client if s/he is okay with you taking notes; explain why you need to take notes.
- When working with non-Deaf clients, attorneys may be more accustomed to having more control over the pace of the interview and how they go through a list of questions. This process comes across as rude and rushed to Deaf people. Please allow Deaf people to tell their story first (it may include many asides or deviations) and then ask follow-up questions. Always plan for at least one hour when meeting with a Deaf client.
- Explain the purpose of the interview and why you need to ask questions. Give the client a road map of how the conversation will go:
- Ask the client to tell you his/her story
- Ask follow-up questions
- Always make sure that the client has an opportunity to ask questions

Best Practices for deaf and hard of hearing clients

- Meet in a quiet room/noise-free environment
- Ask the client if s/he has a seating preference
- Speak clearly, enunciate well, and with appropriate volume – as if you were giving a presentation to an audience
- Tell the client that you are happy to repeat anything as needed for clarity or to rephrase as necessary
- Always provide a roadmap for the conversation
- **DO NOT:** speak extra slowly; mumble; cover your mouth; talk while looking down at your notes.
- CART (Computer Assisted Realtime Translation) Remote CART – can only work if all speech is heard by the remote provider

Video Remote Interpreting (VRI)

- When an onsite ASL interpreter cannot be obtained, VRI can be used as a backup. The attorney is responsible for payment of VRI services
- VRI may employ interpreters from other parts of the region and country, which may result in unfamiliarity with regional/local signs or pronunciation
- There are technical problems and accessibility issues with VRI. Therefore, in person ASL interpretation is always best

Best phone practices for Deaf, deaf and hard of hearing clients

- No one uses a TTY/TTD anymore
- VP
- VRS (Video Relay Service) a form of Telecommunications Relay Service
 - This service is funded by the Federal Communications Commission. There are many different providers; usually, a Deaf individual will prefer a specific service. Most VRS providers offer multiple platform mobile apps.
 - VRS utilizes certified interpreters to interpret between a Deaf person on a videophone and a hearing person using a telephone
- Email communication
- Captioned telephones and web CapTel

Meeting in person is the best practice

Interacting with People with Disabilities

It is important to understand the general rules of etiquette when interacting with people with disabilities.

1. Focus on the person:
 - a. One easy way to focus on the person is to watch the person signing and not their interpreter.
 - b. Don't focus on a person's companion
2. If you want to help a person with a disability ALWAYS ask the person if s/he wants assistance.
3. If you wish to help a person who is blind, do not hold on to their elbow. Offer them your arm.
4. Assistive devices (i.e. wheelchair, scooter, or cane) and service animals are personal and should only be touched if the person with a disability gives you permission to do so.
5. If someone uses a wheelchair and you will be having a long conversation with him/her, use a chair to be at eye level with the person.
6. Always use person first language. For example, a 'person with a disability' rather than 'a disabled person.' Don't use the term: 'the disabled' rather say 'people with disabilities.' **Please DO NOT use the terms: "handicapped," "crippled," and "retarded."**
7. Listen attentively if you are talking to a person who has difficulty speaking. Do not interrupt the person while they are speaking. Repeat what you understand and then wait for cues to make sure that you have understood what s/he is saying. If helpful, ask short or close-ended questions.
8. People who have psychiatric disabilities have varying personalities and different ways of coping with their disability. Always ask what will make him/her more comfortable and always respect his/her needs to the maximum extent possible.
9. Not all disabilities are visible. Whether visible or invisible, disabilities are real.
10. If you're not sure what to do, just ask.

RESOURCES

New England ADA Center (CT, RI, MA, ME, NH, & VT):

1. Requesting Interpreters by State: <https://www.newenglandada.org/request-interpreter>
2. Braille Services by State: <https://www.newenglandada.org/braille-services>

3. CART Services by State: <https://www.newenglandada.org/cart-services>
4. State Protection and Advocacy Agencies: <https://www.newenglandada.org/state-protection-advocacy>
5. ADA Center State Affiliates: <https://www.newenglandada.org/state-affiliates>
6. ADA Title III Publications: <https://www.newenglandada.org/publications>
7. Learn About the ADA for Businesses and Non-Profits:
<https://www.newenglandada.org/businesses-non-profits>

Disability Etiquette:

1. United Spinal's Disability Etiquette Publication Offers Tips On Interacting With People With Disabilities: <https://unitedspinal.org/disability-etiquette/#basics>
2. A video from the [D.C. Office of Disability Rights](#) discusses general rules of etiquette for interacting with people with disabilities: <https://www.respectability.org/inclusion-toolkits/etiquette-interacting-with-people-with-disabilities/>

COMMUNICATION ACCESS IN FEDERAL COURTS

As per the National Association of the Deaf (NAD):

“If your client requires an accommodation in order to understand court proceedings, you or possibly the client must contact the court in advance to request the accommodations that are necessary for the client to understand the court proceedings. The Americans with Disabilities Act (ADA) **does not apply** to the federal courts. However, **the Judicial Conference of the Administrative Office of the United States Courts has adopted a policy that all federal courts will “provide reasonable accommodations to persons with communications disabilities.”** Federal court policy requires federal courts to provide sign language interpreters or other appropriate auxiliary aids and services, at no charge to deaf or hard of hearing court participants. Federal court policy allows federal courts to decide whether to provide accommodations for court spectators who are deaf or hard of hearing. These guidelines are published in Vol. I, Administrative Manual, Chapter III, General Management and Administration, Guide to Judiciary Policies and Procedures.”¹⁰

The NAD advocates for federal courts to provide accommodations for deaf and hard of hearing people in federal court, for any reason. The NAD has reprinted “The Guidelines for Providing Services to the Hearing-Impaired and Other Persons with Communications Disabilities” on their website and the guidelines can be accessed here:

<https://www.nad.org/resources/justice/courts/communication-access-in-federal-courts/>

¹⁰ “Communication Access in Federal Courts,” National Association of the Deaf, December 6, 2016, <https://www.nad.org/resources/justice/courts/communication-access-in-federal-courts/>.

ABI NORTHEAST CONSUMER FORUM

Newport, RI July 12, 2019

COST AS AN OBSTACLE TO BANKRUPTCY RELIEF

Stephen Morrell¹

- A. When the authors of the *2013 Final Report of the ABI National Ethics Task Force*² considered the issue of consumers' access to the bankruptcy system, they highlighted "the tension between the time and skill it takes to responsibly and ethically represent a consumer debtor, and the legal fee the consumer can afford and the market will support".
- B. The use of retainers and the requirement that chapter 7 counsel be paid in advance for the full complement of services relating to a chapter 7 case can compound that tension to the point where those most needy of bankruptcy relief are too broke to file.
 - 1. Debtors' counsel routinely require that a retainer be paid before services are rendered to secure payment in full for the commencement of a chapter 7 case as well as the ensuing representation of the debtor during the case.
 - 1.a. See, *Lamie v. United States Trustee*, 540 U.S. 526, 537, 124 S. Ct. 1023, 1032 (2004).
 - 2. An "advance fee" retainer is an unqualified prepayment for legal services whereby counsel takes title to the payment upon receipt.

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Lois R. Lupica and Nancy B. Rappaport, *Final Report of the ABI National Ethics Task Force*, April 2013

- 1.b. *CK Liquidation Corp. et al v. Ropes & Gray LLP*, 343 B.R. 376, 379 (1st Cir. 2006), citing *Indian Motorcycle Assoc III LP v. Massachusetts Hous. Fin. Agency*, 66 F. 3d 1246, 1254 (1st Cir. 1995).
2. The purpose of an “earned upon receipt” retainer is to assure that there be no liability owed to counsel on the date of the petition which might be subject to the automatic stay and extinguished upon the entry of a discharge.
3. Retainers “earned upon receipt” remain subject to the power of the Court to adjudge them excessive pursuant to B.C. 329 (b) and require all of part of the retainer to be disgorged.
 - 3.a. *See, In re Boates*, 551 B.R. 428 (B.A.P. 9th Cir. 2016) (large pre-petition retainer paid to defend anticipated nondischargeability claim ordered disgorged.)
 - 3.b. *See also, Bethea v. Robert J. Adams & Assoc*, 352 F. 3d 1125 (7th Cir. 2003).
- C. Debtor attorneys’ fees rose nearly 50% following the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).
 1. See, Lois R. Lupica, “The Consumer Bankruptcy Fee Study: Final Report”, 20 *Am. Bankr. L. Rev.* 17 (Spring 2012).
- D. Efforts to accommodate the need for low cost alternatives to high upfront fees have been fraught
 1. Pro bono services have been stymied by a shortage of volunteers.
 2. Non-attorney assistance occasionally drifts into the unauthorized practice of law. There have also been instances of unscrupulous activity on the part of some bankruptcy petition preparers.

3. Web based self-help mechanisms are dependent upon access to the internet. Complicated legal concepts are not always reducible to pre-programmed solutions.
4. Fee only chapter 13 cases can result in higher fees and suffer, generally, from low rates of success in terms of obtaining a discharge.

4.a. *But see, In re Puffer*, 674 F. 3d 78 (1st Cir. 2012) (fee only chapter 13 plans are not bad faith per se.)

5. Appearance counsel at 341 meetings are sometimes not prepared, don't always adequately represent the debtor, and rarely file the required disclosures of fees.
 6. The unbundling of post-petition services from the scope of a Chapter 7 engagement requires great care to ensure informed consent, the adequacy of attorney due diligence, and compliance with rules governing withdrawal of representation.
 7. The financing of attorneys' fees can lead to unfair lending practices and can inflate attorney's fees to compensate attorneys for the factors' discounting of law firm accounts receivable.
 8. Nearly 30% of pro se filers fail in their attempt to obtain a discharge.
- E. Ethically and as a matter of professional responsibility, once an attorney commences a chapter 7 case on a consumer's behalf, he or she may be duty bound to perform a set of core functions which arise post-petition.
1. The ABA Model Rules of Professional Conduct (MRPC) speak of core functions in terms of the duties of competence and loyalty.
 2. Rule 1.1, MRPC states that "[a] lawyer shall provide competent representation to a client."

3. Rule 1.2(a) states “Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and ... shall consult with the client as to the means by which they are to be pursued...”
4. Rule 1.2(b) addresses the scope of an attorney's representation of a client, and states that “[a] lawyer may limit the objectives of the representation if the client consents after consultation.”
5. Rule 1.2 (c) provides that a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

5.a. “Informed consent” denotes the agreement by a person to a proposed course of conduct after the attorney has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed conduct.

5.b. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client’s objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent. Comment [5], MRPC 1.2

6. *In re Withrow*, 391 B.R. 217 (Bankr. D. Mass. 2008) brought the duty of diligent representation into the equation. While considering sanctions against debtor’s counsel for filing inaccurate schedules, the Court acknowledged that the second guessing of lawyers must be sensitive to the real-life circumstances of bankruptcy practice.

6.a. The Court, nevertheless, considered as essential whether the attorney

6.a.i) Impressed upon the debtor the critical importance of accuracy in the preparation of documents presented to the Court

6.a.ii) Sought and reviewed whatever documents were within the debtor's control in order to verify the information; and

6.a.iii) Employed external verification tools readily accessible at minimal cost, such as on-line registry searches. *391 B.R. at 228.*

F. The Statutory Framework

1. U. S. Bankruptcy Code (B.C.)

1.a.B.C. 101 (12) (A) defines a “debt relief agency” as anyone who provides a consumer (with nonexempt property valued below a statutory threshold) with “bankruptcy assistance” in return for money. Attorneys can qualify as such.

1.a.i) See, *Milavetz, Gallop & Millavetz v. United States*, 559 U.S. 229, 236, 130 S. Ct. 1324, 1331 (2010).

1.b.B.C. 327(a) authorizes the trustee to employ professionals at the expense of the estate.

1.c. B.C. 329 requires “any attorney representing a debtor” to disclose payments made within a year of the petition “in a case under this title, or in connection with such a case,” and requires that all fees paid for bankruptcy-related services be reasonable.

1.d.B.C. 330 (a) (1) omits chapter 7 debtor's counsel from the list of professionals who may seek compensation from the estate.

1.e.B.C. 330 (a) (4) authorizes reasonable compensation to be awarded to attorneys representing chapter 13 and chapter 12 debtors.

1.f. B.C. 362 (a) (6) stays any act to recover a claim against the debtor that arose before the commencement of the case.

1.g.B.C. 524 (a) (2) enjoins collection of any pre-petition debts (including for services rendered post-petition pursuant to a pre-petition contract).

1.g.i) See, *Bethea v. Robert J. Adams & Assoc.* 352 F. 3d 1125 (7th Cir. 2003).

1.h.B.C. 526 (a) (1) requires a debt relief agency to perform the services promised and prohibits the making of false statements, by the agency or the debtor, in a bankruptcy case.

1.i. B.C. 527 requires a debt relief agency to disclose certain rights to assisted persons, including the right to a written contract with an attorney or a bankruptcy petition preparer.

1.j. B.C. 528 (a) (1) requires a debt relief agency to provide “assisted persons” with a contract explaining clearly and conspicuously the services the agency will provide, the fees, and the terms of payment.

1.k.B.C. 541 (a) defines what property of the debtor becomes property of the estate.

1.l. B.C. 707 (b) (4) (C) and (D) impose upon attorneys the duty of reasonable inquiry in connection with the petition, pleadings and written motions

2. Federal Rules of Bankruptcy Procedure (F.B.R.)

2.a.F.B.R. 1006 (b) (3) (attorney may not receive payment from debtor when there is a filing fee balance).

2.b.F.B.R. 2016 (requiring disclosure to the U.S. Trustee of fee arrangements between debtor and counsel (including fee sharing agreements)).

2.b.i) See, *In re Bonilla*, 573 B.R. 368 (Bankr. D.P.R. 2017).

2.c. F.B.R. 2017 (implementing procedure for B.C. 329 disgorgement).

i) See, *In re D'Arata*, 2018 WL 3740680 (Bankr. S.D.N.Y.)

2.d.F.B.R. 9011(b) (sanctions)

i) See, *Young v. City of Providence ex rel Napolitano*, 404 F. 3d 33, 39 (1st. Cir. 2005) (“culpably careless” conduct is sufficient.)

G. Innovative Approaches to Fee Arrangements

1. Limited Scope Representation

1.a. The ABI Ethics Task Force has suggested the following guidelines:

1.a.i) The initial client interview and counseling should make clear the expected scope of representation and the expected limited fee.

1.a.ii) Attorneys counseling unsophisticated consumer debtors must be mindful, when gathering initial information to assess a case, to avoid the formation of the debtor’s perception that a full-scale attorney-client relationship is being formed.

- 1.a.iii) An engagement letter and informed consent should be prepared in plain language and carefully reviewed with the debtor. This letter must clearly and conspicuously set forth the services being provided, the services not being provided, and the potential consequences of the limited services arrangement.
- 1.a.iv) The engagement letter must also clearly describe the fee arrangement, including a statement of how fees for additional services will be charged.
- 1.a.v) All documents and disclosures filed with the bankruptcy court should be done with full candor consistent with the attorney's duty of confidentiality, disclosing the exact nature of the representation and the calculation of fees for services being provided.
- 1.a.vi) In the event that withdrawal from the unbundled representation becomes warranted, attorneys must be mindful of protecting their client's interests to the fullest extent practical when exiting the case.
- 1.a.vii) As is the case with all legal representation, if the attorney becomes aware of a legal remedy, problem, or alternative outside of the scope of his or her representation, the client must be promptly informed. The attorney has the further obligation to provide his or her client with a thorough explanation of the potential benefits and harms implicated, in order for the client to make an informed decision as to how to proceed.

2. Bifurcation of Fees

- 1.b. The concept is a response to the Supreme Court admonition in *Lamie v. U.S. Trustee* that chapter 7 debtor's counsel cannot be employed pursuant to B.C. 327 and cannot be paid from property of the estate. A negative inference could be drawn that post-petition services might be paid from property which is not property of the estate without running afoul of the *Lamie* decision.

1.b.i) See, *Walton v. Clark & Washington PC (in re Walton)* 469 B.R.383, 386 (Bankr. M.D. Fla. 2012) (citing *Lamie v. United States Trustee* 540 U.S. at 535-36.

1.c. These agreements divide services between those performed pre-petition and those performed post-petition. The pre-petition agreement enables the attorney to be paid in advance for pre-petition services and paid later for post-petition services pursuant to a separate contract.

1.d. Once the case is filed, debtors are typically given the option to proceed thereafter pro se. However, the debtor has the option to engage counsel to complete the representation by signing the post-petition fee agreement. The bifurcated fee agreement does not limit the representation so much as it facilitates the debtor's post-petition payment for the attorney's post-petition services.

1.e. Only fees generated post-petition should be included in the post-petition attorney fee contract. The client must be given full disclosure of the necessity for further work and the amount to be charged.

1.f. The Zero-Down Option:

1.f.i) Debtor enters into a pre-petition retainer agreement for the preparation and filing of the Initial Bankruptcy Papers for \$0 down, with the option to either proceed post-petition without an attorney, hire a different attorney, or enter into a post-petition fee agreement with the same attorney for the prosecution of the case through the entry of a discharge.

1.f.ii) This arrangement may be difficult to square with the standard of practice announced in *In re Withrow*, 391 B.R. at 228.

1.g. Factoring of Fees

- 1.g.i) Another feature of bifurcation, contemplating third party financing for the post-petition fees
- 1.g.ii) Attorney assigns the right to collect the account to the factor for a discounted price

H. Judicial Response to Innovations

1. *Gordon v. Hines (In re Hines)*, 147 F. 3rd. 1185, 1190-91 (9th Cir. 1998):
 - a. "...the very administration of the bankruptcy system requires that attorneys for Chapter 7 debtors must have a legally enforceable right [to payment] for their post-petition services that were contracted for before filing of the petition. If the absence of such a right were to become law, it does not require much thought to recognize that the entire system would suffer a massive breakdown."
2. Unbundling of Services (Limited Scope Representation)
 - a. *In re Johnson*, 291 B.R. 462, (Bankr. D. Minn 2003) (citing *In re Castorena*, 270 B.R. 504 (Bankr. D. Idaho 2001) (attendance at the 341 meeting is "exceedingly difficult" to unbundle).
 - b. *In re Castorena*, 270 B.R. at 531:
 - i) In order to properly limit services, "that limitation must be carefully considered and narrowly crafted, and be the result of educate and informed consent"...
 - ii) "To send a debtor into a bankruptcy pro se, on the theory that he has had 'enough' advice and counseling in the document preparation stage to safely represent himself, is except in the extraordinary case so fundamentally unfair so as to amount to misrepresentation"...

iii) “An attorney, in accepting an engagement to represent a debtor in a chapter 7 bankruptcy case, will find it exceedingly difficult to show that he properly contracts away any of the fundamental and core obligations such an engagement necessarily imposes”...

iv) “Proving competent, intelligent, informed and knowing consent of the debtor to waive or limit such services inherent to the engagement will be required. Compliance with [Rules of Professional Conduct 1.1 (competence), 1.2 (scope of representation) and 1.4 (communication)] is mandatory, and must be proved.”

c. *In re Seare*, 575 B.R. 599 (B.A.P. 9th Cir. 2014).

i) “Any such unbundling must be done consistent with the rules of ethics and professional responsibility; i.e. they must be reasonable under the circumstances and only when the client gives informed consent to the limitation.”

3. Bifurcation of Fees (pre-petition v. post-petition)

a. *In re Slabbink*, 482 B.R. 576 (Bankr. E.D. Mich. 2012) (services furnished under a post-petition agreement are not dischargeable and as such are not a per se violation of Rules of Professional Conduct, if

i) Attorney furnishes competent representation

ii) Attorney provides adequate consultation

1.g.iii) Client makes fully informed and voluntary decision to consent to arrangement)

b. *In re Hazlett* 2019 WL 1567751 (Bankr. D. Utah)

i) All dealings and decisions, including the offered methods of payment, must be based on the client's best interests and not the lawyer's financial interests.

ii) All fees for legal services, including any finance charge on installment payments, must be reasonable and necessary

iii) All fee arrangements must be fully revealed in the Form B2030 Disclosure of Compensation, which must be filed within fourteen days of the petition

1.g.iv) If the client elects to proceed pro se or to retain the services of another lawyer, the filing attorney must immediately comply with applicable rules regarding the substitution or withdrawal of counsel

4. Appearance Counsel

a. *In re D'Arata*, 2018 WL 3740680 (Bankr. S.D. N.Y.)

i) The Court ordered debtor's counsel to disgorge all fees charged to the debtor when counsel failed to appear for the 341 meeting, pursuant to B.C. 329 (b) and F.B.R. 2017.

ii) The Court observed, "Appearance counsel are attorneys who appear at proceedings at the request of, and on behalf of, the debtors' chosen attorney. These lawyers are generally not disclosed to the Court or to the

Chapter 7 trustee before their appearance, and debtors are usually unaware that an appearance attorney will be representing them until right before the meeting or hearing. They often know little or nothing about the case. Various courts have frowned on the use of appearance counsel in such circumstances.”

b. See also, In re Bradley, 495 B.R. 747 (Bankr. S.D. Tex. 2013) (criticizing and banning the use of appearance counsel)

5. Factoring

a. In re Wright, 591 B.R. 68 (Bankr. N.D. Okla. 2018) (attorney who charged more to clients whose fees were factored and who admitted to designating fees for pre-petition services as post-petition was ordered to disgorge fees).

The *Wright* Court articulated four concerns regarding factoring

1.g.v) F.B.R. 2016 requires attorneys to list in the Disclosure of Compensation all aspects of any fee splitting arrangement

1.g.vi) The potential for clients who used the “zero-money-down” option with fees factored by a third party paying substantially more than those who paid the retainer up front

1.g.vii) The improper shifting of most, if not all, of the fees to the post-petition fee agreement;

1.g.viii) A potential conflict of interest arising from the creation of a non-dischargeable debt through the use of a post-petition fee agreement and the attorney's desire to maintain a favorable relationship with the factor while representing the client.

I. Further reading

Adam D. Herring, *Problematic Attorneys' Fee Arrangements and the Illusion of "Access to Justice"*, Am. Bankr. Inst. J, October 2018.