Consumer Workshop II

The Supreme Court and Consumer Bankruptcy: Unbundling Services and Fee Issues

John C. Smiley, Moderator
Lindquist & Vennum LLP; Denver

Jenny M.F. Fujii
Kutner Brinen Garber P.C.; Denver

Peter Mullison
Colorado Bankruptcy Law Group, LLC; Denver

Prof. Michael D. Sousa
University of Denver Sturm College of Law; Denver

Hon. William T. Thurman
U.S. Bankruptcy Court (D. Utah); Salt Lake City

AMERICAN BANKRUPTCY INSTITUTE
Rocky Mountain Conference
January 21-22, 2015
Denver, Colorado

Consumer Workshop II: The Supreme Court and Consumer Bankruptcy

Unbundling Services and Fee Issues

Honorable William T. Thurman

United States Bankruptcy Court, District of Utah

Salt Lake City, Utah

Defending Fee Applications in Consumer Bankruptcy: *Baker Botts*

In a decision that has prompted much discussion in the bankruptcy community, the Supreme Court ruled in *Baker Botts LLP v. ASARCO* that §327(a) professionals are not entitled to compensation for defending fee applications because §330 does not expressly alter the American Rule against fee shifting.[1]

Although the ruling focuses squarely on large business bankruptcy cases, *Baker Bott's* analysis is relevant to all Bankruptcy Code sections dealing with employment and compensation, particularly consumer bankruptcy.[2] In a chapter 13 case, unlike a chapter 11 case, debtor's counsel does not need to be appointed. Debtors counsel is required to file a disclosure of compensation which list fees paid to date, balance owed and all services included in the fee.[3] Any portion of the agreed fee not paid prior to filing will be paid through the chapter 13 plan - as

[1] *Baker Botts LLP v. ASARCO LLC*, 135 S. Ct. 2158 (2015).
[2] *See Lamie v. U.S. Tr.,* 124 S. Ct. 1023 (2004) (chapter 7 debtor's counsel is not compensated from the estate, unless employed by the trustee and approved by the bankruptcy court); *In re Friedland*, 182 B.R. 576 (Bankr. D. Colo.1995) (bankruptcy code allows for awards of reasonable compensation from estate to counsel of debtors in Chapters 13, but does not provide for allowance of compensation to counsel for debtors in Chapter 7.) Thus, debtor's counsel in a chapter 7 will rarely seek compensation. *Baker Botts* analysis is relevant to chapter 7 trustee's counsel employed and compensated pursuant to §§327 and 330.
[3] Fed. R. Bankr. P. 2016; *see also* 11 U.S.C. § 329.

an administrative expense clam.[4] Fees sought for services excluded from the initial disclosure of compensation are payable only upon a fee application and court order pursuant to §330(a)(4)(B)[5].

After the application is filed, a chapter 13 trustee may object to the fees of counsel for the debtor which will require a response. It is uncertain as to whether responding to such objection is compensable under the standard of *Baker Botts*. Chapter 13 debtor's counsel is not appointed under the same statute as chapter 11 debtor's counsel. As a result, an argument could be made that *Baker Botts* is not controlling. In addition, it is not unusual for debtor's counsel in chapter 13 to take advantage of the presumptive fee processes established in most districts, which avoids the *Baker Botts* question. Where separate fee applications are submitted in excess of the presumptive fee, challenges could be made to the fees and defensive of the same could have *Baker Botts* implications. No reported cases have been found to date on this however.

Consumer chapter 11 cases could be filed where the debtor's debts exceed the statutory maximum allowed for chapter 13 cases as determined by §109. In such cases, defense of attorneys fees could be problematic for debtor's counsel and *Baker Botts* will be applicable.

One thrust of *Baker Botts* may be a move to unbundling of legal services by counsel for the Debtor. This would occur where debtor's counsel may seek to have a post petition contract with the client if an objection is raised to the fees requested. Whether such unbundling contract is enforceable is a question.[6] Over and above the ability to separately contract for reimbursement for services in defending a fee request, the question of unbundling must be addressed.

---

[4] 11 U.S.C. §1326(b)(1).
[5] Section 330(a)(4)(B) authorizes compensation for attorneys representing the interests of individual chapter 12 and chapter 13 debtors.
[6] *See In re Lehman Bros. Holdings, Inc.*, 508 B.R. 283, 294 (S.D.N.Y. 2014) (parties are not free to rewrite the Code to create an exception to pay what the Code does not allow.) *See also* US Trustee (FAQs) – Professional Compensation (Sept. 25, 2015), http://www.justice.gov/ust/Prof_Comp/FAQ_Prof_Comp .

Unbundling is likely governed by the various state bar associations rules of professional conduct. Some states allow it, while others may not. For example, in the District of Utah, attorneys are allowed to withdraw from a case, but once they are in, they are expected to stay, "all in."[7] Each state's rules should be considered.

Unbundling Legal Services: *In re Seare*

In *In re Seare,*[8] the 9th circuit addressed the question of when consumer bankruptcy attorneys may limit their scope of representation and found that unbundling is permissible is some jurisdictions but must be done in a manner consistent with the rules of ethics and professional responsibility binding all attorneys.[9] The court also found that Debtor's counsel did not comply with applicable ethical rules by providing a boilerplate fee agreement and not informing the client of the risk associated with limited-scope services.

When unbundling services attorneys must be mindful of the ethical obstacles he or she must navigate. First, the attorney must consider the client's objectives and determine if unbundling is reasonable in light of client's goals. Second, unbundling requires obtaining informed consent, which necessitates an attorney to conduct a full investigation into the case while analyzing all foreseeable issues. Lastly, the attorney must communicate the intent to not represent the client in other foreseeable matters in the case and the risk associated therewith.

In light of *Baker Botts* and its possible financial implications on the consumer bar, unbundling (if allowed) may provide consumer attorneys with more autonomy and the possibility of increased clientele due to growing market for unbundled legal services. For example, many online nonlawyer legal service companies like LegalZoom provide unbundled services. These

[7] See Bankr. D. Ut. LBR 2091-1(a).
[8] *In re Seare,* 515 B.R. 599 (9th Cir. BAP 2014).
[9] *Id.* at 176.

companies have serviced millions and are growing in popularity due to the likeability of "customized" and "a la carte" legal services. Other benefits of unbundling may include an increased public access to justice and the reduction of pro se filers with the option of affordable bankruptcy.

Questions to Consider:

- In light of *Baker Botts*, should unbundling be allowed in all jurisdictions?
- Will the cost of a fee defense in a chapter 13 significantly outweigh the core fees? If so, will the objecting party always win?
- Will routine objections to attorney fees threaten the chapter 13 bankruptcy system?

Practice Pointers:

- Counsel should analyze the case before filing the petition and determine if their fees for representing the debtor will exceed the presumptive fee limitations. If so, counsel should maintain adequate records of time spent and negotiate the fee application, as an extension of the fee application preparation, before an objection is filed in court.

AMERICAN BANKRUPTCY INSTITUTE
Rocky Mountain Conference
January 21-22, 2015
Denver, Colorado

Peter Mullison, Esq.

Colorado Bankruptcy Law Group, LLC

Denver, Colorado

Wellness International Network, LTD v. Sharif

135 S.Ct. 1932 (2015)

Held: Article III permits bankruptcy judges to adjudicate *Stern* (*Stern, Executor of the Estate of Marshall v. Marshall, Executrix of the Estate of Marshall*, 131 S.Ct. 2594 (2011)) claims with the parties' "knowing and voluntary" consent.

Knowing and voluntary consent. In this case, Respondent Sharif filed a Chapter 7 bankruptcy to, in part, discharge Petitioner Wellness' default judgment against him. Wellness filed an adversary complaint against Sharif in bankruptcy court, objecting, among other things, to Sharif obtaining a discharge, arguing that Sharif had concealed property in his bankruptcy filing.

Sharif admitted that the adversary proceeding was a "core proceeding" under 28 U.S.C. §157(1), (2)(J), which allows a bankruptcy court to enter final judgment subject to appeal.

After repeatedly evading discovery requests, the bankruptcy court denied his discharge and granted Wellness default judgment in its adversary action. Sharif appealed to the district court,

should only be treated as a "report and recommendation." The district court denied his motion for supplemental briefing and affirmed the bankruptcy court's judgment.

The Seventh Circuit Court of Appeals ruled that the bankruptcy court lacked constitutional authority to enter final judgment to enter final judgment on Wellness' adversary complaint.

The Court's analysis focused on its concern regarding the separation of powers and whether allowing bankruptcy courts to decide *Stern* claims by consent would "impermissibly threate[n] the institutional integrity of the Judicial Branch." The Court distinguished its decision here from its *Stern*, stating that *Stern* was "premised on nonconsent to adjudication by the Bankruptcy Court".

The Court's analysis does not require the parties' express consent.

The Court held that parties could knowingly and voluntarily consent to *Stern* claims being heard by a bankruptcy court, and remanded the case for a determination as to whether Sharif's consent was knowing and voluntary.

Practice Pointers: Given that the Court did not define what constitutes "knowing and voluntary" consent, practitioners should determine at the outset whether they should register an objection to allowing the bankruptcy court to rule on a *Stern* claim.

AMERICAN BANKRUPTCY INSTITUTE
Rocky Mountain Conference
January 21-22, 2015
Denver, Colorado

Peter Mullison, Esq.

Colorado Bankruptcy Law Group, LLC

Denver, Colorado

Bank of America, N.A. v. Caulkett

135 S.Ct. 1995 (2015)

Held: A debtor in a Chapter 7 bankruptcy proceeding may not void a junior mortgage lien under §506(d) when the debt owed on a senior mortgage lien exceeds the current value of the collateral if the creditor's claim is both secured by a lien and allowed under §502 of the Bankruptcy Code.

Stripping a junior mortgage in a Chapter 7 bankruptcy. In this consolidated case, the debtors each owned homes that were encumbered with both senior and junior mortgage liens. The values of the home were below the amount owed on the senior liens, leaving the junior mortgage liens entirely underwater. When the debtors filed their Chapter 7 bankruptcies, they moved to "strip off", or void, the junior mortgage liens under §506 of the Bankruptcy Code.

Section 506(d) provides, "To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void." The dispute between the debtors and the lender rested on their interpretations of whether the junior mortgages were "secured" within the meaning of §506(d).

Despite the debtors' urging, the Court refused to distinguish its holding *Dewsnup v. Timm* (502 U.S. 410, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992)), and relies on *Dewsnup* to construe the meaning "secured" within the context of §506(d). In *Dewsnup*, the Court held that if a claim "has been 'allowed' pursuant to §502 of the Code and is secured by a lien with recourse to the underlying collateral, it does not come within the scope of §506(d)." Since the debtors did not dispute that the claims were allowed under §502, the Court held that the junior mortgages could not be stripped.

Practice Pointers: Debtors who want to strip their second (or any other junior) mortgages will have to file a Chapter 13 bankruptcy.

Stripping a junior mortgage becomes less viable as property values increase. Practitioners should advise their clients who are interested in stripping a junior mortgage to obtain the most thorough valuation possible, at least a comparative market analysis, if not a complete appraisal.

Debtors can still strip judgment liens in a Chapter 7 bankruptcy.

AMERICAN BANKRUPTCY INSTITUTE
Rocky Mountain Conference
January 21-22, 2015
Denver, Colorado

Jenny M. F. Fujii, Esq.

Kutner Brinen Garber PC

Denver, Colorado

Chapter 13 Administrative Expenses After Conversion to Chapter 7

Harris v. Viegelahn

What happens to the funds held by a Chapter 13 Trustee in a confirmed Chapter 13 case when the debtor converts the case to Chapter 7? During the course of a Chapter 13 case, the Chapter 13 Trustee collects plan payments and makes periodic disbursements to creditors pursuant to the terms of the confirmed plan. If the debtor completes all plan payments and fulfills any other requirements of the plan, then this issue raised by conversion does not arise. However, debtors, for various reasons, are unable to fulfill the terms of their plan and opt to convert the case to Chapter 7. The issue raised in the *Harris* case is: What is the Chapter 13 Trustee in a confirmed case required to do with the money on hand after conversion: (1) disburse the funds under the provisions of the confirmed Plan; or (2) return the money to the debtor? The Supreme Court was called upon to resolve a split in the circuits and ruled that all of the undistributed funds held by the Chapter 13 trustee must be returned to the debtor. *Harris v. Viegelahn*, 135 S.Ct. 1829, 1839 (2015).

The debtor in *Harris* confirmed his Chapter 13 plan, subsequently fell behind on post-confirmation mortgage payments, lost his home in foreclosure, then converted his case to

Chapter 7 about a year after foreclosure. *Harris,* 135 S.Ct. 1829, 1836. After the foreclosure, the Chapter 13 trustee continued to receive the monthly $530 plan payment, but stopped making payments to the mortgage company on the pre-petition arrearage. *Id.* Ten days after conversion, the Chapter 13 trustee paid $1,200 to debtor's counsel, $267.79 to herself as a fee, and $4,051.43 to a consumer electronics store and six unsecured creditors. The debtor asserted that the funds should have been returned to him upon conversion instead of paid to his creditors. The Bankruptcy Court agreed, and the District Court affirmed. *Id.*

In order to resolve this issue, the Supreme Court analyzed section 348(e) which provides that conversion "terminates the service of any trustee . . . serving in the case before such conversion." The Court concluded that the "moment a case is converted from Chapter 13 to Chapter 7 . . . the Chapter 13 trustee is stripped of authority to provide that 'service.'" §348(e). *Harris,* 135 S.Ct. 1829, 1838. If the Chapter 13 trustee's "service" is terminated, the Chapter 13 trustee is therefore barred from paying creditors. *Id.; See also 11 U.S.C. §1326(c)*("the trustee shall make payments to creditors under the plan."). In other words, the Chapter 13 trustee no longer has any authority to provide "service" upon conversion. Conversely, the *Harris* Court found that if the Chapter 13 trustee instead returns undistributed wages to the debtor, this act "renders no Chapter 13-authorized 'service'" and would not be prohibited by the Bankruptcy Code. The Bankruptcy Rules dictate the post-conversion activities of a Chapter 13 trustee: turnover of records to the Chapter 7 trustee (Rule 1019(4) and file a report with the United States bankruptcy trustee (Rule 1019(5)(B)(ii)). *Id.* at 1839. "Continuing to distribute funds to creditors pursuant to the defunct Chapter 13 plan is not an authorized 'wind-up' task." *Id.* As a result, the Court found that Chapter 13 trustee must not do anything but return undistributed funds to the debtor.

The *Harris* Court suggested that, as a practical matter, "creditors may gain protection against the risk of excess accumulations in the hands of Chapter 13 trustees by seeking to include in a Chapter 13 plan a schedule for regular disbursement of funds the trustee collects" in order to maximize disbursement in a confirmed case. *Harris*, 135 S.Ct. 1829 at 1839-40.

Since the Supreme Court's decision in *Harris,* courts are split as to the applicability of *Harris:*[1]

- *In re Edwards,* 538 B.R. 536, 542-543, 2015 Bankr. LEXIS 3195, *14-15 (Bankr. S.D. Ill. 2015) (following the result in *Harris* in a *dismissed* confirmed case but under a different rationale: pursuant to 11 U.S.C. §349(b)(3) post-petition property and wages held by the trustee at the time of dismissal of the debtor's confirmed Chapter 13 case must be distributed to the debtor due to the debtor's vested right in post-petition property and wages, and dismissal renders the Chapter 13 plan effectively vacated and prevents the trustee from distributing funds in accordance with its terms).

- *In re Beauregard*, 533 B.R. 826, 832, 2015 Bankr. LEXIS 2279, *12, 73 Collier Bankr. Cas. 2d (MB) 1787 (Bankr. D.N.M. 2015) (finding that the *Harris* decision requires all funds held by a Chapter 13 trustee returned to the debtor if a case is converted to Chapter 7 *before* confirmation without paying any administrative expenses).

- *In re Sowell*, 535 B.R. 824, 826, 2015 Bankr. LEXIS 2655, *3 (Bankr. D. Minn. 2015) (finding that in a Chapter 13 case *converted* to Chapter 7 prior to confirmation, "the logic and analysis employed by the Supreme Court applies with equal force to a case, like this one, in which no plan has been confirmed").

[1] This is not an exhaustive list of all cases citing *Harris.*

- *In re Ulmer*, 2015 Bankr. LEXIS 2202, *4 (Bankr. W.D. La. June 26, 2015)(finding that the Trustee must comply with *Harris* if the case is converted, however, if the case is dismissed the Trustee should comply with 11 U.S.C. § 1326(a)(2) and the "no look" fee order).

- *In re Spraggins*, 2015 Bankr. LEXIS 3016, *3, *6 (Bankr. D.N.J. Sept. 3, 2015)(interpreting *H*arris to hold that "no provisions of chapter 13 apply in a case converted to chapter 7", and concluding that "absent bad faith, upon conversion of a chapter 13 case to a chapter 7 case, a debtor is entitled to return of any and all post-petition wages not yet distributed by the trustee").

- *In re Brandon*, 537 B.R. 231 (Bankr. D. Md. 2015) (holding that in a Chapter 13 case *converted* to Chapter 7 or *dismissed* prior to confirmation of a Chapter 13 plan, "Harris does not preclude the court from directing Chapter 13 trustees to pay funds remaining in their possession to debtor's counsel up to the amount of the attorney's fee allowed").

The *Brandon* Court distinguishes the *Harris* decision from Chapter 13 cases converted prior to confirmation and holds that *Harris* does not alter the requirement for Chapter 13 trustees return undistributed funds to the debtor after payment of administrative expenses under 11 U.S.C.S. § 503(b) pursuant to the terms of §1326(a)(2). The *Brandon* Court dissects §1326 and the scenarios contemplated by each sentence:

> Each of the three sentences in § 1326(a)(2) addresses a different issue based on the procedural posture of the Chapter 13 case. The first sentence directs a Chapter 13 trustee to retain pre-confirmation plan payments "until confirmation or denial of confirmation." The second sentence directs the Chapter 13 trustee to distribute such payments as soon as practicable if a plan is confirmed. Because under *Harris* a Chapter 13 plan is no longer binding and the Chapter 13 trustee's services are terminated once the case is converted, it follows that a Chapter 13 trustee could not rely on the second sentence of § 1326(a)(2) as authority to continue to distribute plan payments in accordance with the plan. The third sentence of § 1326(a)(2), however, specifically deals with disposition of plan payments if "a plan is not confirmed." It does not follow that after *Harris* a Chapter 13 trustee must comply with a portion of this sentence (return pre-confirmation plan payments to the debtor), but ignore another portion of that same sentence (after deducting funds needed for payment of allowed administrative expense claims). As the Third Circuit indicated in *Michael*, the third sentence of § 1326(a)(2) applies generally to cases in which a Chapter 13 plan is not confirmed and is simply not a provision swept away by conversion of a case to one under Chapter 7.

Brandon, 537 B.R. 231, 237. As a practical matter, the *Brandon* Court suggests that an "independent basis for the court to authorize payment of funds held by a Chapter 13 trustee to counsel" exists where debtors provide counsel with an assignment of and security interest in post-petition wages held by the Chapter 13 trustee pursuant to a prepetition retainer agreement or engagement letter. *Id.*

Questions to Consider:

- In light of *Harris*, will the Courts in this Circuit apply the hands-off approach to pre-confirmation Chapter 13 cases, or will the Courts adopt the analysis in *Brandon* allowing the Chapter 13 trustee to conform with the requirements of §1326(a)(2) to return funds to the debtor only after deducting claims under §503(c)?
- Will the *Harris* doctrine apply to dismissed cases as opposed to converted cases?
- What effect will *Harris* have on the Bankruptcy bar's willingness to represent Chapter 13 debtors, and what is the best way for practitioners to protect their interests in getting paid?

Practice Pointers:

- Debtor's counsel should consider independent means to secure the payment of fees in Chapter 13 cases, such as an assignment of and security interest in the debtor's post-petition wages held by the trustee.
- Creditor's and debtor's counsel should consider provisions in the plan requiring regular disbursement of funds to maximize recovery.

AMERICAN BANKRUPTCY INSTITUTE
Rocky Mountain Conference
January 21-22, 2015
Denver, Colorado

Consumer Workshop II: The Supreme Court and Consumer Bankruptcy

John C. Smiley, Esq.

Stephanie A. Kanan, Esq.

Lindquist & Vennum, LLP

Denver, Colorado

Same-Sex Couples and Joint Petitions: *United States v. Windsor* and *Obergefell v. Hodges*

Section 302(a) of the Bankruptcy Code provides that an individual debtor and that person's spouse may file a joint case.[1] A joint petition "was designed for ease of administration and to permit the payment of only one filing fee."[2] According to legislative history, its use is based on the assumption that "in most consumer cases, married debtors are jointly liable on their debts and jointly hold most of their property."[3]

Although the Bankruptcy Code does not define the term "spouse" for purposes of § 302(a), until the Supreme Court's ruling in *United States v. Windsor* in 2013, many bankruptcy courts would not permit same-sex married couples to file joint petitions due to the 1996 federal Defense of Marriage Act ("DOMA").[4] Pursuant to DOMA, the term "spouse" only applied to

[1] 11 U.S.C. § 302(a).
[2] *Matter of Stuart*, 31 B.R. 18, 19 (Bankr. D. Conn. 1983).
[3] *Id.* (citing H.Rep. No. 595, 95th Cong., 1st Sess. 321 (1977); S.Rep. No. 989, 95th Cong., 2nd Sess. 32 (1978), U.S.Code Cong. & Admin.News 1978, p. 5787).
[4] *See, e.g., In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004) (DOMA limits "marriage" and "spouses" to opposite-sex couples for purposes of federal law).

marriages between a man and woman, and allowed states to disregard same-sex marriages performed in other states.[5]

Some bankruptcy courts, however, allowed same-sex married couples to file joint bankruptcy petitions, finding DOMA unconstitutional and/or inapplicable, and looking to state law to determine whether two people were married and eligible to file a joint petition.[6] On July 6, 2011, the U.S. Department of Justice ("DOJ") announced that it would no longer oppose joint bankruptcy petitions filed by same-sex married couples.[7] Although the DOJ's announcement ostensibly meant that the U.S. Trustee for the different bankruptcy jurisdictions would not oppose such petitions, some U.S. Trustee's continued their opposition.[8]

On June 26, 2013, in *United States v. Windsor*, the Supreme Court declared DOMA unconstitutional – clearing the path for same-sex married couples to file joint bankruptcy petitions.[9] Although the federal definition of spouse that applied only to marriages between a man and a woman was struck down, the Court did not classify same-sex couples as any type of protected class, identify what level of scrutiny it was applying, or rule on the constitutionality of states denying same-sex couples the right to marry.[10] As a result, the various state bans of same-

---

[5] 1 U.S.C. § 7 and 28 U.S.C. § 1738C.
[6] *See In re Balas*, 449 B.R. 567 (Bankr. C.D. Cal. 2011) (finding DOMA unconstitutional); *In re Somers*, 448 B.R. 677, 682-84 (Bankr. S.D.N.Y. 2011) (finding debtors legally married pursuant to state law eligible under 11 U.S.C. § 302); *see also In re Favre,* 186 B.R. 769 (Bankr. N.D. Ga. 1995) (holding that a legally married same-sex couple recognized by the state "would qualify for relief under section 302").
[7] *See U.S. Shifts Policy on Same-Sex Bankruptcies*, REUTERS.COM (July 8, 2011), http://www.reuters.com/assets/print?aid=USTRE76770020110708#ZdohRsQyzB1e6k51.97.
[8] *See, e.g., In re Balas, supra.*
[9] *United States v. Windsor*, __ U.S. __, 133 S.Ct. 2675 (2013).
[10] *Id.*

sex marriage remained in effect, denying same-sex couples in those states equal access to the bankruptcy system.

Two years later, however, in *Obergefell v. Hodges*, the Supreme Court held that the fundamental right to marry is guaranteed to same-sex couples by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[11] The ruling requires all states to issue marriage licenses to same-sex couples and to recognize same-sex marriages validly performed in other jurisdictions – allowing same-sex married couples across the country to enjoy the benefits conferred under § 302(a) of the Bankruptcy Code.[12]

Following *Obergefell*, few courts have addressed the issue of same-sex couples filing joint bankruptcy petitions. In *In re Villaverde*, the chapter 13 trustee filed a motion to dismiss the bankruptcy case filed by a same-sex couple registered as domestic partners in California, on the grounds that the couple was not considered "spouses" eligible to file a joint petition.[13] The court agreed with the trustee and dismissed the case, holding that domestic partnership is not a "marriage" under California law, and that a couple who had chosen not to marry following the legalization of same-sex marriage was not eligible to file a joint petition under 11 U.S.C. § 302.[14] The court was careful to explain that its ruling was not premised on the couple's status as a same-sex couple: "[b]ecause both same- and opposite-sex couples can get married and, as a

[11] *Obergefell*, 576 U.S. ___, 135 S.Ct. 2584 (2015).
[12] *Id.*
[13] *In re Villaverde*, Case No. 15-bk-16988, 2015 WL 6437204 (Bankr. C.D. Cal. Oct. 21, 2015).
[14] *Id.*

result, file a joint petition, denying same-sex domestic partners the ability to jointly file is no different than denying an unmarried, cohabitating opposite-sex couple the same."[15]

Current State of the Law:

According to the court in *Villaverde*:

> Now that same-sex marriage, like opposite-sex marriage, is available nationwide, there no longer remains a legal obstacle blocking two otherwise eligible individuals (regardless of either's sex or gender) from getting married and becoming each other's spouses. It follows that a same-sex couple also has the same, equal rights as an opposite-sex couple to file a joint petition under 11 U.S.C. § 302 as long as the couple is married.[16]

Under this analysis, there should be no impediment for a lawfully married same-sex couple filing a joint petition under the Bankruptcy Code.

---

[15] *Id.* at *5.
[16] *Id.*

Questions to Consider:

- Will other courts (and trustees) consider domestic partners as spouses for purposes of § 302?

- Will courts (and trustees) consider same-sex common law married couples as eligible spouses for purposes of § 302?[17]

Practice Pointers:

- Same-sex couples in registered domestic partnerships or civil unions in states that have not automatically converted those to marriages should consider getting legally married prior to filing a joint bankruptcy petition. Although courts have recognized legitimate common law marriages for purposes of 11 U.S.C. § 302(a), same-sex common law married couples intending to file a joint petition would also benefit from getting legally married to eliminate any potential issues.

[17] *See, e.g., In re Elliot*, 2009 WL 2611220, * 1 (Bankr. N.D. Ohio 2009) (finding that a common law married heterosexual couple was legally married for purposes of 11 U.S.C. § 302).

AMERICAN BANKRUPTCY INSTITUTE
JOURNAL
The Essential Resource for Today's Busy Insolvency Professional

Consumer Corner

BY CARRIE A. ZUNIGA

The Ethics of Unbundling Legal Services in Consumer Cases

Editor's Note: *This article draws heavily from ABI's Ethics Task Force Final Report, which discusses unbundling issues, competency, conflicts and many other ethical issues facing bankruptcy attorneys. The full report is available at go.abi.org/FinalEthicsReport.*

Carrie A. Zuniga
Lakelaw; Waukegan, Ill.

Carrie Zuniga is a senior associate at the Waukegan, Ill., office of Lakelaw, and her practice includes consumer bankruptcy.

Since the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), consumer bankruptcy attorneys' fees have increased by approximately 48 percent.[1] Furthermore, as attorneys' fees are not excepted from discharge under § 523 and pre-petition debts for legal fees are subject to the discharge under § 727, attorneys must be paid in full prior to the debtor filing a case.[2] There is a growing segment of debtors in bankruptcy who do not qualify for legal aid but are unable to raise the necessary funds in order to retain an attorney in full before filing a chapter 7 case.

As such, it has become increasingly problematic for consumer attorneys to reconcile the inability to be paid post-petition with a client's difficulty in paying attorneys' fees. Even prior to BAPCPA's enactment, consumer bankruptcy attorneys faced incredible competition "to represent the occasional consumer of legal services."[3] Certainly, the practice of law is a business, and attorneys seek to improve their bottom lines without losing clients to competitors.[4]

The practice of "unbundling" allows a debtor and his or her attorney to limit the scope of services to be performed in exchange for paying a smaller fee. For instance, some attorneys exclude their attendance at a § 341 meeting or negotiating a reaffirmation agreement so that their clients can pay reduced fees. Some attorneys enter into a fee agreement to complete pre-petition work and require a separate fee agreement for post-petition work once the case is filed, thus allowing the post-petition fees to survive the discharge.[5]

Practitioners in favor of unbundling services argue that the practice can give debtors access to legal services that may otherwise be unattainable.[6] Furthermore, courts can benefit from the practice when the alternative is a debtor filing *pro se* or using a bankruptcy petition preparer. Case law continues to evolve as debtors and their attorneys utilize alternative agreements to limit the scope of their representation with the idea that limited representation in bankruptcy is better than none at all.

Nothing in the Bankruptcy Code requires an attorney to represent a debtor in all matters, although most local rules indicate that the attorney *should* represent the debtor in all matters, with only some courts excluding adversary proceedings.[7] However, many courts anticipate that an attorney who files a bankruptcy case, "having initiated the process ... must shepherd the client through it, to its conclusion."[8] Certainly, this is the ideal course that debtors would follow to receive a discharge. Given the complexity of the process for a debtor to obtain bankruptcy relief, some courts even suggest that it is unlikely that an exclusion of services would ever be appropriate.[9]

While the attorney/client relationship is contractual in nature, attorneys also have ethical duties to

1 "Best Practices for Limited Services Representation in Consumer Bankruptcy Cases," Final Report of ABI's National Ethics Task Force at 49 (citing Lois R. Lupica," The Consumer Bankruptcy Fee Study: Final Report," 20 *Am. Bankr. Inst. L. Rev.* 17 (2012) (hereinafter, "ABI Ethics Final Report").
2 *See Bethea v. Robert J. Adams & Associates*, 352 F.3d 1125, 1127 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 2176 (2004), and *Rittenhouse v. Eisen*, 404 F.3d 395, 397 (6th Cir. 2005).
3 *In re Bancroft*, 204 B.R. 548, 550-51 (Bankr. C.D. Ill. 1997).
4 *Id.* at 551.
5 *In re Slabbinck*, 482 B.R. 576 (Bankr. E.D. Mich. 2012). *See also* Northern District of Illinois Bankruptcy Standing Order dated Feb. 17, 2004, and Rule 2091-1(B) of the Local Rules for the U.S. Bankruptcy Court for the Northern District of Illinois.
6 *In re Seare*, 493 B.R. 158, 182 (Bankr. D. Nev. 2013).
7 *Id.* at n 22.
8 *Bancroft* at 552.
9 *In re Egwim*, 291 B.R. 559, 573 (Bankr. N.D. Ga. 2003).

their clients and the court.[10] The obligations that an attorney owes to the court are fundamental to the administration of justice and the maintenance of public confidence in the legal system.[11] Unbundling raises serious ethical concerns in the context of bankruptcy, especially when it comes at the suggestion of an attorney "who often benefits from and has superior knowledge of the possible ramifications of excluding certain services."[12] Not only might a debtor assume that the excluded service is unnecessary, but he or she might also not understand the risk that the excluded task would apply to his or her case.[13]

Reconciling Competent Representation with Limited-Scope Representation

As there is no provision in the Bankruptcy Code or Bankruptcy Rules addressing unbundling, courts look to the applicable rules of professional conduct for the state in which the bankruptcy case is filed. In all cases, attorneys must provide competent representation to their clients.[14] In order to competently represent a debtor in a chapter 7 case, the attorney's professional responsibilities must include meeting the debtor's objectives of obtaining a discharge and retaining as much of their property as possible.[15] Clients are unlikely to understand bankruptcy law and rely on attorney expertise to guide them.[16] Therefore, in order to provide competent representation, some courts have found that attorneys cannot select what aspects of the bankruptcy case that they should assist their clients with to the exclusion of others.[17]

Competent representation must be reconciled with an attorney's ability to limit the scope of his or her representation. Most states have adopted some form of Rule 1.2(c) of the Model Rules of Professional Conduct, which states that "[a] lawyer may limit the scope of representation if the limitation is *reasonable under the circumstances* and the client gives *informed consent*."[18] Generally speaking, courts are concerned that attorneys will offer limited-scope agreements and leave "debtors vulnerable and unrepresented at the exact moment [that] they need professional legal advice, especially for routine and fully anticipated matters."[19]

Courts have found that if the limitation breaches the duty of competence, then the limitation is unreasonable under the circumstances.[20] A common service that attorneys unbundle is attendance at the § 341 meeting of creditors. However, most courts that have addressed the unbundling of this service have found that attendance at the § 341 meeting is so fundamental to a successful bankruptcy case that it would be "'exceedingly difficult' to show that any such obligations were properly contracted away."[21] The § 341 meeting is a known event, and "[b]y filing the petition in bankruptcy, the attorney sets in motion a series of events, including the first meeting of creditors, which exposes a layperson to a potential plethora of legal hurdles."[22]

In order to properly limit services, "that limitation must be carefully considered and narrowly crafted, and be the result of educated and informed consent."[23] In order to determine whether a debtor gave informed consent, courts look to the fee agreement.[24] An attorney should explain to his or her client that not all attorneys unbundle services in the same way, and the attorney's disclosures must include information on the "risks to the client that the proposed limitations would create, as well as the technical aspects, legal ramifications and material risks."[25]

Most courts are wary of boilerplate language in a fee agreement as a way of obtaining informed consent.[26] The court in *In re Castorena* speculated that any informed consent is suspect in the context of bankruptcy due to the unlikelihood that an attorney could adequately explain "the lay of the bankruptcy landscape, including all its variations, contingencies and permutations, in order to obtain a truly informed consent."[27] The court even suggested that allowing a debtor to essentially proceed *pro se* after the case is filed is "so fundamentally unfair as to amount to misrepresentation."[28]

The Trend Toward Unbundling

The relevant case law on unbundling may not seem particularly favorable to attorneys, but there is a budding consensus among the courts that debtors' attorneys can limit their representation in a chapter 7 case as long as the ethical rules are followed.[29] The *In re Seare* court agreed that adversary proceedings could be unbundled and that attorneys may charge additional fees for adversary proceedings.[30] However, the court found that the debtors' attorney in this case breached his duty of competence by failing to ascertain the debtors' objective to eliminate a wage garnishment related to a fraud judgment.[31] Moreover, the debtors' attorney did not provide informed consent because he failed to communicate the near certainty of a nondischargeability action or the risk of defending an adversary proceeding unrepresented.[32]

One form of unbundling that is used quite frequently in the U.S. Bankruptcy Court for the Northern District of Illinois and recently addressed by the court in *In re Slabbinck* is the concept of unbundling pre-petition and post-petition services. The debtors "tender a small retainer for pre-petition work and later hire and pay counsel once the proceeding begins — for a lawyer's aid is helpful in prosecuting the case, as well as in filing it."[33] The *Slabbinck* court held that this form of unbundling is not *per se* violative of § 329, but expressed a strong preference for debtor representation for the entire chapter 7 case.[34] The court opined that if

10 *In re Merriam*, 250 B.R. 724, 736 (Bankr. D. Colo. 2000).
11 *Id.*
12 *Seare* at 184.
13 *Id.* at 199.
14 Model Rules of Prof'l Conduct R. 1.1 (2011).
15 *Egwim* at 566.
16 *Seare* at 189.
17 *In re Colimar*, 417 B.R. 920, 923 (Bankr. N.D. Ind. 2009).
18 ABI Ethics Final Report at 51 (emphasis added).
19 *In re Minardi*, 399 B.R. 847, 851 (Bankr. N.D. Okla. 2009).
20 *Seare* at 193 (citing *In re Egwim* at 571).
21 *In re Johnson*, 291 B.R. 462, (Bankr. D. Minn. 2003) (citing *In re Castorena*, 270 B.R. 504, 530 (Bankr. D. Idaho 2001)). *See also In re Bancroft*, 204 B.R. 548 (Bankr. C.D. Ill. 1997).
22 *Bancroft* at 551. *But see Merriam* at 739 (necessity and benefit of attendance at § 341 meeting depends on specific facts of case and should be evaluated as such).
23 *In re Castorena*, 270 B.R. 504, 531 (Bankr. D. Idaho 2001).
24 *Slabbinck* at 587 (citing *In re Mansfield*, 394 B.R. 783, 793 (Bankr. E.D. Pa. 2008)).
25 *Seare* at 198 (citing *Slabbinck* at 589) (internal quotation marks and citation omitted).
26 *Danvers Sav. Bank v. Cuddy (In re Cuddy)*, 322 B.R. 12, 17-18 (Bankr. D. Mass. 2005) (if desire to file for bankruptcy is strong enough, debtor will accept terms that attorney proposes).
27 *Castorena* at 529.
28 *Id.*
29 *Seare* at 187.
30 *Id. See also In re Castorena*, 270 B.R. at 530 (adversary proceedings excluded from list of core functions of debtors' attorneys), and *In re Egwim*, 291 B.R. at 573 (attorney can charge separately for services outside scope of anticipated work).
31 *Id.* at 191.
32 *Id.* at 204-05.
33 *Bethea*, 352 F.3d at 1128.
34 *Slabbinck* at 596-97.

attorneys and clients can contract for certain services to the exclusion of others, then competence is "most appropriately evaluated by looking at the actual work that was agreed to be performed and then was performed by the attorney, not by looking at the remaining work that will have to be done to complete the case when the individual has not hired the attorney to perform those services and the attorney has not performed those services."[35]

Best Practices for Debtor's Counsel

Debtors' attorneys must strike a delicate balance between protecting their economic interests while providing competent representation to clients. While courts have frowned upon unbundling services in bankruptcy, limited-scope representation is increasingly becoming the norm. The Final Report of ABI's National Ethics Task Force suggested minimum standards for best practices in limited-scope representation, as well as a proposed rule and model fee agreements for both debtors with and without secured debts.[36] Debtors' attorneys would be well advised to review the Final Report before entering into a limited-scope agreement.

Attorneys should be cognizant that if the service excluded in the fee agreement is a routine or fundamental aspect of the bankruptcy case, courts are less likely to find that the attorney has compiled with the relevant ethical rules. While courts are moving toward finding unbundling generally permissible, opinions finding that the ethical rules were followed are rare. Additionally, attorneys should be aware that boilerplate language in fee agreements will not suffice, as the court will construe the agreement in the light that is most favorable to the debtor. Since bankruptcy fees are on the rise, unless Congress amends the Bankruptcy Code to allow fees to be paid for post-petition, consumer bankruptcy attorneys will continue to draft more limited-scope representation agreements. Nonetheless, the best practice for debtors' counsel is to use limited-scope representation agreements sparingly. abi

Reprinted with permission from the ABI Journal, Vol. XXXII, No. 9, October 2013.

35 *Id.* at 593.
36 ABI Ethics Final Report at 57-63.

This report was funded by the American Bankruptcy Institute's Anthony H.N. Schnelling Endowment Fund (endowment.abi.org) and is reprinted with the permission of the American Bankruptcy Institute (www.abiworld.org).

Final Report of the American Bankruptcy Institute National Ethics Task Force

April 21, 2013

Co-Reporters

Lois R. Lupica
Maine Law Foundation Professor of Law
University of Maine School of Law

Nancy B. Rapoport
Interim Dean and Gordon Silver Professor of Law
William S. Boyd School of Law, UNLV

Chair

Judith Greenstone Miller
Jaffe Raitt Heuer & Weiss, P.C.

Vice-Chairs

Claude R. ("Chip") Bowles, Jr.
Bingham Greenebaum Doll LLP

Richard P. Carmody
Adams and Reese LLP

Michael P. Richman
Hunton & Williams LLP

Best Practices for Limited Services Representation in Consumer Bankruptcy Cases[1]

Introduction[2]

The ABI Bankruptcy Ethics Task Force has considered the issue of Limited Scope Representation ("LSR"), also known as "unbundling legal services" and "discrete task representation." We have also briefly examined the issue of "ghostwriting," a form of LSR.[3] These practices have developed as a means to serve the ever-increasing number of self-represented debtors (also known as *pro se* debtors).

LSR on behalf of a consumer debtor typically consists of the provision by an attorney of a subset of legal services in connection with the filing of a consumer bankruptcy case. LSR is in contrast to the plenary representation of a debtor, where the lawyer is paid a full fee to represent a debtor with respect to all aspects of his bankruptcy case—from pre-filing counseling to post-discharge proceedings. LSR is undertaken to achieve a lower overall cost, and typically in lieu of filing *pro* se or filing with the assistance of a petition preparer. This arrangement allows for legal representation by an attorney for cost containment purposes.[4]

The problem of the high cost of consumer bankruptcy representation is well documented.[5] The recent Consumer Bankruptcy Fee Study revealed a 24% increase in attorney fees post-BAPCPA for Chapter 13 cases, with mean fees in some jurisdictions approaching $5,000.[6] For no-asset cases filed under Chapter 7, mean attorney fees have increased 48%—as high as $1,500 at the mean in some jurisdictions.[7]

Although in most jurisdictions there is a mechanism for attorney fees in Chapter 13 cases to be paid through the plan (thus limiting the amount of cash a financially distressed debtor must have

---

[1] This proposed rule is restricted to consumer practice. LSR in the business context has a very different justification and implicates very different issues.

[2] The Reporters' Notes liberally draw on the excellent WHITE PAPER ON LIMITED SCOPE REPRESENTATION IN BANKRUPTCY, prepared by LSR Subcommittee member Theresa V. Brown-Edwards (ABI Ethics Task Force Multijurisdictional Practice/Limited Service Representation Subcommittee) 2012.

[3] Due to the time and resource constraints, the Task Force decided to defer a thorough discussion ghostwriting. It is expected that a future ABI working group will address this important issue.

[4] The Task Force discussed at length the issue of consumers' access to the bankruptcy system, and 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. Ultimately the Task Force decided to limit the scope of its report addressing access to the consumer bankruptcy system to a discussion of the issue of Limited Services Representation.

[5] Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 AM. BANKR. INST. L. REV. 17 (2012) [hereinafter Lupica].

[6] *Id.* at 30.

[7] *Id.*

in hand to pay an attorney prior to filing),[8] high attorney fees remain a concern. In many instances, at least a portion of the fee must be paid to the attorney up front, and providing for the fee balance to be paid through the plan may adversely affect the plan's feasibility. Thus, high fees in Chapter 13 cases *may* be pricing some debtors out of filing for bankruptcy under Chapter 13.[9] Although it is difficult to measure how many consumers in financial distress do *not* file for bankruptcy protection, the Consumer Bankruptcy Fee Study did reveal that zero cases filed *pro se* under Chapter 13 ended with the debtor receiving a discharge.[10] This is a result of the myriad new obligations imposed on debtors by BAPCPA, and the difficulty many debtors have had (and continue to have) in meeting these obligations.[11]

The problem of *pro se* representation is even more compelling in Chapter 7, where it is far more common. The Consumer Bankruptcy Fee Study found that 5.8% of all Chapter 7 cases are filed *pro se*.[12] This descriptive statistic is reflective of a national random sample of cases filed post-BAPCPA. We recognize, however, that the incidence of *pro se* filings is considerably higher in many jurisdictions. In the ten courts with the greatest number of *pro se* cases, 9.5% to 27.1% of all cases are filed without attorney representation.[13]

The burden that *pro se* debtors place on the court system has been widely recognized.[14] Judges, trustees, and court staff have detailed the extra time and system resources eaten up by aiding

---

[8] *Id.* at 116.

[9] *Id.* at 104.

[10] *Id.* at 33-34.

[11] As observed:

> BAPCPA's enactment changed the consumer bankruptcy system in a myriad of small and not-so-small ways. For example, there is now an income and expense standard consumer debtors must meet in order to qualify for Chapter 7. The most critiqued of all new requirements, the means test, mandates that all debtors calculate their income and expenses using a system of complex calculations. It requires the application of various local and IRS expense standards to the debtor's financial information, adjusted by geographic location and household size.
>
> The list of necessary documents and records required by a consumer debtor filing under Chapter 7 or Chapter 13 has also notably increased. In addition to a schedule of assets and liabilities, a schedule of current income and expenditures, and a statement of financial affairs, a debtor must now produce: (i) evidence of payment from employers, if any, received within 60 days of filing; (ii) a statement of monthly net income and any anticipated increase in income or expenses after filing; (iii) a record of any interest the debtor has in a federal or state qualified education or tuition account; and (iv) a copy of his or her tax return for the most recent tax year.
>
> Two educational courses are now also required of debtors—a debtor must complete a credit counseling course prior to filing, and a debtor education course must be completed prior to discharge.

Id. at 33-34 (footnotes omitted).

[12] *Id.* at 31.

[13] *See* Administrative Office of the United States Courts, By the Numbers—Pro Se Filers in the Bankruptcy Courts (2011) (*available at* http://www.uscourts.gov/News/TheThirdBranch/11-10-01/By_the_Numbers--Pro_Se_Filers_in_the_Bankruptcy_Courts.aspx).

[14] Lupica, *supra* note 5, at 102.

pro se debtors who are attempting to navigate the complexities of the bankruptcy process.[15] Moreover, these efforts and resource expenditures are often for naught. The chance a *pro se* debtor's case will be dismissed because of a failure to comply with the dictates of the Bankruptcy Code and Rules is considerably higher than if the debtor were represented.[16]

In considering the issue of Limited Services Representation, the Task Force recognizes the necessity of reconciling the need to protect debtors from receiving inadequate and ineffective representation, even for a limited fee, and the interest of providing debtors with the option of limited legal representation in lieu of self-help resources or non-legal assistance. With the goal of addressing each of these concerns, the Task Force has examined the elements of debtor representation in consumer bankruptcy cases and has developed a framework for engagement of counsel for limited services. After due discussion and consideration, the Task Force is recommending a framework for LSR representation in Chapter 7 consumer cases *only* because of Chapter 13's complexity and the difficulty of distinguishing between the "basic" and the "full service" elements of representation of a Chapter 13 debtor.[17] In addition, the ability to pay legal fees paid through a plan and the historically low incidence of *pro se* Chapter 13 cases has led the Task Force to conclude that the concerns motivating the LSR Proposal are best met by the development of a proposal for best practices for limited services representation only in Chapter 7 consumer cases.

LSR and Model Rules, Local Rules, Bar Association Opinions and Judicial Pronouncements

Limited Scope Representation has been gaining attention among the federal and state judiciary. Typically, states and bar associations have been more receptive to "unbundled" legal services than federal courts. The Model Rules of Professional Conduct, largely adopted in some form in most states, permit Limited Scope Representation under certain, defined circumstances. Rule 1.2(c) reads, "[a] lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent."[18] The Official Comments to Rule 1.2(c) provide:

> The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client . . . . 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.[19]

---

[15] *Id.*

[16] *Id.* at 103.

[17] Note, however, that nothing in this Best Practices Statement obviates the need for attorneys for consumer debtors to comply with, *e.g.*, the Bankruptcy Code provisions involving debt relief agencies. *See* 11 U.S.C. §§ 101(8), 101(12A), 526-258.

[18] MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2011).

[19] *Id.* at R. 1.2 cmt. 5.

The comments to Rule 1.2 further state that lawyers and clients may enjoy "substantial latitude to limit the representation," so long as the proposed limitations are "reasonable under the circumstances." The Official Comment [7] offers the following illustration.

> If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely.[20]

Model Rule 1.0(h) defines "reasonable" as being consistent with the "conduct of a reasonably prudent and competent lawyer.[21] In determining the reasonableness of a proposed representation, the legal knowledge, skill, thoroughness and preparation required is informed by the nature of the unbundled representation.[22]

Currently, dozens of federal judicial districts have adopted a local rule of bankruptcy procedure or written an opinion addressing LSR. The degree of enthusiasm for LSR by courts, who have examined this issue, ranges from high to very low. Some courts have embraced LSR as a tool to address the growing problem of *pro se* debtors.[23] As reported above, legal fees have increased in almost every jurisdiction, pricing some debtors out of legal representation. Moreover, diminished funding for legal services organizations has decreased the availability of low- or no-cost legal representation for low-income debtors. Although the incidence of *pro se* debtors varies from jurisdiction to jurisdiction, at all levels *pro se* cases are reported to add to the already considerably administrative burdens on the courts and the trustees.[24]

Other courts, however, have viewed the practice of unbundling more skeptically.[25] Those

---

[20] *Id.* at R. 1.2 cmt. 7; *see also In re* Minardi, 399 B.R. 841, 851-52 (Bankr. N.D. Okla. 2009) (examining the reasonableness requirement based on the nature of the case and the financial circumstances facing a chapter 7 debtor).

[21] MODEL RULES OF PROF'L CONDUCT R. 1.0(h) (2011).

[22] *Id.* at R. 1.2 cmt. 7.

[23] *See* Hale v. United States Trustee, 509 F.3d 1139, 1148 (9th Cir. 2007) (agreeing with the bankruptcy court's determination that bankruptcy counsel may not exclude from representation of the debtor "critical and necessary services"); *In re* Johnson, 291 B.R. 462, 469 (Bankr. D. Minn. 2003) (attorneys representing individual debtors in chapter 7 cases may not "unbundle the core package of ordinary legal representation reasonably anticipated in every case"); *In re* DeSantis, 395 B.R. 162, 169 (Bankr. M.D. Fla. 2008) (counsel for an individual chapter 7 debtor in a consumer case may not exclude from the scope of representation certain essential services; debtor's counsel "must advise and assist their client in complying with their responsibilities assigned by Section 520 of the Bankruptcy Code, including helping their clients decide whether to surrender collateral or instead reaffirm or to redeem secured debts."); *In re* Burton, 442 B.R. 421, 452-53 (Bankr. W.D. N.C. 2009) (disapproving of an attempt to limit representation to file lien avoidances or defend against stay relief motions on the basis that these constitute "key services" to the bankruptcy case).

[24] Lupica, *supra* note 5, at 102.

[25] *See In re* Egwim, 291 B.R. 559, 578 (Bankr. N.D. Ga. 2003); *In re* Carvajal, 365 B.R. 631, 631 (Bankr. E.D. Va. 2007); *In re* Hodges, 342 B.R. 616, 61920 (Bankr. E.D. Wa. 2006). Despite differing views as to the

courts that have viewed limited scope representation less favorably have expressed concern that LSR leaves debtors without guidance in the thick of the bankruptcy case, when they are most vulnerable.[26] Moreover, some judges see full service representation as necessary to meet the minimum standards of a lawyer's professional responsibility. Yet others have noted that what falls under the umbrella of "basic services" is fact-intensive and varies from case to case.

Although both sides of the argument have merit, the Task Force is viewing the LSR Proposal as a needed alternative to a debtor's *pro se* representation. The Proposed Rule should be used as a guide for measuring the reasonableness of a particular Chapter 7 bankruptcy representation arrangement.

In recognizing that the concept of reasonableness is both fact-intensive and situation-specific, the Restatement (Third) of Law Governing Lawyers offers the following guidelines: (i) a client must be informed of and consent to any "problems that might arise related to the limitation," (ii) a contract limiting the representation is construed "from the standpoint of a reasonable client," (iii) if any fee is charged, it must be reasonable in light of the scope of the representation, (iv) changes to representation made after an unreasonably long time after beginning representation must "meet the more stringent tests...for post inception contracts or modifications," and (v) the limitation's terms must be reasonable in light of the client's sophistication level and circumstances.[27]

Informed Client Consent

The reasonableness of a representation cannot be evaluated without the client's informed consent. Informed consent requires that the client knows of and understands the risks and benefits of the limited representation. The Model Rules define informed consent as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks and reasonably available alternatives to the proposed course of conduct."[28]

In the context of consumer bankruptcy, any attempt to limit the scope of representation

---

degree to which unbundling is permissible, no court appears to have allowed the exclusion of all post-petition services altogether. *See In re* Wagers, 340 B.R. 391, 398 (Bankr. D. Kan. 2006).

[26] *In re* Bulen, 375 B.R. 858, 866 (Bankr. D. Minn. 2007) (observing that unbundled legal representation is akin to putting a "Band-aid on a gun shot" and leads to an "unraveled legal process, no increased access to justice."); *see also In re* Cuddy, 322 B.R. 12, 17 018 (Bankr. D. Mass. 2005).

[27] Restatement (Third) of Law Governing Lawyers § 19 cmt. c. (2000).

[28] MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2011). The Official Comments to Rule 1.0(e) further explain: "The communication necessary to obtain such consent will vary according to the Rule involved and circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives." *Id.* at cmt. 6.

must be fully disclosed and clearly understood by the debtor before proceeding with the engagement.[29] This means that for a debtor to provide valid, fully informed consent to limited services representation, the lawyer must fully explain the services that are omitted from the representation, including the materiality of these services and the potential ramifications of their omission. As a matter of "best practices," the Task Force recommends that any informed consent be in writing. A "Model Agreement and Consent to Limited Representation in Consumer Bankruptcy" is found below.

In addition to executing the "Agreement and Consent to Limited Representation in Consumer Bankruptcy," the Task Force further recommends that an affidavit be signed by the attorney and filed with the Bankruptcy Court attesting that the "Agreement and Consent to Limited Representation in Consumer Bankruptcy" was signed by the debtor and the attorney and that the debtor understood its substance.

Despite well-founded concerns for protecting the interests of consumer debtors, the trend in bankruptcy cases (and non-bankruptcy cases) generally favors allowing limited representation in some form. The target of this proposed rule is the debtor who falls in the liminal space between not qualifying for legal aid but with limited funds to pay for full-service representation.

Best Practices for Limited Scope Representation

Given the fact-specific nature of limited scope representation in the context of consumer bankruptcy, it is difficult to design the contours of a limited scope representation that fully addresses the client's needs for affordable counsel and that also meets the standard of competent representation.[30] Best practices, at a minimum, require the following:

---

[29] *See* Hale v. U.S. Trustee, 509 F.3d 1139, 1147 (9th Cir. 2007); *In re* Castorena, 270 B.R. 504, 529 (Bankr. D. Idaho 2001) ("Unless debtors truly understand what they are bargaining away, the bargain is a sham."(citing *In re* Basham, 208 B.R. 926, 932-33 (B.A.P. 9th Cir. 1997), *aff'd*, 152 F.3d 924 (1998)).

[30] *In re* Castorena, 270 B.R. at 530 (noting the difficulty of predicting which services would be deemed to "part and parcel" of any debtor-engagement, but that "the closer to heart of the matter—the debtors' desire to obtain bankruptcy relief and the process necessary to do so—the less likely exclusion is appropriate." The court identified the following services as core: (i) proper filing of required schedules, statements, and disclosures, including any required amendments thereto; (ii) attendance at the section 341 meeting; (iii) turnover of assets and cooperation with the trustee; (iv) compliance with tax turnover and other orders of the bankruptcy court; (v) performance of the duties imposed by section 521(1), (3) and (4); (v) counseling in regard to and the reaffirmation, redemption, surrender or retention of consumer goods securing obligations to creditors, and assisting the debtor in accomplishing these aims; (vi) responding to issues that arise in the basic milieu of the bankruptcy case, such as violations of stay and stay relief requests, objections to exemptions and avoidance of liens impairing exemptions.). *See also In re* Kieffer, 306 B.R. 197, 207 (Bankr. N.D. Ohio 2004) (characterizing the following matters as "routine": (i) motion for turnover of tax refund, (ii) Rule 2004 examination, (iii) objection to exemption, (iv) objection to motion for relief from stay, and (v) simple notice of sale); *In re* Wagers, 340 B.R. at 398–99 (observing that objections to exemptions, objections to discharge based on the schedules and statements and motion to dismiss for substantial abuse under section 707(b) likely "are so closely related to the advice the attorney gave the pre-petition preparation for filing that the attorney would at least be morally bound, and might be legally bound, to defend the debtor's position against such attacks.").

1. The initial client interview and counseling should make clear the expected scope of representation and the expected limited fee.
2. 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.
3. 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.
4. The engagement letter must also clearly describe the fee arrangement, including a statement of how fees for additional services will be charged.[31]
5. 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.
6. 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.
7. 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.

In considering the range of tasks and services an attorney typically provides to consumer debtors, the Task Force recognized a distinction between the representation of Chapter 7 individual debtors with secured consumer debts, and those Chapter 7 debtors with only unsecured consumer debt.

[31] There are always risks with asking the client to pay, post-petition, for fees incurred pre-petition as part of the engagement. If the Proposed Rule suggested in this Best Practices Statement is not enacted, then perhaps a better approach would be that taken by a case in the Middle District of Florida. In that case, the court approved a payment system in which "the client execute[d] separate fee agreements for prepetition and postpetition services." *See* Walton v. Clark & Washington, 469 B.R. 383, 384 (Bankr. M.D. Fla. 2012).

Even in the context of providing limited services representation, a lawyer representing a Chapter 7 debtor must comply with all of the relevant governing Rules of Professional Conduct. These rules include the requirements of (i) competency (Rule 1.1.),[32] (ii) diligence (Rule 1.3),[33] (iii) communication (Rule 1.4),[34] (iv) confidentiality (Rule 1.6)[35] , and (v) conflicts of interest (Rules 1.7,[36] 1.8,[37] 1.9,[38] 1.10,[39] and 1.11[40]).[41]

---

[32] "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Model Rules of Prof'l Conduct R. 1.1 (2011). The issue of attorney competency in the bankruptcy context will be further addressed elsewhere in the Task Force's Reports.

[33] "A lawyer shall act with reasonable diligence and promptness in representing a client." *Id.* at R. 1.3.

[34] (a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) 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 or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Id. at R. 1.4.

[35] "(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." *Id.* at R. 1.6.

[36] *Id.* at 1.7 (prohibiting representation of current clients whose interests conflict with other current clients).

[37] *Id.* at 1.8 (prohibiting the representation of clients whose interests conflict with the lawyer's personal or business interests).

[38] *Id.* at 1.9 (prohibiting the representation of current clients' whose interests conflict with former clients).

[39] *Id.* at 1.10 (imputing certain conflicts of interest to other members of a lawyer's law firm).

[40] *Id.* at 1.11 (addressing conflicts of interest when an attorney leaves government service and enters private sector practice).

[41] For example, it is a breach of the obligations of competence and diligence to have non-lawyer staff to counsel a debtor. *See generally In re* Sledge, 353 B.R. 742, 749 (Bankr. E.D.N.C. 2006); *In re* Pinkins, 213 B.R. 818, 820-21 (Bankr. E.D. Mich. 1997).

Proposed Rule Providing for Limited Scope Representation in Consumer Bankruptcy Cases

(1) If permitted by the governing Rules of Professional Conduct, a lawyer may limit the scope of the representation of an individual debtor (or debtors in a joint case),[42] whose debts are primarily consumer debts, if the limitation is reasonable under the circumstances and the client gives informed consent in writing.

(2) Limited Services Representation for Individual Chapter 7 Debtors with No Secured Debts.

A. With respect to a Chapter 7 case filed by an individual debtor, whose debts are primarily consumer debts, where such debtor has no secured debt listed on the bankruptcy schedules or statements, reasonable limited representation includes *all of the following*:

1. An initial meeting with the debtor to explain the bankruptcy process and discuss pre-bankruptcy planning (including exemptions) as well as non-bankruptcy alternatives.
2. Advice to the debtor concerning the debtor's obligations and duties under the Bankruptcy Code and Rules and applicable court orders.
3. Preparation and filing of the documents and disclosures required by the Bankruptcy Code, including performance of the duties imposed by Section 521 of the Code.
4. Provision of assistance with the debtor's compliance with Section 707(b)(4) of the Bankruptcy Code.
5. Preparation and filing of the petition, the Statement of Financial Affairs, and the necessary schedules.
6. Attendance at the Section 341(a) meeting.
7. Communication with the debtor after the Section 341(a) meeting.
8. Monitoring the docket for issues related to discharge.

B. In addition to the limited service representation in a Chapter 7 case, as it is defined above, the representation may also include the following services, to be indicated with a check on the Model Agreement:

- Representation of the debtor in connection with a motion by the Chapter 7 Trustee to reopen the case for the inclusion of newly discovered assets.
- Representation of the debtor in connection with a challenge to the debtor's discharge and/or the dischargeability of certain debts.

[42] As used herein, the term "debtor" shall include an individual debtor, as well as debtors in a joint case. Counsel should be particularly careful in joint debtor cases to ensure that both debtors are fully cognizant of the limitations of LSR. Counsel should also be mindful of the danger of joint debtors implicating conflict of interest concerns.

- Preparation and filing of all motions required to protect the debtor's interests.
- Representation of the debtor with respect to defending objections to exemptions.
- Preparation and filing of responses to all motions filed against the debtor.
- Representation of the debtor in connection with a motion for relief from stay.
- Representation of the debtor in connection with a motion for relief from stay that is resolved by agreement.
- Representation of the debtor in connection with a motion seeking dismissal of the case.
- Other _____

(3) Limited Services Representation for Chapter 7 Debtors with Listed Secured Debts.

A. With respect to a Chapter 7 case filed by an individual debtor, whose debts are primarily consumer debts, where such debtor has listed secured debt on the bankruptcy schedules or statements, reasonable limited representation includes *all of the following*:

1. An initial meeting with the debtor to explain the bankruptcy process and discuss pre-bankruptcy planning (including exemptions) as well as non-bankruptcy alternatives.
2. Advice to the debtor concerning debtor's obligations and duties under the Bankruptcy Code and Rules and applicable court orders.
3. Preparation and filing of the documents and disclosures required by and performance of the duties imposed by Section 521 of the Bankruptcy Code.
4. Provision of assistance with the debtor's compliance with Section 707(b)(4) of the Bankruptcy Code.
5. Preparation and filing of the petition, the Statement of Financial Affairs, and the necessary schedules.
6. Representation of the debtor (including counseling) with respect to the reaffirmation, redemption, surrender, or retention of consumer goods securing obligations to creditors.
7. Attendance at the Section 341(a) meeting.
8. Communication with the debtor after the Section 341(a) meeting. .
9. Monitoring the docket for issues related to discharge.

B. In addition to the limited service representation in a Chapter 7 case, as it is defined above, the representation may also include the following services, to be indicated with a check on the Model Agreement:

- Representation of the debtor in connection with a motion by the Chapter 7 Trustee to reopen the case for the inclusion of newly discovered assets.
- Representation of the debtor in connection with a challenge to debtor's discharge and/or the dischargeability of certain debts.

- Preparation and filing of all motions required to protect the debtor's interests.
- Representation of the debtor with respect to defending objections to exemptions.
- Preparation and filing of responses to all motions filed against the debtor.
- Representation of the debtor in connection with a motion for relief from stay.
- Representation of the debtor in connection with a motion for relief from stay that is resolved by agreement.
- Representation of the debtor in connection with a motion seeking dismissal of the case.
- Other _____

Model Agreement and Consent to Limited Representation in Consumer Bankruptcy Cases

In order to provide you with reasonable and affordable representation in connection with your consumer bankruptcy case, I, _____, attorney-at-law, licensed in the State of _____, Bar No. _____, agree to provide you, for a limited fee (as described in **Section III** below, hereinafter referred to as the "Fee"), with some, *but not all*, of the services and advice you may need in connection with your bankruptcy case.

You agree that I am being hired to provide you limited bankruptcy-related representation and recognize that at any time between now and when your case is concluded (either because you receive a discharge, your case is converted to a case under another chapter, or because your case is dismissed), circumstances may arise that require additional legal advice and/or legal services. In such event, you have the option of engaging my services for an additional fee, hiring another attorney, or representing yourself.

You understand that you are seeking legal representation under Section ___ (I OR II) below.

Within the scope of my representation, I agree to act in your best interest at all times, and agree to provide you with competent legal services.

I. For Chapter 7 Debtors Who Have No Secured Debts.

If you have *no secured debts* and are filing for bankruptcy under Chapter 7, the Fee includes *all of the following services*:

1. An initial meeting with you to explain the bankruptcy process and discuss pre-bankruptcy planning (including exemptions) as well as non-bankruptcy alternatives.
2. Advice to you concerning your obligations and duties under the Bankruptcy Code and Rules and applicable court orders.
3. Preparation and filing of the documents and disclosures required by and performance of the duties imposed by Section 521 of the Bankruptcy Code.
4. Provision of assistance with respect to your compliance with Section 707(b)(4) of the Bankruptcy Code.
5. Preparation and filing of the petition, Statement of Financial Affairs, and the necessary schedules.
6. Attendance at the Section 341(a) meeting.
7. Communication with you after the Section 341(a) meeting.
8. Monitoring the docket for issues related to discharge.

If you have no secured debts and are filing for bankruptcy under Chapter 7, the Fee *does not* include any of the following services *unless the box next to the service is checked*. If a box next to a service is checked, that service will be included in the Fee.

- ❑ Representation of your interests in connection with a motion by the Chapter 7 Trustee to reopen the case for the inclusion of newly discovered assets.
- ❑ Representation of your interests in connection with a challenge to your discharge and/or the dischargeability of certain debts.
- ❑ Preparation and filing of all motions required to protect your interests.
- ❑ Representation of your interests with respect to defending objections to exemptions.
- ❑ Preparation and filing of responses to all motions filed against you.
- ❑ Representation of your interests in connection with a motion for relief from stay.
- ❑ Representation of your interests in connection with a motion for relief from stay that is resolved by agreement.
- ❑ Representation of you in connection with a motion seeking dismissal of the case.
- ❑ Other _____

II. For Chapter 7 Debtors Who Have Secured Debts.

If you have secured debts and are filing for bankruptcy under Chapter 7, the Fee includes *all of the following services*:

1. An initial meeting with you to explain the bankruptcy process and discuss pre-bankruptcy planning (including exemptions) as well as non-bankruptcy alternatives.
2. Advice to you concerning your obligations and duties under the Bankruptcy Code and Rules and applicable court orders.
3. Preparation and filing of the documents and disclosures required by and performance of the duties imposed by Section 521 of the Bankruptcy Code.
4. Provision of assistance with respect to your compliance with Section 707(b)(4) of the Bankruptcy Code.
5. Preparation and filing of the petition, Statement of Financial Affairs, and the necessary schedules.
6. Representation of your interests (including counseling) with respect to the reaffirmation, redemption, surrender or retention of consumer goods securing obligations to creditors.
7. Attendance at the Section 341(a) meeting.
8. Communication with you after the Section 341(a) meeting.
9. Monitoring the docket for issues related to discharge.

If you have secured debts and are filing for bankruptcy under Chapter 7, the Fee *does not* include any of the following services *unless the box next to the service is checked*. If a box next to a service is checked, that service will be included in the Fee.

- ❑ Representation of your interests in connection with a motion by the Chapter 7 Trustee to reopen the case for the inclusion of newly discovered assets.
- ❑ Representation of your interests in connection with a challenge to your discharge and/or the dischargeability of certain debts.
- ❑ Preparation and filing of all motions required to protect your interests.
- ❑ Representation of your interests with respect to defending objections to exemptions.
- ❑ Preparation and filing of responses to all motions filed against you.
- ❑ Representation of your interests in connection with a motion for relief from stay.
- ❑ Representation of your interests in connection with a motion for relief from stay that is resolved by agreement.
- ❑ Representation of your interests in connection with a motion seeking dismissal of the case.
- ❑ Other_____

III. The Fee

Because you have agreed to a limited services representation arrangement, I have agreed to a limited fee (the "Fee"). You shall pay for the services described and indicated in **Section** ___ (**I or II**) above as follows:

❑ **A flat fee of** $ _____, plus $___ for out of pocket expenses,[43] **OR**

❑ **An hourly fee.** The current hourly fee that I charge is $_____. The current hourly fee that my legal assistant charges is $_____. I expect your case will take about ____ hours. The total Fee you will be charged will be capped at $ ____, plus $____ for expenses.

In the event that you ask me to provide additional services (in addition to those services set forth in Section ____ (I or II) above) after I have begun representing you, there shall be an additional fee paid to me to be calculated as follows: _____

You acknowledge that the fee for additional services (on top of those services set forth in

[43] These expenses may include long-distance telephone and fax costs, photocopy expenses, and postage. Costs such as filing fees, if any, and debtor counseling and debtor education fees shall be paid directly by you.

Section ____ (I or II) above) requested after your bankruptcy petition is filed must be paid from funds that are not part of your bankruptcy estate (such as your post-petition earnings).

You understand that I will exercise my best judgment while performing the limited legal services described in **Section _____ (I or II)** above, and you also understand:

a. that I am not promising any particular outcome;

b. that you entered into this agreement for limited services because I am charging you a Fee that is less than a fee would be for full-service legal representation in connection with your bankruptcy case;

c. that issues may arise in your case that are not covered by the list of core tasks. If that happens, you have the option of (i) representing yourself with respect to the new issues, (ii) entering into another agreement with me, whereby I will continue to represent you for an additional fee, or (iii) hiring another lawyer to represent you; and

d. that I have no further obligation to you after completing the above-described limited legal services unless and until we enter into another written representation agreement.

Except as required by law, I have not made any independent investigation of the facts and I am relying entirely on your limited disclosure of the facts necessary to provide you with the services described in **Section ___ (I or II)** above. .

If any dispute arises under this agreement concerning the payment of the Fee, we shall submit the dispute for fee arbitration in accordance with [_____]. This arbitration shall be binding upon both parties to this agreement.

YOU ACKNOWLEDGE THAT YOU HAVE READ THE ABOVE AGREEMENT BEFORE SIGNING IT. YOU FURTHER ACKNOWLEDGE THAT I HAVE ANSWERED ANY QUESTIONS YOU HAVE ABOUT THE LIMITED SERVICE REPRESENTATION ARRANGEMENT INTO WHICH WE ARE ABOUT TO ENTER.

Signature of client/s 1._____

2._____

Signature of attorney _____

Date: _____