AMERICAN BANKRUPTCY INSTITUTE

2018 Rocky Mountain Bankruptcy Conference

CONCURRENT SESSION

Consumer Workshop II

Ethics and Avoiding Malpractice

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2018

ETHICS AND AVOIDING MALPRACTICE:

HOW TO AVOID MISSING DEADLINES IN A FAST-PACED PRACTICE

Hon. Kevin R. Anderson
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Observations as a Former Chapter 13 Trustee

As the Chapter 13 trustee, I administered from 4,000 to 11,000 cases at any given time. Each week, my office had to manage hundreds of phone calls and thousands of ECF notices; and my lawyers had to file or respond to hundreds of motions and objections and appear at hundreds of hearings and 341 meetings. The management of such a practice required a refined approach to organization, technology, and training. Below are some of the things I learned in managing a bulk, consumer practice.

The Attributes of a Successful[1] Consumer Practice

In my experience, successful consumer practitioners excel in the following areas:

- Ability to organize and streamline common legal tasks
- Utilization of technology to create efficiencies and avoid inaccuracies.
- Investment in infrastructure and staff training

Organization. The ability to organize complex but repetitive processes is a talent for some, but can become a learned skill for others. The consumer bankruptcy practice consists of a variation on three to four dozen different processes that regularly repeat themselves (albeit with infinite factual permutations). The best debtors' counsel focus on and continually tweak their training, checklists, and forms relating to repeating tasks to make them more efficient, effective, and profitable.

Technology & Training. With potentially hundreds of clients, it is impossible for the consumer practitioner to be in all places at once (meeting with clients, fielding calls, filing and responding to motions, appearing at 341s and court hearings, etc.). Your success requires a maximization of technology and trained staff to timely and effectively carry out the many tasks of running a consumer practice. Don't be short-sighted when it comes to purchasing and maintaining technology for your practice or in training and retaining quality staff.

Invest in Your Practice. My experience suggests that debtor's counsel sometimes neglect the first rule of business, which is that the boss gets paid last! By investing in technology and training,

[1] By successful, I mean both as to the competent representation of clients, and the financial profitability of the practice.

you may initially take home less income, but for the long-term viability of your practice (and your reputation), don't be penny-wise and pound-foolish.[2]

Use Checklists.

The Bankruptcy Code and Rules are full of requirements and deadlines. In a busy consumer practice, a checklist ensures that you timely satisfy each requirement in each case. Failure to do so can result in dismissal of the case, a denial of a client's discharge, and a possible malpractice claim.

Many trustees provide checklists and policies for their particular office (especially the Chapter 13 trustees), and the bankruptcy courts likewise provide many local forms and checklists on their website. Use these ready-made checklists in your practice.

For internal processes, the lawyer should create detailed checklists with applicable deadlines and directions so that administrative tasks (such as collecting paystubs, bank statements, and tax returns) can be completed by staff, and legal matters can be worked up by paralegals for final review by the attorney. Examples of common tasks that are readily amendable to checklists include the following:

- ➔ Initial client interview, disclosures, and document collection.
- ➔ Preparation of statements, schedules, plan, etc.
- ➔ Filing the petition.
- ➔ Preparing the client and gathering documents for 341 meeting.
- ➔ Responding to trustee requests for documents.
- ➔ Responding to motions to dismiss for –
    - o failure to appear at 341 meeting;
    - o failure to provide documents;
    - o failure to make plan payments;
- ➔ Responding to motions for relief from stay.
- ➔ Responding to trustee or creditor objections to confirmation.
- ➔ Filing motions to abate payments or to retain tax refunds.
- ➔ Filing motions to sell or to incur debt.

[2] I was surprised how often counsel asserted that errors in their bankruptcy papers were because they had not updated their bankruptcy software, or because they were not aware of amendments to the Code, rules, or forms. Don't be that attorney.

Keeping Track of Deadlines.

Concurrent with checklists, is the creation of fool-proof processes for Intake & Routing to ensure that all hearings, deadlines, and reminders are entered into and tracked by your calendaring system. This requires your staff to review all communications to your office (phone, mail, email, ECF notices, etc.), enter necessary deadlines and reminders, and then properly route the matter to the responsible party for processing.

The following are suggested Intake & Routing procedures for your office:

Intake & Routing

- ➔ ECF Notifications
  - o First thing each morning, process all ECF notifications.
  - o Identify papers requiring a filed response or attendance at a hearing, set deadline and reminders in calendar system, and route to staff person who will respond and appear.
  - o Immediately recognize important notifications such as a motion for sanctions against counsel, notice of appeal, or a court's OSC, and immediately route to attorney.
- ➔ Email
  - o Filter out junk and irrelevancies.
  - o Responds to basic questions from clients or potential clients (use lawyer approved script for common questions).
  - o Prioritize email that needs immediate response.
  - o Route to proper person and set deadline and reminders in calendar system.
- ➔ Mail
  - o Filter mail for junk and irrelevancies.
  - o Recognize important mail (complaint, appeals, subpoena, etc.).
  - o Route to proper person and set deadline and reminders in calendar system.
- ➔ Telephone
  - o Answer basic questions using lawyer-prepared script, route calls to senior staff or attorney, or take a message.
  - o Recognize when a call merits an interruption of senior staff or attorney (e.g., calls from the court).
- ➔ Walk Ins
  - o Answers basic questions about bankruptcy services (use hand–outs and lawyer-approved script).

- Set appointment to meet with attorney for initial interview and provide client with checklist of what they need to bring to the interview.

➔ Appointments

- Send multiple reminders to clients regarding appointments, 341 meetings, court hearings, 2004 exams, etc. using email, texts, and telephone calls.
- Text and emails can include (1) maps to your office, the court, the 341 meeting location, and parking locations; (2) a list of documents to bring; (3) how to dress (if relevant); (4) a summary of what will happen and how long the matter will likely take; other relevant information that will help your client be as prepared as possible.
- Reschedule appointments if necessary.

Daily & Weekly Calendar Review

➔ Each Thursday or Friday, an office calendar for the next 3–4 weeks is prepared and distributed to all staff.

- The office calendar lists court hearings, 341 Meetings, appointments with clients, CLEs, attorneys or staff out of the office, etc.
- Include on this same calendar, or print on a separate "deadline" calendar, all deadlines and tickles with a notation of the action item and the responsible person. This is essential if the responsible person is ill or otherwise not available and will ensure that deadlines are not missed.
- Staff looks for scheduling conflicts and make appropriate changes or arrangements to ensure all hearings and appointments are covered.

➔ First thing, a staff member reviews the morning's court calendar looking for any hearings that may have been stricken or that did not appear on the office calendar.

➔ Each morning, a staff member runs a calendar report of all deadlines that come due within 7 days, 3 days, and today. The report should include a list of completed and uncompleted tasks along with person responsible to complete that task. The report can be edited so that the responsible person only receives a list of uncompleted tasks. Special notice should be made of items due that day.

These suggests can help you craft internal processes that will make you efficient, effective, and profitable in representing consumer clients while avoiding the potentially serious consequences to your clients, your reputation, and your practice arising from missed deadlines.

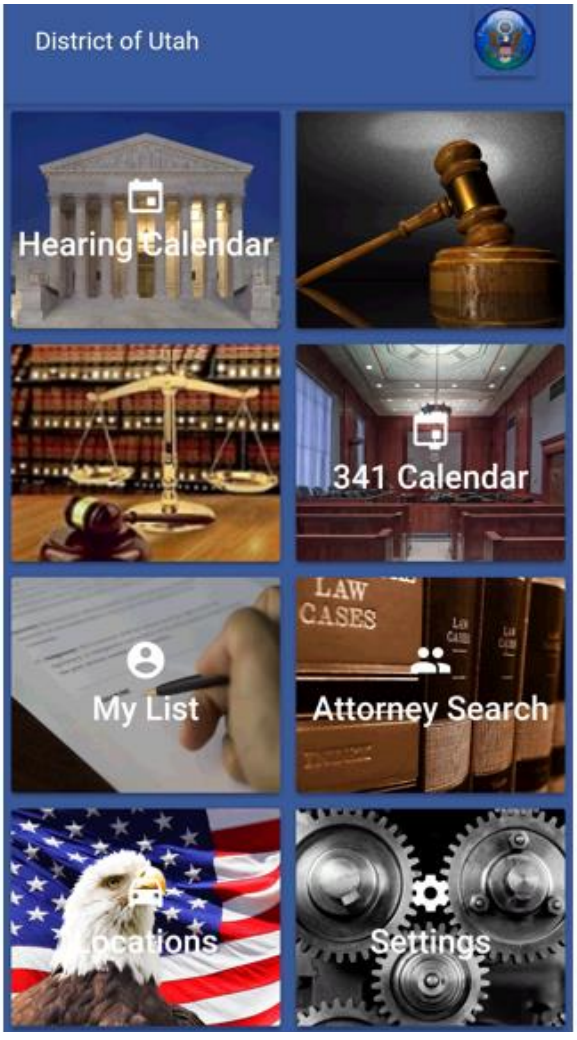
ChapMobile App

iOS and Android Devices

CHAP is excited to announce the free ChapMobile app. Attorneys and trustees can now use their phone to check upcoming court and 341 calendars, and to search for hearings by judge, attorney, debtor name, or case number. This app is now available in Utah and soon in Colorado. Below is a screen shot of the app, and its features include:

- View each judge's daily calendar for several days in advance.
- Search for hearings by debtor name or case number.
- View 341 calendars by Trustee or search by attorney, debtor name, or case number.
- Create a list of "favorite" attorneys (e.g., all attorneys in your firm) to quickly view their upcoming court or 341 hearings.
- View the court's contact information, or access another bankruptcy court's Public Mobile Calendar.

Hearing Calendar:
Displays hearing data, organized by judge.
Search by:
Debtor Name
Case Number



341 Calendar:
Displays all scheduled 341 Meetings, by Trustee.
Search by:
Debtor Name
Case Number
Attorney

My List:
Create an attorney "favorites" list, and view their cases scheduled on the hearing calendar.

Attorney Search:
Search an attorney name to view their cases scheduled on the hearing calendar.

Locations:
Court office locations, contacts, and court website.

Settings:
Each user can set their own preferences at any time and view app information for the "Last Updated" date and time.

HOW TO AVOID MALPRACTICE

FROM

BANKRUPTCY CREDITOR PERSPECTIVE

2018 Rocky Mountain Bankruptcy Conference

by:

Kenneth J. Buechler

Just because a debtor files for bankruptcy does not mean that the creditor is finished or that the underlying debt can be discharged. The creditor has several options in bankruptcy. However, the creditor must proceed promptly, with caution and diligence.

A. What to Do When the Creditor Gets Notice of a Bankruptcy?

The filing of a bankruptcy immediately operates as an automatic stay of all collection actions against a debtor and his or her property. 11 U.S.C. §362(a). Any action taken in violation of the automatic stay is void and without effect. *Franklin Sav. Ass'n v. Office of Thrift Supervision*, 31 F.3d 1020 (10th Cir. 1994). Importantly, the automatic stay does not stop a debtor's actions or claims against creditors or third parties. *Victor Foods, Inc. v. Crossroads Economic Development of St. Charles County, Inc.,* 977 F.2d 1224 (8th Cir. 1992); *Martin-Trigona v. Champion Federal Sav. and Loan Ass'n,* 892 F.2d 575 (7th Cir. 1989). A debtor may continue to pursue claims and/or counterclaims against a creditor in a non-bankruptcy forum even while the creditor is prohibited from continuing its claims against the debtor.

Creditor's beware: violations of the automatic stay are sanctionable. *In re Skinner*, 917 F.2d 444 (10th Cir. 1990); *In re Aspen Limousine Svc., Inc.*, 198 B.R. 341 (D.Colo. 1996). Individual

debtors have a cause of action for damages for violations of the automatic stay, including attorney's fees. 11 U.S.C. §362(k). Entities can seek sanctions for stay violations under 11 U.S.C. §105(a). *Standard Indus., Inc., v. Aquila, Inc. (In re C.W. Mining Co.)*, 625 F.3d 1240 (10th Cir. 2010).

However, merely passively holding an asset of a debtor, for instance a truck that was repossessed pre-bankruptcy but not immediately turned over post-bankruptcy, is not a violation of the automatic stay. *WD Equipment, LLC v. Cowen (In re Cowen)*, 849 F.3d 943 (10th Cir. 2017).

1. Meeting of Creditors

Under 11 U.S.C. §341, the United States Trustee must hold a meeting of creditors after the filing of the bankruptcy case. The date for the meeting will be set by the Court an put in the notice. All debtors must appear and be examined under oath at the meeting of creditors as to their financial affairs. *Id.* Any matter relevant to a debtor's financial affairs, including the pre-petition transfer of assets can be inquired at the meeting. Counsel is not required to appear for the creditor at these meetings; the creditor may appear *pro se*, even if the creditor is a corporation or company. 11 U.S.C. §341(c). Although a debtor may take the 5th Amendment privilege, the court may make an adverse inference from the failure to testify. *In re Martinez*, 126 Fed.Appx. 890 (10th Cir. 2005).

2. Proof of Claim

Whether the debtor files Chapter 7 or Chapter 13, a creditor should always file a proof of claim in the case. Typically, Chapter 7 cases are "no asset" cases and unless the Trustee recovers property, there may not be a distribution. The deadline to file a claim is 70 days after the Petition Date in voluntary Chapter 7, 12 or 13 or the date of the order of conversion to a case under Chapter 12 or 13. Fed.R.Bankr.P. 3002(c). For an involuntary Chapter 7 case, the deadline is 90 days after the order for relief is entered. *Id.*

In a "no asset" Chapter 7 case, the creditor will not initially receive the form for the proof of claim. The creditor should pay attention to further notices it receives from the Bankruptcy Court as there may be a later date to file the claim. In a Chapter 13 case, a form will be mailed with the notice of the meeting of creditors.

In a Chapter 11 case, if the debtor has listed the creditor as not disputed, not contingent, and liquidated, then the creditor need not file a proof of claim if the creditor agrees with the amount listed by the debtor. 11 U.S.C. §1111(a). If the debtor lists the creditor as disputed, contingent or unliquidated, or if the creditor disagrees with the amount listed by the debtor, the creditor should file a proof of claim with the court.

The filing of a proper proof of claim is *prima facie* evidence of the debt. Fed.R.Bankr.P. 3001(f). There are very specific rules on the information that must be contained in the proof of claim. Fed.R.Bankr.P. 3001(c). If the claim is based on a writing, the creditor must attach a copy of the document. Fed.R.Bankr.P. 3001(c)(1). Moreover, the creditor must attach supporting information, including an itemization if the claim includes interest, fees, expenses or other charged. Fed.R.Bankr.P. 3001(c)(2). Failure to provide this documentation and information, may preclude the creditor from introducing such information in a contested hearing. Fed.R.Bankr.P. 3001(c)(2)(D). *See In re Reynolds*, 470 B.R. 138 (Bankr.D.Colo. 2012).

The form may be obtained from the Bankruptcy Court. http://www.cob.uscourts.gov/forms.asp. The deadline for filing proofs of claim (known as the "bar date") cannot be extended under the excusable neglect standard. *Jones v. Arross*, 9 F.3d 79 (10th Cir.1993). However, if the claim is allowed, the creditor will receive a pro rata distribution of assets, following payment of administrative expenses and the Trustee's fee. 11 U.S.C. §§726, 502, 507, 326.

3. Deadline to Object to Discharge and/or Dischargeability

Under Rule 4004(a), a creditor has 60 days after the first date set for the meeting of creditors to file a complaint objecting to a debtor's discharge under Chapter 7, 11 U.S.C. §727(a). The deadline to object to discharge in a Chapter 11 case is no later than the first date set for the hearing on confirmation. In a Chapter 13 case, a motion objecting to the debtor's discharge must be filed no later than 60 days after the first date set for the meeting of creditors.

A new time period for filing complaints objecting to discharge commences when a Chapter 11 or Chapter 13 case is converted to a Chapter 7 case. No new time period is available, however, if a case started in Chapter 7, and the applicable period expired in that original chapter, and the case thereafter was converted to Chapter 11 or 13 and then reconverted to Chapter 7. *See* Fed.R.Bankr.P. 1019(3).

Similarly, under Rule 4007 of the Bankruptcy Rules, a complaint to determine the dischargeability of a debt under 11 U.S.C. §523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under §341(a) in a Chapter 7, Chapter 11, or Chapter 13 case.

All of these deadlines are typically identified on the Notice of Bankruptcy Case, Meeting of Creditors, & Deadlines issued by the Bankruptcy Court and sent to the creditors. Counsel should calendar the deadlines and consult with the creditor to determine whether it is appropriate to object to a debtor's discharge and/or the dischargeability of the creditor's debt.

4. Deadline to Object to Chapter 13 Plan

When a debtor files a case under Chapter 13, they are required to also file a Chapter 13 Plan which tells creditors how they will be repaid, typically over time. *See* 11 U.S.C. §1322. The Notice of Chapter 13 Bankruptcy Case issued by the Court will typically set forth the date of the

confirmation hearing, but not the specific date for filing objections to the plan. The last day to file an objection to a Chapter 13 Plan is seven (7) days after the date of the meeting of creditors. Fed.R.Bankr.P. 2002(b), 9006 and L.B.R. 3051-1.

5. Deadline to Object to Exemptions

In Colorado, debtors may claim various exemptions under state law. Personal property is mostly covered under C.R.S. §§13-54-102 and 102.5. Real property that is a debtor's homestead is covered under C.R.S. §38-41-201. There are additional exemptions available under Colorado law which may apply to other kinds of property.

The deadline to object to a debtor's claim of exemption is 30 days after the ***conclusion*** of the meeting of creditors or within 30 days after any amendment to the debtor's schedules is filed, whichever is later. Fed.R.Bankr.P. 4003(b).

B. How the Creditor Can Obtain Relief from the Automatic Stay.

There are certain circumstances that a creditor may obtain relief from the automatic stay. If the creditor has a security interest in property, the creditor should determine whether there is any equity in the property over and above the creditor's lien. If there is no equity, or if the creditor's lien is not adequately protected (e.g., lack of insurance, continuing use resulting in diminution, declining value), then the creditor may seek relief from stay under 11 U.S.C. §362(d).

Courts look to various factors to determine whether relief from the automatic stay is appropriate to continue with non-bankruptcy litigation. *In re Curtis*, 40 B.R. 795, 799-800 (Bankr.D.Utah 1984). Such factors include the impact of the litigation on the bankruptcy case, the status of the case as of the bankruptcy filing, and the cost to the debtor of litigating in multiple forums. *Id.*

C. Chapter 7 - Liquidation Versus Chapter 13 - Reorganization

Generally speaking, a debt is secured only up to the value of the collateral. 11 U.S.C. §506(a). Any amounts that are owed in excess of the value are unsecured. In an individual Chapter 7 or Chapter 13 case, such value with respect to personal property is determined using the replacement value. 11 U.S.C. §506(b). The Bankruptcy Code sets forth a priority scheme under which creditors may receive payment on their claims. 11 U.S.C. §502. Administrative expenses of the bankruptcy, including the trustee's fees and costs, have priority over unsecured claims. 11 U.S.C. §§503, 326, 502, 726, 1326.

If there are non-exempt assets available for distribution in a Chapter 7 case, the Trustee will make the distributions at the end of the case. 11 U.S.C. §726. Thus, it is important for the creditor to timely file a proof of claim in order to receive a distribution. However, if the Chapter 7 Trustee has funds left over after an initial distribution to timely filed claims, the Trustee may pay tardily filed claims. 11 U.S.C. §726(a)(2).

In a Chapter 13 case, the confirmed Plan will dictate how and when each creditor may receive payment on their claim. Chapter 13 is typically used to stretch out payments to secured creditors to cure any defaults, to domestic support creditors for any arrears, and/or to pay tax liabilities over time. If a Chapter 13 debtor is not paying unsecured creditors in full, the debtor must devote all of their net disposable income over the applicable commitment period (typically 3 to 5 years) for their plan if the Chapter 13 Trustee or an unsecured creditor objections to the plan. 11 U.S.C. §1325(b)(1).

D. Asset Sales, Financing, Surcharge and Cash Collateral Issues

The Chapter 7 Trustee, or the debtor in a Chapter 13 case, may use, sell or lease secured property in the ordinary course of business. 11 U.S.C. §363(b). The Trustee or debtor may also sell

the secured property free and clear of liens in certain circumstances. 11 U.S.C. §363(f). The Trustee or debtor may even sell property the debtor co-owns with a non-debtor. 11 U.S.C. §363(h)

During bankruptcy, a debtor must provide adequate protection to a secured creditor if the debtor is retaining and/or using the secured property. 11 U.S.C. §361. The form of adequate protection can be cash payments, additional or replacement liens or other relief designed to protect the secured creditor. *Id.*; *United Savings Ass'n v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (1988).

Under *Chaussee v. Morning Star Ranch Resorts Company*, 64 B.R. 818 (Bankr.D.Colo. 1986), a debtor in possession may use a secured creditor's cash collateral in much the same fashion as a receiver would be permitted to use cash from operations under state law. In other words, a Chapter 13 or Chapter 11 debtor may continue to operate its business in the ordinary course and use a secured creditor's collateral in the debtor's cash to fund operations. However, the Trustee must obtain court approval to use, sell or lease secured property outside of the ordinary course, or obtain the consent of the secured creditor. 11 U.S.C. §363(c)(2).

Under 11 U.S.C. § 506(c), a debtor-in-possession "may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim." *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, fn. 3 (2000).

A debtor or trustee in bankruptcy may incur unsecured debt in the ordinary course without court approval. 11 U.S.C. §364(a). Any credit or debt outside the ordinary course or granting of liens against property requires court approval. 11 U.S.C. §§364(b) and (c).

E. Discharge and Dischargeability

In a Chapter 7 case where the debtor is an individual, the court must grant the debtor a discharge of all of his or her debts unless one or more of 12 different factors are met. 11 U.S.C. §727(a). Such factors include a debtor's fraudulent transferring of assets, concealment of assets, destruction of records, making a false oath, failing to explain satisfactorily any loss of assets or deficiency of assets to meet the debtor's liabilities. *Id.* This provision is typically referred to as the "fresh start" provision and/or the "big discharge." "Exceptions to discharge are to be narrowly construed, and because of the fresh start objectives of bankruptcy, any doubt is to be resolved in the debtor's favor." *In re Sandoval*, 541 F.3d 997, 1001 (10th Cir. 2008) (quotation omitted).

Claims under Colorado's Mechanic's lien Trust Fund Statute are not dischargeable in bankruptcy. C.R.S. §38-22-127; 11 U.S.C. §523(a)(4); *In re Regan*, 477 F.3d 1209 (10th Cir. 2007). Under *Bullock v. BankChampaign, N.A.*, 569 U.S. 267 (2013), there is a heightened standard of scienter for claims under Section 523(a)(4). *Id.* A plaintiff must show that a debtor had knowledge of, or gross recklessness in connection with, the improper nature of the debtor's her conduct. *Id.* To recover treble damages under Section 523(a)(4), a creditor must prove specific evidence of violation of Colorado's Civil Theft Statute. C.R.S. §18-4-405; *Itin v. Ungar*, 17 P.3d 129 (Colo. 2000).

For claims under Section 523(a)(2)(A), there is a lower standard of intent. Actual fraud under that section encompasses fraudulent conveyance schemes, even when those schemes do not involve false representation. *Husky Intern. Electronics, Inc. v. Ruiz*, 136 S.Ct. 1581 (2016). In other words, a recipient of a fraudulent transfer who later files bankruptcy, may have their discharge denied because of their participation in the scheme of the transferor. *Id.*

As with a claim under Section 727(a), claims under Section 523(a) are construed liberally in favor of the debtor and strictly against the creditor. *In re Warren*, 512 F.3d 1241, 1248 (10th Cir.

2008)(quoting *Gullickson v. Brown*, 108 F.3d 1290, 1292 (10th Cir.1997)).

F. Reclamation Claims and Preferences.

A seller of goods on credit may demand to reclaim the goods upon the buyer's insolvency. C.R.S. §4-2-702. Bankruptcy recognizes this state law right. 11 U.S.C. §546(c). If a contractor or materialman does provide goods and desires to reclaim, they must take action timely. The demand must be made within 20 days of the bankruptcy filing, so long as the goods were supplied within the last 45 days. *Id.*

A creditor of a debtor should also be concerned about payments it received within the 90 days prior to a debtor's bankruptcy filing. Payments made to or for the benefit of a creditor of a debtor within 90 days on account of an old debt are avoidable by a Chapter 7 Trustee (or Chapter 11 debtor), if the creditor received more than it would have in a liquidation. 11 U.S.C. §547(b). Transferring balances from one credit card to another is a preferential transfer. *Parks v. FIA Card Services, N.A. (In re Marshall)*, 550 F.3d 1251 (10th Cir. 2008). A debtor is presumed insolvent in the 90 days before bankruptcy. 11 U.S.C. §547(f). However, creditors who receive payments in the ordinary course of business or for contemporaneous exchange for new value have defenses to the avoidance claims. 11 U.S.C. §547(c).

G. Landlord-Tenant Issues.

If you are a landlord, there are special protections available to you in bankruptcy. As discussed above, the automatic stay prohibits any eviction action or collection action for pre-bankruptcy rents. 11 U.S.C. §362(a)(6). However, if a residential landlord obtained an order or judgment for possession ***before*** the bankruptcy case was filed, the landlord may proceed with the eviction without seeking relief from the bankruptcy court. 11 U.S.C. §362(b)(22).

Once the bankruptcy case is filed and until a debtor rejects a lease, the debtor must perform all duties under the lease in a timely manner. *See* 11 U.S.C. §365(d)(3). If the debtor fails to perform the obligations under the lease, including rents, the landlord may have an administrative claim against the bankruptcy estate if the claim meets the requirements of 11 U.S.C. §503(b) as a reasonable and necessary expense of preserving the estate. *General Am. Transport, Inc. v. Martin (In re Mid Region Petroleum, Inc.)*, 1 F.3d 1130 (10th Cir. 1993).

If debtor-in-possession or Trustee intends to assume a lease in bankruptcy, if there was a default in the lease, the debtor-in-possession or Trustee must cure all monetary obligations at the time of assumption, compensate the landlord for any actual pecuniary loss, and provide adequate assurance of future performance. 11 U.S.C. §365(b). A debtor cannot be in breach of a lease merely by filing bankruptcy. 11 U.S.C. §365(e).

The debtor-in-possession or Trustee may reject any unexpired lease. 11 U.S.C. § 365(a). In a Chapter 7 case, if the Trustee does not assume or reject a lease of residential property within 60 days after the voluntary case was filed, the lease is automatically deemed rejected. 11 U.S.C. §365(d)(1). In a Chapter 11 or 13 case, the debtor-in-possession or Trustee has until the confirmation of the plan to assume or reject the lease.11 U.S.C. §365(d)(2). With respect to nonresidential real property, the lease is deemed rejected on the earlier of 120 days after the voluntary case is filed, or the date of the entry of an order confirming a plan. 11 U.S.C. §365(d)(4).

If a lease is rejected, the landlord has a claim against the bankruptcy estate for the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of: (i) the date of the filing of the petition; and (ii) the date on which the lessor repossessed, or the leasee surrendered, the leased

property, plus, any unpaid rent due under such lease, without acceleration, on the earlier of such dates. 11 U.S.C. §502(b)(6). The landlord must file a proof of claim with the Bankruptcy Court for such "rejection damages." For any unpaid post-petition rents and charges, the landlord must timely file a motion to allow the claim under 11 U.S.C. §503(b).

H. Reaffirmation Agreements and Secured Personal Property.

Under 11 U.S.C. §524(c), certain kinds of debts may be reaffirmed during a bankruptcy case. Reaffirming a debt is essentially a waiver by the debtor of the discharge as to that one debt. There are very specific requirements, disclosures and forms for a reaffirmation agreement. 11 U.S.C. §524(k). Such forms are available at http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx. The reaffirmation agreement must be entered into prior to the entry of a discharge, the debtor must receive the required disclosures, and the agreement must be filed with the Court. 11 U.S.C. §524(c). Failure to follow all of the requirements for a reaffirmation agreement will result in a discharge of the debt.

Under 11 U.S.C. §521(a)(2), an individual debtor is required to state his/her intention to surrender, redeem or reaffirm the debt to a creditor whose debt is secured by personal property and then to timely perform such intention. Pursuant to 11 U.S.C. §362(h), the automatic stay terminates with respect to personal property securing a debt and such personal property ceases to be property of the estate unless the debtor timely files a statement of intention under §521(a)(2)(A) and timely performs such intention under §521(a)(2)(B) unless the court determines otherwise.

In addition, with respect to a purchase money security interest, 11 U.S.C. §521(a)(6) provides that an individual debtor in a Chapter 7 case may not retain possession of personal property as to which a creditor has an allowed claim for the purchase price secured in whole or part by an interest

in such personal property, unless the debtor, not later than 45 days after the first meeting of creditors either enters into a reaffirmation agreement with the creditor under Section 524(c) with respect to the claim secured by such property, or redeems such property from the security interest pursuant to Section 722.

Section 521(a)(6) further provides that if the debtor fails to act within the 45-day period, the stay under §362(a) is terminated with respect to such personal property, such property shall no longer be property of the estate, and the creditor may take whatever action as to such property as is permitted by applicable non-bankruptcy law, unless the Court determines on the motion of the trustee filed before the expiration of such 45-day period, and after notice and a hearing, that such property is of consequential value or benefit to the estate, orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee.

RESOURCEFUL LINKS

U.S. Bankruptcy Court, Colorado: www.uscourts.cob.gov.

American Bankruptcy Institute: www.abiworld.org.

CM/ECF [case filing] for Colorado Bankruptcy Court: https://ecf.cob.uscourts.gov.

National PACER home page: www.pacer.gov.

U.S. Trustee's Office, for Region 19: http://www.justice.gov/ust/r19/index.htm

2018 Rocky Mountain Bankruptcy Conference

How to Avoid Malpractice: Unbundling Bankruptcy Services And the Importance of "Informed Consent"

By: Jenny M.F. Fujii
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What risks do attorneys face when "unbundling" bankruptcy services with their Chapter 7 bankruptcy clients? The answer to that question relies upon an understanding of what unbundling is, how it affects the relationship between an attorney and the prospective client, and the client's full comprehension of the risks at stake.

What is "Unbundling"?

"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." *Consumer Corner: The Ethics of Unbundling Legal Services in Consumer Cases*, ABI Journal at 14 (October 2013). Unbundling is "dividing comprehensive legal representation into a series of discrete tasks, only some of which the client contracts with the lawyer to perform." *Dignity Health v. Seare (In re Seare)*, 493 B.R. 158, 183 (Bankr. D.Nev. 2013)(citing Amber Hollister, *Limiting the Scope of Representation: Unbundling Legal Services*, 71 Or. State Bar Bull. 9, 9 (2011). The unbundling of legal services involves a performance of "only specific limited tasks instead of handling all aspects of a matter." ABA Formal Ethics Opinion 07-446 (2007). "This arrangement allows for legal representation by an attorney for cost containment purposes." Final Report of the American Bankruptcy Institute National Ethics Task Force: Best Practices for Limited Services Representation in Consumer Bankruptcy Cases ("ABI Ethics Report"), at 59 (April 21, 2013). The "unbundling" of legal services has also been referred to as "limited services representation," "limited scope representation", or "discrete task representation."

For example, some attorneys may offer a reduced rate for legal services by not attending a § 341 creditors meeting, or by having another attorney or professional handle specific services. Sometimes unbundling may exclude services which may be handled by another attorney at a lower cost. *Seare*, 493 B.R. at 183. Another form of "unbundling" involves the attorney and client entering into separate fee agreements for pre and post-petition work. *In re Grimmett*, 2017 Bankr. LEXIS 1492, Case No. 16-010947-JDP (Bankr. D.Idaho June 5, 2017). The practice of unbundling, when done properly, may serve as a "means to serve the ever-increasing number of self-represented debtors." ABI Ethics Report, at 49 (April 21, 2013).

The unbundling of legal services "recognizes that the attorney-client relationship need not fit an identical mold for each client; parties have the right to contract for the services they deem appropriate to the situation." *Seare*, 493 B.R. at 183 (citations omitted). Unbundling allows clients to pick and choose what matters require legal representation and pay only for those services related to those chosen tasks. *Id*. at 184. The "evolution of ethical rules over recent years has been toward greater client input and control." *In re Merriam*, 250 B.R. 724, 736 (Bankr. D.Colo. 2000)(noting that the Colorado Rules of Professional Conduct Rule 1.2(c) is "illustrative of the expanding role of the client in controlling his or her legal affairs.") Courts are likely to benefit from the practice of unbundling. Unbundling allows limited legal representation versus pro se litigation where the limited representation would likely increase the quality of pleadings and more precisely focus the issues. *Seare*, 493 B.R. at 184. (citations omitted). *Pro se* debtors place a higher burden on the court system by requiring Judges, trustees, and court staff to spend additional time and resources assisting these debtors with navigation of the complex bankruptcy process. ABI Ethics Report, at 50 (citations omitted). Even with the additional help from the court system, *pro se* debtor cases are often dismissed due to the inability to comply with the Bankruptcy Code and Rules. *Id.* Proponents of unbundling legal services in consumer bankruptcies argue that the practice of unbundling allows debtors to access the legal services they find valuable without the burden of paying a higher fee for comprehensive services.

What Can You "Unbundle" From Your Package of Services?

The question of whether an attorney is allowed to unbundle any services is guided by several sources. The local bankruptcy rules of each jurisdiction may or may not address unbundling. Absent specific local bankruptcy rules, attorneys should consult their local rules of professional conduct. Most jurisdictions have adopted the Model Rules of Professional Conduct ("Model Rules") in whole or in part. Pursuant to Model Rule 1.2(c)[1], attorneys may "limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent." Some states have not adopted the changes to Model Rule 1.2(c), which was amended in 2002.[2] The previous Model Rule 1.2(c) required "consent after consultation," which is less burdensome than "informed consent."

It is important to first determine the standards in the jurisdiction(s) in which you practice by reviewing whether your jurisdiction has adopted local bankruptcy rules to address unbundling. Then a prudent attorney should also review the local rules of professional conduct regarding unbundling. Toward the end of this article are a few examples of how some jurisdictions have addressed unbundling in their local rules, but is not intended to be a comprehensive survey. Some jurisdictions have issued formal ethics opinions.[3] Last but not least, case law also provides guidance as to the limits

[1] Adopted and Amended in 2002.

[2] The amendments to Model Rule 1.2(c) and its Comments regarding limited-scope representations were in part "intended to provide a framework within which lawyers may expand access to legal services by providing limited but nonetheless valuable legal services to low- or moderate-income persons who otherwise would be unable to obtain counsel." ABA Formal Opinion 472, 2 (2015)(citing "A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013," at 59 (Art Garwin ed., 2013)).

[3] The Colorado Bar Association's Formal Ethics Opinion 101 states that a lawyer limiting the scope of services provided to a client should "clearly explain the limitations of the representation, including the types of services

and requirements for unbundling. Excerpts a sample from recent case law are also located below.

Whether or not unbundling is addressed in the local bankruptcy rules of your jurisdiction, it is a good practice for attorneys to ensure that their clients have given "informed consent." The Model Rules and most local rules of professional conduct require the client to give informed consent. Note, however, that some jurisdictions have not yet adopted the "informed consent" requirement of Model Rule 1.2(c). Further, some jurisdictions have viewed the process of unbundling more favorably than others. This article is designed to address the general trend in a sample of jurisdictions and courts.

What is Informed Consent?

What does informed consent mean? "Informed consent requires that the client knows of and understands the risks and benefits of the limited representation." ABI Ethics Report, at 53. Informed consent is defined in the Model Rules of Professional Conduct 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." *Id.*; Model Rule 1.0(e). The National Ethics Task Force of the American Bankruptcy Institute ("Task Force") provided further guidance on informed consent as follows:

> In the context of consumer bankruptcy, any attempt to limit the scope of representation must be fully disclosed and clearly understood by the debtor before proceeding with the engagement. 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.

How do you obtain informed consent? Informed consent is determined on a case by case basis. First, attorneys must take the time to review and inquire about the nature of the debtor's liabilities, financial transactions, transfers of assets, and other matters that would affect the ability for the debtor to obtain a discharge or retain assets. Only after the attorney conducts a thorough review of the debtor's financial situation would the attorney be equipped with the appropriate information to advise the debtor regarding any potential concerns. At the very least, informed consent cannot occur until the attorney first understands the issues, then effectively communicates with the debtor which services will not be performed, the additional services the debtor may need that are not being provided, and the ramifications of not having any legal representation on the excluded services. Adequate consultation

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which are not being provided and the probable effect of limited representation on the client's rights and interests." The D.C. Bar Legal Ethics Committee also advised in its Opinion 330 (2005) that the "client's understanding of the scope of the services" is a fundamental requirement in a limited-scope representation. ABA Formal Opinion 472 at 3, November 30, 2015.

means "the attorney must explain to the client the limitation of representation, plus what is likely to happen post-petition, including the technical aspects, legal ramifications, material risks, and available alternatives." *In re Slabbinck*, 482 B.R. 576, 594 (E.D. Mich. 2012).

The American Bar Association's Standing Committee on Ethics and Professional Responsibility recommends that "lawyers providing limited-scope representation confirm the scope of the representation in writing provided to the client," even though a written agreement is not required by Model Rule 1.2(c). ABA Formal Opinion 472: "Communication with Person Receiving Limited-Scope Legal Services," at 1, November 30, 2015 (noting that some State rules require written agreements, while other State rules provide that written agreements are not required but are preferred). An "effective written engagement letter minimizes . . . risks if it specifically describes the scope of the representation, how the fee is to be computed, how the tasks are to be limited, and what the client is to do." Formal Opinion No. 2011-183, Oregon Board of Governors (2016 Revision), at 5-6. Further, a lawyer providing limited scope representation must identify the issues that opposing counsel may or may not discuss directly with the debtor. *Id.* at 4. There is no basis, however, for limiting communication between a debtor and opposing counsel on subjects outside the scope of representation. *Id.*

Recent case law highlights circumstances in which debtors did not or were not able to provide the requisite consent for unbundled services. Providing a client with boilerplate language in a fee agreement, without an explanation of what the terms mean does not meet the informed consent standard. *Seare*, 493 B.R. 158. In Nevada, an attorney has an affirmative duty when unbundling to explain to the debtor that not all attorneys unbundle services in the same manner. *Seare*, 493 B.R. 158 at 197. Informed consent is not given where debtors agree, in writing, that the services exclude "adversary proceedings" or "nondischargeability actions" if the debtors do not understand what adversary proceedings or nondischargeability actions are, and were not advised of the probability of any such actions. *Seare*, 492 B.R. at 206-07 (noting that a nondischargeability action could have been foreseeable if counsel had inquired about the nature of the debt).

Unbundling creates a conflict of interest where post-petition services are withheld until post-petition fee payments are made, and the attorney participates in coercive collection practices and threatens immediate withdrawal. *Grimmett*, 2017 Bankr. LEXIS 1492, *25-26. Informed consent was not given where the attorney failed to inform a debtor about the §341 meeting of creditors and did not "highlight the fact that he did not intend to represent them at the meeting." *Hale v. United States Trustee*, 509 F.3d 1139, 1148 (9th Cir. 2007)(noting further that the attorney attempted to persuade the debtors to dismiss their Chapter 7 filing with little or no explanation). The exclusion of critical and necessary services may result in sanctions. *Id.* Counsel's flat fee of $250 per case was reduced to $125 per case where services were limited to pre-filing preparation of the petition, schedules, and statement of financial affairs, the pre-filing services were primarily performed by interns and not licensed attorneys, and the fee did not include representation of the debtors at the §341 creditors meeting. *In re Castorena*, 270 B.R. 504 (Bankr. D.Idaho 2001). Disgorgement of fees was appropriate where the attorney did not meet with the debtors, did not attend the creditors meeting, and

required a secretary to meet with and assist the debtors with filling out the bankruptcy forms. *In re Bancroft*, 204 B.R. 548 (Bankr. C.D.Ill. 1997). The Bankruptcy Court for the Northern District of Indiana refused to approve a reaffirmation agreement where counsel did not participate and provide an evaluation of the circumstances with the debtor. *In re Collmar,* 417 B.R. 920, 924 (Bankr. N.D.IN. 2009)(noting that competent representation of a debtor requires assistance with the decision of whether to reaffirm a debt). The *Collmar* Court further noted that even if an attorney is not allowed to exclude reaffirmation agreements from the services provided, counsel is allowed to charge a reasonable fee. *Id.* at 923-24. However, "counsel cannot condition performing those services upon payment or, unless granted permission to withdraw, refuse to provide them." *Id.* at 623, n.3 (citations omitted). Although unbundling did not violate the Michigan Rules of Professional Conduct, the Court required counsel to submit an affidavit regarding the scope of consultation to the debtor in order to analyze and determine whether the debtor's consent was fully informed. *Slabbinck*, 482 B.R. 476 at 595-97.

Counsel must represent the Debtor at the §341 meeting of creditors. *In re Johnson,* 291 B.R. 462 (Bankr. D. Minn. 2003); *Merriam,* 250 B.R. 724. See also, the Local Bankruptcy Rules for the District of Colorado (Eff. 12/1/17) (designating a list of "basic services" which may not be unbundled). An agreement to represent the debtor at only one creditors meeting, but excluded representation at any subsequent creditors meetings, violated the New York Rules of Professional Conduct, Rule 1.2. *In re Ortiz*, 496 B.R. 144 (Bankr. S.D.N.Y. 2013).

Some courts support the idea that an attorney who initiates the bankruptcy process "must shepherd the client through it, to its conclusion." *In re Bancroft*, 204 B.R. 548, 550-51 (Bankr. C.D. Ill. 1997). Another court indicates that the exclusion of services would rarely be appropriate. *In re Egwim*, 291 B.R. 559, 573 (Bankr. N.D. Ga. 2003).

CONCLUSION

Failure to comply with your local bankruptcy rules and/or local rules of professional conduct regarding unbundling could result in disgorgement of fees and/or sanctions, and potentially, a malpractice claim. Consult the applicable local rules in your jurisdiction. Understand the level of consent required and communicate directly with debtors to ensure you understand their situation and they understand the full effect of and risks associated with unbundling. Lastly:

> ***Lawyers are not plumbers. They cannot in discriminately dismiss clients at their whim, or even if their clients don't pay on time. Lawyers are professionals that owe fiduciary duties to their individual clients, and must continue to represent them even if initially rosy predictions turn sour.***
>
> *Seare*, 493 B.R. 158, 181; citing Am. Bar Ass'n, Section of Litig., Handbook on Ltd. Scope Legal Assistance 91 (2003)("ABA" Handbook)(other citations omitted).

*** Practice Tips[4] ***

1. Consult your Local Bankruptcy Rules first.
2. If unbundling is not addressed in your Local Bankruptcy Rules, consult your local Rules of Professional Conduct.
3. Always put your agreement writing indicating the agreed fees, what services are included, and what services are not included.
4. Even if everything is in writing, you must ensure that your client understands the RISKS involved with any services that are not included. This requires the attorney to ask pertinent questions and advise the client if there are potential problems in their case, and how that affects the client's goals.
5. Take and retain notes during meetings with your client, including information regarding the topics raised and discussed, documents provided, and if applicable, any legal or factual matters that raise any red flags.
6. Communicate with the client any potential issues that may arise as a result of the bankruptcy filing, including potential adversary proceedings or contested matters.
7. Explain the process involved and potential risks that adversary proceedings could have on the client's ability to obtain a discharge or meet any of the client's goals.
8. If services are NOT included in the fees quoted, explain what additional fees would be required.

[4] The ABI Ethics Report also provides guidance with the following: "Best Practices for Limited Scope Representation," "Proposed Rule Providing for Limited Scope Representation in Consumer Bankruptcy Cases," and a "Model Agreement and Consent to Limited Representation in Consumer Bankruptcy Cases."

EXAMPLES OF LOCAL BANKRUPTCY RULES AND/OR LOCAL RULES OF PROFESSIONAL CONDUCT

- **COLORADO**

Local Bankruptcy Rules for the United States Bankruptcy Court for the District of Colorado (Effective 12/1/17)

L.B.R. 9010-1(c) Scope of Representation/Employment; Limited Unbundling

(1) Attorney Representation of a Debtor. Representation of a debtor by an attorney before this Court constitutes an entry of appearance for all purposes in the debtor's bankruptcy case, except as provided in L.B.R. 9010-1(c)(2). While the attorney remains attorney of record for the debtor in the bankruptcy case, the attorney has a duty to advise the debtor on all bankruptcy matters that arise during the course of the bankruptcy case and to represent the interests of the debtor in connection with the bankruptcy case that may affect the debtor, the debtor's property and, in the case of reorganization proceedings, property of the estate. An attorney may not circumvent this Rule by limiting services in his or her client engagement letter or in the attorney's disclosures filed in accordance with Fed. R. Bankr. P. 2016.

(2) Limited Unbundling.

(A) Adversary Proceedings. A debtor's attorney may expressly exclude adversary proceedings from the scope of the engagement; however, if engaged as the attorney in an adversary proceeding, an attorney may not exclude services within that adversary proceeding.

(B) Ethical Limitations. Nothing in this Rule requires debtor's attorney to file a paper or advance a position contrary to the attorney's obligations under Fed. R. Bankr. P. 9011. In those circumstances in which debtor's attorney has fulfilled his or her obligations to advise the debtor, but has determined not to file a responsive paper or otherwise advance a position, either in agreement with the debtor or contrary to the debtor's wishes but in compliance with Rule 9011, then debtor's attorney must file a Notice of Advisement in substantial conformity with L.B.F. 9010-1.1, as set forth in L.B.R. 9010-1(c)(6).

(C) Nonpayment of Fees. If the debtor fails to pay debtor's attorney for services rendered or to be rendered, the attorney may move to withdraw his or her appearance for the debtor in accordance with L.B.R. 9010-4, except:

(i) An attorney for the debtor may not withdraw prior to completion of the Basic Services, as defined in L.B.R. 9010-1(c)(5), except upon a showing of good cause.

(ii) While a motion to withdraw is pending, the attorney must continue to perform for the debtor all Necessary Services, as defined in L.B.R. 9010-1(c)(4). These services may not be limited to the Basic Services.

(3) Ghostwriting and BPP Services by Attorney Prohibited. An attorney may not assist any party with the preparation of a bankruptcy petition or any document required under Fed. R. Bankr. P. 1007 for filing in a bankruptcy case, without signing the document, except an attorney may provide pro bono services and advice under a nonprofit organization or Court-approved program to an individual anticipating the filing of a voluntary petition without signing any document, entering an appearance, or

continuing representation of the individual in the bankruptcy case after filing. An attorney may not serve as a bankruptcy petition preparer, as defined under 111 U.S.C. § 110(a)(1).

(4) Necessary Services. Necessary Services refers to all services that are necessary to represent the interests of the debtor in a particular case.

(5) Basic Services. Absent a Court order to the contrary, a debtor's attorney may not move to withdraw as attorney prior to completion of the following services (the "Basic Services"):

(A) meeting with the debtor, advising the debtor, and analyzing the needs of the case;

(B) preparing a complete filing package as required by Fed. R. Bankruptcy Rule 1007 and any necessary amendments thereto;

(C) attending the debtor's meeting of creditors pursuant to 11 U.S.C. § 341 and any continued meetings of the same;

(D) advising and assisting the debtor with any trustee requests for turnover and any audit requests from the United States Trustee;

(E) advising the debtor regarding any reaffirmation agreements; and

(F) in a chapter 13 proceeding, a debtor's attorney may not exclude from his or her representation the Basic Services or any Necessary Services, whether such services are required before or after the confirmation of debtor's plan of reorganization, except as set forth in L.B.R. 9010-1(c)(2). However, nothing in this Rule prohibits an attorney from charging the debtor additional fees for services not contemplated by the original fee agreement between the debtor and debtor's attorney.

(6) Notice of Advisement. Filing a Notice of Advisement is only permitted when the attorney cannot advance a position due to ethical constraints or because the debtor has advised the attorney that the debtor does not wish to oppose the requested relief. When required by L.B.R. 9010-1(c)(2)(B), debtor's attorney must file a Notice of Advisement in substantial conformity with L.B.F. 9010-1.1 and serve it on the debtor and opposing counsel on or before three days prior to the objection deadline for the pending motion or request for relief. Such notice must advise the Court and interested parties that:

(A) after consultation with the client, no further action will be taken by the attorney as to the specific matter; and

(B) whether opposing counsel may communicate directly with the debtor concerning the matter.

(7) Sanctions for Violations; Standing. After notice and hearing, the Court, acting *sua sponte* or on a motion filed by any interested party, may impose monetary or other sanctions against an attorney for violations of L.B.R. 9010-1(c), including an award of reasonable attorney fees. Repeated violations may be grounds for prohibiting the attorney from practicing before the Court.

Commentary

L.B.R. 9010-1(c)(1), Scope of Representation: This subsection prohibits the debtor's attorney from unbundling legal services except as expressly permitted by subsection (c)(2). The Rule intends to allow debtor's attorney flexibility in setting his or her fee arrangements. For example, an attorney may charge a flat fee for the Basic Services (defined in subsection (c)(5)) and then charge hourly thereafter or an attorney may charge hourly for all services rendered. What this Rule prohibits, however, is charging a set fee for the Basic Services and then

refusing to provide additional services as they become necessary in the case unless the debtor agrees to pay in advance for additional services, while still remaining attorney of record. If the debtor fails to pay for additional services, the attorney may move to withdraw, but he or she cannot remain attorney of record and refuse to provide services. Such practices (of remaining attorney of record but refusing to represent the debtor on some matters) have prevented the debtor from being able to speak directly with opposing counsel on a matter on which debtor's attorney is not representing the debtor, such as relief from stay motions on mortgages and car loans. Nor may an attorney agree to perform only pre-confirmation services in a chapter 13 case and then refuse to provide post-confirmation services. As long as the attorney remains attorney of record, the attorney must provide all Necessary Services until he or she has obtained a Court order allowing withdrawal. Nothing in this Rule, however, is intended to require debtor's attorney to perform legal services for the debtor that are unconnected with the bankruptcy case. For example, this Rule does not require the attorney to advise the debtor in connection with a pending divorce proceeding or a real estate transaction, unless the debtor and the attorney have expressly contracted to expand the scope of the attorney's services to provide such additional services. In summary, while debtor's attorney remains attorney of record, he or she must file either a response or a Notice of Advisement in substantial conformity with L.B.F. 9010-1.1 for every motion or application filed that may impact the debtor, debtor's property, or, in a reorganization case, property of the estate. Debtor's attorney must also perform all Necessary Services.

L.B.R. 9010-1(c)(4), Necessary Services: Whether a service is necessary refers to whether the circumstances of the case give rise to the need for the services. For example, if a creditor files a motion for relief from the automatic stay, then the debtor is required to file a response if the debtor wishes to oppose the relief. In this instance, responding to the motion is a Necessary Service. On the other hand, if no such motion is filed, then the service of defending against a stay relief motion is not a Necessary Service in that particular case. In some cases, the debtor's home may be encumbered by judicial liens. If so, then debtor's attorney must advise the debtor and, if grounds exist, file a motion to avoid such liens. Not every case will require lien avoidance motions, but when such services are applicable to the particular case, then they are deemed Necessary Services. Similarly, if the debtor wishes to reaffirm a particular debt, then debtor's attorney must advise the debtor as to whether reaffirmation is in the debtor's best interest or would impose an undue hardship on the debtor and his or her dependents. Nothing in the definition of Necessary Services, however, should be construed to require an attorney to perform services for the debtor that would cause the attorney to violate his or her ethical obligations. If the attorney has ethical constraints, then the attorney should file a Notice of Advisement in substantial conformity with L.B.F. 9010-1.1 pursuant to subsection (c)(2)(B).

Colo. R. Prof. Conduct 1.2(c):

(c) A lawyer may limit the scope or objectives, or both, of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. A lawyer may provide limited representation to pro se parties as permitted by C.R.C.P. 11(b) and C.R.C.P. 311(b).

Even though section (c) of this rule allows unbundling of legal services, an attorney remains obligated to comply with C.R.C.P. 11(b). *In re Merriam*, 250 Bankr. 724 (Bankr. D. Colo. 2000).

- **KANSAS**

Kansas Rule of Professional Conduct 1.2(c): *A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent in writing*

Kansas Supreme Court Rule 115A governing unbundling includes:

- *Rule 115A(a)* establishing that an attorney may limit the scope of representation if the limitation is reasonable under the circumstances, and the client gives informed consent, confirmed in writing.

- *Rule 115A(b)(1)* establishing that an attorney making a limited appearance must file a notice of limited entry of appearance that states the precise court proceeding and issues to which the limited appearance pertains.
- *Rule 115A(b)(2)* clarifying that an attorney may file a notice of limited entry of appearance for one or more court proceedings in a case.
- *Rule 115A(b)(3)* establishing the specific requirements for papers filed in a limited appearance.
- *Rule 115A(b)(5)* articulating that an attorney may not enter a limited appearance for the sole purpose of making evidentiary objections, and that an attorney and the litigant for whom the attorney appears may not argue on the same legal issue during the period of limited appearance.
- *Rule 115A(c)* allowing an attorney to assist in the preparation of pleadings as long as "prepared with assistance of a Kansas licensed attorney" is inserted at the bottom of the paper. The attorney is not required to sign the paper.

- **OKLAHOMA**

Oklahoma Rule of Professional Conduct 1.2(c): A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent.

- **UTAH**

Local Bankruptcy Rules for the United States Bankruptcy Court for the District of Utah
L.B.R. 2091-1 Effective date: 12/1/17

DEBTOR'S ATTORNEYS – SCOPE OF REPRESENTATION

(a) Scope of Representation. A debtor's attorney must represent the debtor in all aspects of the case, including the § 341 Meeting, motions filed against the debtor, reaffirmation agreements, agreed orders, and other stipulations with creditors or third parties, and post-confirmation matters. The debtor's attorney must also represent the debtor in adversary proceedings filed against the debtor unless, pursuant to this rule, the Court has excused the attorney from this requirement. The scope of representation cannot be modified by agreement. The court may deny fees or otherwise discipline an attorney for violation of this rule.

(b) Relief From the Duty to Represent Debtors in Adversary Proceedings. If an adversary proceeding is filed against the debtor, the debtor's attorney may move the Court for an order relieving the attorney of the duty to represent the debtor in the adversary proceeding following the procedures set forth in Local Rule 2091-2. The motion shall be filed in the adversary proceeding and not in the main bankruptcy case.

L.B.R. 2091-2: Effective Date: 12/1/17

ATTORNEYS – SUBSTITUTION OR WITHDRAWL OF ATTORNEY

(a) Substitution. Whenever an attorney of record in a pending case will be replaced by another attorney who is an active member of this court, a notice of substitution of counsel must be filed. The notice must (i) be signed by both attorneys; (ii) include the attorneys' bar numbers; (iii) identify the parties represented; (iv) be served on all parties; and (v) verify that the attorney entering the case is aware of and will comply with all pending deadlines in the matter. Upon the filing of the notice, the withdrawing attorney will be terminated from the case, and the new attorney will be added as counsel of record. When an attorney of record leaves a law firm,

the law firm is responsible for filing a notice of substitution of counsel in accordance with this section and identifying the individual attorney with primary responsibility for the case.

(b) Withdrawal Leaving a Party Without Representation.

(1) No attorney will be permitted to withdraw as attorney of record in any pending bankruptcy case or adversary proceeding, thereby leaving a party without representation, except upon submission of:

(A) A motion to withdraw as counsel in the form prescribed by Local Form 2091-2 that includes (i) the last known contact information of the moving attorney's client(s), (ii) the reasons for withdrawal, (iii) notice that if the motion is granted and no notice of substitution of counsel is filed, the client must file a notice of appearance within 21 days after entry of the order, unless otherwise ordered by the court, (iv) notice that pursuant to Local Rule 9011-2(a), no corporation, association, partnership, limited liability company or other artificial entity may appear pro se, but must be represented by an attorney who is admitted to practice in this court, and (v) certification by the moving attorney that the motion was sent to the moving attorney's client and all parties; and:

(B) A proposed order granting motion to withdraw as counsel in the form prescribed by Local Form 2091-2-A stating that (i) unless a notice of substitution of counsel is filed, within 21 days after entry of the order, or within the time otherwise required by the court, the unrepresented party shall file a notice of appearance, (ii) that no corporation, association, partnership, limited liability company or other artificial entity may appear pro se, but must be represented by an attorney who is admitted to practice in this court, and (iii) that a party who fails to file such a notice of substitution of counsel or notice of appearance may be subject to sanction pursuant to Fed. R. Civ. P. 16(f)(1), including but not limited to dismissal or default judgment.

(2) No attorney of record will be permitted to withdraw after an action has been set for hearing or trial unless (i) the motion to withdraw as counsel includes a certification signed by a substituting attorney indicating that such attorney has been advised of the hearing or trial date and will be prepared to proceed with the hearing or trial; (ii) the motion to withdraw as counsel includes a certification signed by the moving attorney's client indicating that the party is prepared for hearing or trial as scheduled and is eligible pursuant to Local Rule 9011-2(b) to appear pro se at the hearing or trial; or (iii) good cause for withdrawal is shown, including without limitation, with respect to any scheduling order then in effect.

(3) Withdrawal may not be used to unduly prejudice the non-moving party by improperly delaying the litigation.

(c) Withdrawal With and Without the Client's Consent.

(1) With Client's Consent.

(A) In the Bankruptcy Case. Where the withdrawing attorney has obtained the written consent of the client, such consent must be submitted with the motion.

(B) In an Adversary Proceeding. If withdrawing from representation in an adversary

proceeding, the written consent must clearly advise the client of the last date to answer the complaint, and advise the client that default judgment may be entered if the client fails to answer the complaint. If the attorney has obtained the written consent of the client, the motion may bepresented to the court without notice and a hearing

(2) Without Client's Consent.

(A) In the Bankruptcy Case. Where the moving attorney has not obtained the written consent of the client, the motion must contain (i) a certification that the client has been served with a copy of the motion to withdraw as counsel; (ii) a description of the status of the case including the dates and times of any scheduled court proceedings, requirements under any existing court orders, and any possibility of sanctions; and, if appropriate; (iii) certification by the moving attorney that the client cannot be located or, for any other reason, cannot be notified regarding the motion to withdraw as counsel.

(B) In an Adversary Proceeding. If withdrawing from an adversary proceeding, the motion must be accompanied by a statement of the moving attorney certifying that: (i) the attorney has sent the client written notification advising the client that the attorney will not be representing the client in the adversary proceeding, (ii) advising the client of the last date to answer the complaint, and (iii) advising the client that a default judgment may be entered if the client fails to answer the complaint (a copy of the written notification must also be attached to the motion); or the client cannot be located or for whatever reason cannot be notified of the pendency of the motion.

(d) Procedure After Withdrawal

(1) Upon entry of an order granting a motion to withdraw, the action shall be stayed until 21 days after entry of the order, unless otherwise ordered by the court. The court may in its discretion shorten the 21-day stay period.

(2) The court will enter the order and serve it on all parties and the withdrawing attorney's client at the address provided in the motion to withdraw as counsel, which order will specifically advise the parties of the terms of this rule.

(3) Within 21 days after entry of the order, or within the time otherwise required by the court,

(A) any individual whose attorney has withdrawn shall file a notice of pro se appearance or new counsel shall file an appearance on that party's behalf.

(B) new counsel shall file an appearance on behalf of any corporation, association, partnership, or other artificial entity whose attorney has withdrawn. Pursuant to Local Rule 9011-2(a), no such entity may appear pro se, but must be represented by an attorney who is admitted to practice in this court.

(4) After expiration of the stay period, either party may request a scheduling conference or submit a proposed amended scheduling order.

(5) An unrepresented party who fails to appear within 21 days after entry of the order, or within the time otherwise required by the court, may be subject to sanction pursuant to Fed. R. Civ. P. 16(f)(1), including but not limited to dismissal or default judgment.

- **WYOMING**

Wyoming Rule of Professional Conduct 1.2(c):

A lawyer may limit the objectives or means of the representation pursuant to Rule 6.5, or if:

1. The limitation(s) are fully disclosed and explained to the client in manner which can reasonably be understood by the client; and
2. The client consents thereto.
3. Unless the representation of the client consists solely of telephone consultation, the disclosure and consent required by this subsection shall be in writing.
4. The use of a written notice and consent form approved by, or substantially similar to, a form approved by the Board of Judicial Policy and Administration shall create the presumptions that:
    - The representation is limited to the attorney and services described in the form; and
    - The attorney does not represent the client generally or in any matters other than those identified in the form.

MALPRACTICE PITFALLS IN BANKRUPTCY DEBTOR REPRESENTATION

This outline is intended to provide the reader with a general overview of potential mine fields which need to be maneuvered in representing a bankruptcy debtor. It is designed to assist a lawyer in avoiding both common and unusual bankruptcy mistakes.

A. INITIAL CONFERENCE MISTAKES

You need to be on the alert from the very beginning in representing a bankruptcy debtor, starting with the very first contact you have with that individual or business. The following is an itemization of concerns you should have from the inception of the relationship.

1. Institute a screening system – before the client gets in the door, make sure you really want the person as your client. I actually have staff members who screen potential clients before an appointment is scheduled. My staff is trained to ascertain from the potential client his concerns and expectations, and if they are not realistic, an initial consultation is not scheduled. My assistants are especially sensitive to potential clients who already have representation and are seeking to change attorneys, though my staff is also familiar with which lawyers seem to have problems retaining clients. Potential clients are also warned about probable fees before they arrive since we do not want individuals to attend initial consultations just to discover that they cannot afford our rates.

2. Run a comprehensive conflict search – no one should be allowed to meet with you until a comprehensive conflict search has been completed. Because conducting a complete conflict search is time intensive, my assistants are trained to screen potential clients and that search is another reason why we charge for our initial consultations.

3. Recognize potential conflicts when meeting with clients – if a husband and wife appear to not be in accord, explain to them that your ability to represent both is conditioned upon them agreeing with the strategy you are outlining. In certain cases, if the relationship is strained, you would want them to seek independent counsel to approve the joint representation. When two or three co-owners of a business appear at your office, you need to alert the individuals as to whom or what you will be representing. If they want you to represent a business, you need to explain to them that you may not be able to represent them individually or, if they prefer you represent them individually, that they are aware of the potential conflicts. Oftentimes the conflicts are reconcilable, but only if there is full disclosure from the onset. Finally, recognize situations in which a conflict may arise even though a new client may not have a current conflict with an existing client.

4. The supervising lawyer should meet with the client at the initial consultation – if you are in a high volume practice, this can be difficult, but you need to have a supervising or

responsible lawyer meet with every potential client. The client deserves to meet with his lawyer, but more importantly, the lawyer needs to know whom he'll be representing. Over the years, I have refused to accept certain clients after talking to that person at the initial consultation.

5. Research your potential client on social media – you need to confirm that the potential client is not engaging in conduct inconsistent with information contained in the bankruptcy paperwork.

6. Consider non-bankruptcy alternatives – you need to have a working knowledge of other areas of the law including foreclosure and joint and several liability, because in many cases bankruptcy is not necessary. If your client owns non-recourse real estate, there may not be a reason to put him into bankruptcy. Especially when third parties may be involved or responsible, alternatives short of bankruptcy may be available. When a distraught ex-wife appears in your office and is contemplating bankruptcy because her ex-husband has now filed for bankruptcy and has left her with debts for which he has specifically indemnified her, she may be able to avoid bankruptcy by enforcing those rights under 11 U.S.C. § 523 (a)(15).

7. Meet both the husband and wife – many years ago I was retained by a woman who unfortunately proved to be a pathological liar. She managed to deny me access to her husband with a variety of believable excuses, but fortunately I was able to track him down. You can well imagine his surprise, disappointment and anger when he was advised that his family was 18 months behind on mortgage payments, was facing foreclosure, and had been in chapter 13 for six months. I was able to avoid embarrassment since I had not originally filed the case, but I learned my lesson. Make it mandatory that prior to the bankruptcy filing a responsible person from your office has direct contact with both spouses.

8. Define the scope of initial consultation – every client who meets with anyone at my firm receives an e-mail confirmation limiting the scope of the representation to the initial consultation. This could be invaluable when a potential client starts telling creditors that you represent him after the initial consultation without retaining you. It also eliminates potential conflicts if, at a later date, you are retained by an adverse party on an un-related matter.

9. Consider all timing issues – ask questions about pending foreclosure dates and answer deadlines and other statutory periods. The client needs to understand unequivocally that until you are retained, he remains at risk. However, unless you have some idea as to the pending deadlines, it's difficult to advise clients as to the urgency of the situation.

10. Raise tax implications at the initial conference – I always advise clients I am not a tax attorney nor am I qualified to render advice in that regard and I make it a practice to always warn clients that they need to speak to a tax expert in deciding whether or not to proceed. Many potential clients will tell me how they have been able to work out very good settlements on a large amount of debt, but do not realize that they may be facing devastating 1099s and non-dischargeable ordinary income taxes triggered by debt forgiveness.

B. COMMON MISTAKES ONCE RETAINED

1. Have a written fee agreement – make sure your client signs a written fee agreement. It should be in layman's terms and break down what may be covered by a fixed fee and how much is charged for work beyond the initial scope of the agreement.

2. Use a CYA letter – if you are handling primarily simple and routine bankruptcies, the CYA letter may be relatively short and consist of primarily boilerplate. Nevertheless, use it. Even the simplest cases have many nuances, and relying purely upon forms can lead to major boondoggles.

3. Define "property of the estate" – because of the potential ramifications of a client not understanding this concept, I provide the information to clients in three different forms. I give them a form which outlines their exemptions, each receives a boilerplate provision explaining discrete issues that may arise concerning property of the estate, and I then incorporate a discussion about the client's specific situation. Even with all of this background, you need to be prepared to further clarify this issue.

4. Explain exemptions – every client receives my personalized discussion on exemptions, and then a specific overview of the client's situation. Make sure your client is eligible to use Arizona exemptions. If he is not, then you need to be prepared to engage in a rather in-depth analysis about which state's exemptions he can use, if any at all. If your client has sold his homestead before filing and is holding onto homestead proceedings, confirm your client understands that he has 18 months to spend those homestead proceeds from the date of the house sale and that current case law suggests that the money must be earmarked for that purpose. You also want to make sure to claim the entire exemption amount, even if the asset is worth less, and finally, don't let your client transfer exempt property assets in advance of bankruptcy if such a transfer is fraudulent or preferential. If it is, case law provides that the assets will be returned to the bankruptcy estate and, in almost all cases, the debtor will not be able to claim the exemption.

5. Explain prebankruptcy planning – I now provide every client with a detailed explanation of prebankruptcy planning which covers over a page. I then speak about the client's specific situation and let the client decide how to proceed. I do not tell clients to engage in prebankruptcy planning; I simply explain to them the option and let them make the decision.

6. Explain eligibility – a client needs to understand that he may not be eligible for Chapter 7, and if he is not eligible, why he is not. At the same time, that client should be aware of reorganization options.

7. Explain the differences between Chapter 11 and 13 if eligibility is an issue – an in-depth discussion about the benefits of Chapter 11 over Chapter 13 is beyond the scope of this presentation, but it is something that should be considered if the client is ineligible for Chapter 7.

8. Explain setoff rights – it may be weeks, if not months, before your client actually files for bankruptcy protection. Your client will be very disappointed if his bank seizes his money because you did not warn the client about statutory and contractual setoff rights.

9. Explain the dischargeability concept – your client may not have one challenge mounted to any specific debt, but your client needs to understand this concept.

10. Explain the discharge concept – once again, your client may not have any discharge issues, but he needs to be aware of what this means.

11. Explain the reaffirmation process – before filing, your client needs to understand his options under the law.

12. Explain issues with surrendered real estate not foreclosed upon – until a foreclosure is completed by a lender, your client retains title to real estate in his name. He could easily get stuck with excessive homeowner association assessments, or even worse, be facing a post-bankruptcy liability claim.

13. Confirm how your client owns assets – if your client wants to advance exemption rights, you need to make sure that the asset is owned by the debtor. With the exception of the homestead exemption, which can be asserted on a home titled in a living trust, assets titled to an L.L.C. or corporation cannot be exempted by the debtor.

14. Explain preferences – since oftentimes bankruptcies may not be filed for many months, if your client wants to avoid the reversal of a payment, he needs to understand the concept of preferences. Furthermore, you do not want your client to engage in excessive preferential transfers before bankruptcy because your client may be depleting funds he could devote to other purposes which, in certain instances, could lead to a discharge challenge.

15. Explain fraudulent transfers – all too often, a debtor has no idea that transfers to children that may have been appropriate under the gift tax laws are impermissible transfers. Your client needs to understand this concept so he does not continue this practice as bankruptcy nears and so he is aware what may happen as to transfers that have already occurred.

16. Explain the Trustee's role in the process.

17. Explain the difference between a case closing and a discharge.

C. MISTAKES TO AVOID ONCE A CASE IS FILED

1. Prepare your client for the first meeting of creditors – the first meeting of creditors may be the first time your client has ever appeared at a legal proceeding. As importantly, since the Trustee may ask your client some unexpected questions, or a creditor may appear, ensure your client knows what to expect and understands why he is there.

2. Amend the schedules promptly – if an asset or obligation was missed in the initial schedules, take the extra time to ensure that the schedules are amended promptly.

3. Seek abandonment of encumbered real or personal property your client wants to keep – even today, attorneys do not understand that an increase in the value of an asset prior to abandonment belongs to the bankruptcy estate. To minimize the chances that your client may have to turn over an asset because of appreciation during the administration of a case, procure an abandonment order early in the proceeding. In 2004 through 2006, many debtors lost their homes because their attorneys disregarded this strategy.

4. Timely reaffirm secured debts – current 9th circuit case law provides that, unless the debtor at least tries to reaffirm a secured personal property debt, the creditor has the absolute right to repossess the collateral even if the loan is current.

5. Do not have your client reaffirm debts unnecessarily – if not statutorily mandated, don't have your client reaffirm a secured debt. If he does and defaults, the creditor will have full recourse against the debtor as though the bankruptcy had never been filed.

D. RED FLAGS IN CHAPTER 11 AND 13

1. Assume commercial real estate leases within 120 days or obtain an extension to assume – if your client fails to timely assume such a lease and the lease is then rejected, the landlord can require your client to surrender the premises even if current.

2. Understand the absolute priority rule in Chapter 11s – your client will not be entitled to retain his equity position in a non-personal Chapter 11 unless all creditors are paid in full, new value is contributed into the plan, or creditors consent to a disruption of the absolute priority rule.

3. Procure approval of impaired class in Chapter 11s – in all Chapter 11s, unless you procure approval of an impaired class, the plan cannot be confirmed without the consent of all creditors.

4. Understand when payments begin – in a Chapter 13 the first payments begin thirty (30) days from the filing of a case, whereas in a Chapter 11, payments do not begin in most cases until confirmation of the plan.

5. Be fluent with the Supreme Court decision on calculating plan payments in a Chapter 13 – the *Jan Hamilton, Chapter 13 Trustee, Petitioner v. Stephanie Kay Lanning* decision ruled that plan payments are based upon anticipated or projected monthly income, not by considering disposable income for the six months prior to the bankruptcy filing.

6. Remember, the plan must be based upon disposable income over five (5) years in personal Chapter 11s.

7. Warn your clients about the impact of additional income during the course of a plan – in Chapter 13s, it is supposed to be contributed into the plan, though the same is not true in Chapter 11s.

8. Outline for your clients which expenses are authorized – you do not want your clients to be surprised to discover that certain expenses they have been paying their whole lives cannot be paid in a reorganization case.

9. Alert clients about potential dischargeability issues.

10. Explain the fee application process in a Chapter 11 or 13, unless the fees in a Chapter 13 fall under the no look amount.

11. Give your client a breakdown between transactions that are ordinary and do not require court approval and those that do.

12. Alert clients of the need to procure court approval of most professionals.

13. Explain to them the restrictions on paying professionals.

14. Warn them about the strict guidelines in a single asset real estate case.

15. Be aware of your and your client's fiduciary duty to creditors in Chapter 11s.

This overview is not intended to be all exhaustive or to suggest that other problems may not arise in a bankruptcy case. Nonetheless, if you consider the matters covered in this presentation, you will have substantially reduced the chances that your case goes awry.

17-06

Opinion No. 17-06

Utah Ethics Opinion

Utah State Bar Ethics Advisory Opinion Committee

September 27, 2017

1. **Issues.** This opinion request involves several issues in the practice of consumer Chapter Seven (liquidation) bankruptcies. These issues include:

a. Is a lawyer's advertisement of a "$99" or "Zero Down" for a consumer Chapter Seven liquidation bankruptcy misleading under Rule 7.1? Is it misleading to advertise that this price is good for a limited time or that a promotion with this price was extended?

b. What are the ethical constraints when requesting the client to sign a post-petition attorney fee contract which will not be discharged?

c. What disclosure must be made, if the lawyer intends to sell the rights to collect the post-petition attorney fee contract to a litigation financing company? Does a relationship with the buyer of the attorney fee contract create a conflict of interest under Rule 1.7?

d. Are the attorney fees reflected in the post-petition contract reasonable when the attorney sells her rights to those fees at a deep discount under Rule 1.5?

2. **Opinions.**

a. Without providing the consumer further information, advertisement of a "$99" bankruptcy or a "Zero Down" bankruptcy is misleading under Rule 7.1 because the price refers only to the filing of the initial petition. The price does not include the mandatory filing fee as well as work to be done subsequent to the filing of the petition such as preparation of schedules, meeting of creditors and reaffirmation agreements. All of these subsequent activities are necessary to obtain final discharge of debt which, of course, is the purpose of a consumer bankruptcy. Unless the follow up work is done, the bankruptcy will ultimately be dismissed. The consumer will have wasted both time and money.

b. In connection with the disclosures required under Subsection 2.a above, an attorney must disclose that her fees for post-petition work will be more substantial and not dischargeable in the consumer bankruptcy. The attorney cannot "unbundle" the filing of the petition unless it is reasonable under the circumstances to do so.

c. While it is not a violation of the rules to sell a lawyer's accounts receivable, the client must be fully informed with respect to the transaction. The client must be offered the same discounted price. The client must consent in writing to the sale and must be informed that the legal fees for post-petition work are not dischargeable. The legal financing company will collect the fee and if there is a dispute between the finance company and the client, the lawyer would not represent the client.

d. The fee charged the client (including the finance company discount) must be reasonable. Reasonable fees in consumer bankruptcy are governed by Rule 1.5(a).

3. **Discussion.** This request reflects the growing disconnect between individuals of modest means who need legal services and the ability for lawyers to serve those needs without incurring personal financial hardship. The Utah Bar Association has long recognized this disconnect. Programs have been established to serve the needs of modest means consumers. Every lawyer has a duty to perform pro bono services. Yet, individuals who need to file Chapter Seven liquidation do so because creditors are garnishing wages or threatening foreclosure. The bar cannot reasonably expect that these needs will be met pro bono. Accordingly, it is not sufficient in this opinion to merely declare practices of the consumer bankruptcy bar unethical. Rather, this opinion is intended as a guide to the consumer bankruptcy bar in order to aid them to serve their clients while avoiding violations of the Rules of Professional Conduct. While this opinion discusses the consumer bankruptcy bar, the provisions on advertising, unbundling of services where allowed by law, and full disclosure to the clients are applicable to all lawyers.

4. It takes money to do a consumer bankruptcy. There is a substantial filing fee which may be paid in installments. If the filing fee is not paid, the case will be dismissed. In order to get relief from creditors, a petition must be filed with the court. Typically, the low advertised price refers to the attorney's work in preparation of the petition. Thereafter, there is post-petition work including filing a schedule of the debtor's affairs, attending a meeting of creditors and negotiating any affirmation of debt agreements. In the hypothetical given the committee, the post-petition, attorney fees range from $1000 to $2000.

5. Most individuals in Chapter Seven liquidation do not have funds to pay the lawyer for post-petition work which will not be discharged in the bankruptcy.[1] Accordingly, according to the hypothetical, the lawyer informs the client that additional work must be done in order to accomplish

the goal of discharged debt. The client has the choice of hiring the filing lawyer, hiring another lawyer, or doing the work themselves pro se.

6. Pre-petition attorney fees are dischargeable as any other debt. Post-petition attorney fees are not dischargeable and must be paid even after all other debts are discharged. Care must be taken to include only fees generated post-petition in the post-petition attorney fee contract. Care must also be given to full disclosure of the necessity for further work and the amount to be charged. As individuals in consumer bankruptcy are perhaps hiring a lawyer for the first time in their lives, the lawyer has a duty of clarity in these matters.

7. In the hypothetical given the committee indicated that a law firm "factoring" company will buy the notes of debtors covering post-petition attorney fee costs. It is reported that the discount on such contracts is thirty percent. In cases of non-payment, the "factoring" company will "gently" pursue payment from the client. The factoring company has no recourse to the lawyer but looks solely to the client for payment. The hypothetical indicates that a large percentage of Utah Chapter Seven bankruptcies are financed in this manner.

8. A lawyer is allowed to limit the scope of her engagement if limitation is reasonable under the circumstances and the client gives informed consent.[2]See Rule 1.2(c). Rule 1.5(b) requires that scope of the representation and the basis or rate of the fee be communicated to the client, "preferably in writing." This is particularly applicable when the lawyer agrees to perform only a portion of the services needed to accomplish the goals of a legally unsophisticated client.

These facts present the legal issue of when consumer bankruptcy attorneys such as DeLuca may limit the scope of their representation, a practice colloquially referred to as "unbundling." While unbundling is permissible, it must be done consistent with the rules of ethics and professional responsibility binding on all attorneys. Those rules allow a lawyer to limit his or her representation **only when it is reasonable under the circumstances to do so, and only when the client gives informed consent to the limitation.***In re Seare*, 493 B.R. 158 (Bankr. D. Nevada, April 9, 2013. ((Emphasis added)

9. The *Seare* Court discusses the ethical problems of "unbundling" bankruptcy services at great length. The Committee adopts this discussion as reflecting Utah ethical concerns.

Unbundling raises concerns, however. The push to limit representation may come from the attorney, who often benefits from and has superior knowledge of the possible ramifications of excluding certain services.

There are strong reasons for protecting those who entrust vital concerns and confidential information to lawyers.... Clients inexperienced in such limitations may well have difficulty understanding important implications of limiting a lawyer's duty. Not every lawyer who will benefit from the limitation can be trusted to explain its costs and benefits fairly.... In the long run, moreover, a restriction could become a standard practice that constricts the rights of clients without compensating benefits. The administration of justice may suffer from distrust of the legal system that may result from such a practice. Those reasons support special scrutiny of noncustomary contracts limiting a lawyer's duties, particularly when the lawyer requests the limitation.

There is a particular concern in consumer bankruptcy practice that attorneys will unbundle services that are essential or fundamental to bankruptcy cases and clients' objectives.

A lawyer walks a perilous path in attempting to limit the services provided to bankruptcy debtors. Making an effective disclosure of the risks of such an arrangement, and obtaining informed consent, may be impossible in some cases. As noted, some lawyer services are so fundamental and essential to effective representation, no amount of disclosure and consent will suffice. Instructing a debtor to "go it alone" in any significant aspect of the bankruptcy case exposes counsel to possible criticism, and worse yet, a potential for sanction.

…

In spite of the concerns that unbundling raises, the ABA amended Model Rule 1.2(c) in 2002 to expressly allow limited-scope representation and provide a mechanism to regulate it. Struffolino, *supra,* at 215; AM. BAR ASS'N, ANNOTATED MODEL RULES OF PROF'L CONDUCT 38 (2011) ("ANNOTATED RULES"). The ABA's goal was to "encourage attorneys to provide some assistance to low- and moderate-income litigants who could not otherwise afford full representation." Struffolino, *supra* note 17, at 215 (citing AM. BAR ASS'N, STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS 8 (2009)); ANNOTATED RULES 38 (citing AM. BAR ASS'N, LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROF'L CONDUCT, 1982–2005 at 55 (2006)). ABA Model Rule 1.2, which Nevada has adopted verbatim, states that "[a] lawyer may limit the scope of representation if the limitation is *reasonable under the circumstances* and the client gives *informed consent.* " NEV. RULE OF PROF'L CONDUCT 1.2(c) (2011) (emphasis supplied).

Shortly after the ABA amended the rule, the ABA

published the *ABA Handbook,* a report on limited scope legal assistance. The *ABA Handbook* emphasizes that the majority of people in our nation are low and moderate income, and that often they cannot afford to pay lawyers in litigation. *Id.* at 3. Limited scope legal representation can make the judicial process fairer by providing greater access to justice. *Id.* at 3–4. The ABA quoted a long time limited-service practitioner for the proposition that unbundling should be client driven—"[i]n this legal relationship, 'the client is in charge of selecting one or several discrete lawyering tasks contained within the full-service package.' " *Id.* at 7 (quoting FORREST S. MOSTEN, UNBUNDLING LEGAL SERVS.: A GUIDE TO DELIVERING LEGAL SERVS. A LA CARTE 1 (2000)). …

If limited representation is selected, "the lawyer must also alert the client to reasonably related problems and remedies that are beyond the scope of the limited-service agreement." In a related ethics opinion, the Los Angeles County Bar Association put it this way,

The attorney has a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of retention, and to inform the client that the limitations on the representation create the possible need to obtain additional advice, including advice on issues collateral to representation.

10. A lawyer should not automatically assume that "unbundling" the filing of a petition is **reasonable under the circumstances o**f the case. Indeed, propriety of unbundling a petition may be the **exception rather than the usual practice.** Recent bankruptcy ethics cases demonstrate the concerns of the bankruptcy courts. In *Seare,* the majority of the client's unsecured debt was a judgment for fraud. The lawyer knew this debt was non-dischargeable. Nevertheless, he filed an unbundled and worthless Chapter Seven petition. The attorney was required to disgorge all fees and present a copy of the court's opinion to any future client when the attorney proposed to unbundle the filing of a complaint.

11. ***In re Minardi*,** 399 B.R. 841 (Bankr. N.D. Oklahoma) concerned a lawyer's attempt to limit services to exclude negotiation of reaffirmation agreements. The court found that the "decision to reaffirm an otherwise dischargeable debt plays a critical role in the bankruptcy process—so critical, that assistance with the decision must be counted among the necessary services that make up competent representation of a Chapter Seven debtor." Particularly, the Court held that an agreement for limited representation does not exempt a lawyer from the duty to provide competent representation.

12. The Idaho Bankruptcy Court provides that "an attorney, in accepting an engagement to represent a debtor in a bankruptcy, will find it exceedingly difficult to show that he properly contracts away any of the fundamental and core obligations such an engagement necessarily imposes. Proving competent, intelligent, informed, and knowing consent of the debtor to waive or limit such services inherent to the engagement will be required." *In re Grimmett*, 2017 WL 2437231 (United States Bankr. D. Idaho June 5, 2017) citing *In re Castorena*, 270 B.R. 504 (Bankr. D. Idaho 2001).

13. If a consumer bankruptcy lawyer presents unbundled legal services, she must comply with Rule 7.1's limitations on false or misleading communications. A representation is false or misleading if it "contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." Rule 7.1(a). It would be materially misleading if a bankruptcy lawyer unbundled services and did not explain in detail, preferably in writing, what additional services would be needed to accomplish the client's goal. Just as in *Seare*, it would not be sufficient to remain silent when it is well known that an adversary proceeding is likely to occur. Further, statements indicating that the one-time fee is "for a limited time" or has "been held over" are misleading[3] if not accurate.

14. It is not unlawful for lawyers to sell or encumber their accounts receivable, whether or not the work has been accomplished. Sale or encumbrance of accounts receivable is not sharing fees with a non-lawyer. (Rule 5.4(a)). This is equally true for consumer bankruptcy lawyers. The Texas Court explained:

The main thrust of Leibowitz's argument is that loans such as those at issue in this case fundamentally violate public policy as articulated in the disciplinary rules, which as a general rule prohibit lawyers from sharing legal fees with non-lawyers. However, Texas case law allows an attorney to assign accounts receivable, consisting of current or future, earned or unearned, attorney fees as property securing a transaction. *SeeHennigan v. Hennigan*, 666 S.W.2d 322, 325 (Tex.App.-Houston [14th Dist.] 1984, writ ref'd n.r.e.) (concluding that future attorney's fees constitute "accounts" under section 9.106 of the Uniform Commercial Code).8 Moreover, as previously stated by this Court, there is a significant difference between sharing legal fees with a non-lawyer and paying a debt with legal fees. *SeeState Bar of Tex. v. Tinning,* 875 S.W.2d 403, 410 (Tex.App.-Corpus Christi 1994, writ denied)

15. There are a number of potential pitfalls, however, in litigation funding. All of these pitfalls must be discussed with the client. Because of a regular relationship with the funding company, the possibility of a current conflict of interest between the lawyer's interest, the client's interest

and the interest of the funding company in being paid, the lawyer must comply with Rule 1.6(b). The client must give informed consent, confirmed in writing when waiving any such conflicts.

16. The lawyer has but one client and must maintain confidentiality and loyalty towards that client. "Although litigation funding companies are not subject to lawyers' rules of professional conduct, the lawyers whose clients receive funding are." Hazard, Hodes, & Jarvis, "The Law of Lawyering" 8.26 (2014 Supplement.) Chief among the pitfalls are client confidentiality and protecting the independence of the attorney. Further we call attention to Utah Ethics Advisory Opinion 13-05 which discusses the extent to which a lawyer may involve herself in assisting in the application for financial assistance.

17. Finally, the hypothetical raises questions as to the reasonableness of the consumer bankruptcy lawyer's fees. If the lawyer is willing to do the work with a thirty percent discount, we question (but do not resolve) whether the total fee is reasonable. There are, however, guidelines. The consumer bankruptcy lawyer, like all other lawyers, is subject to the reasonable fee provisions of Rule 1.5 which include the time and labor required, the novelty and difficulty of the questions involved and the skill required performing the legal services properly. Other factors include the likelihood that accepting this matter would preclude taking other employment by the lawyer. A reasonable fee might be the fee customarily charged in the locality for similar services. Finally, the reasonableness of a fee depends upon the experience, reputation and ability of the lawyer performing the service.

Notes:

[1] This is a major difference between Chapter 7 liquidation and Chapter Thirteen reorganization. Legal fees for Chapter 13 may be paid as part of the debtor's plan for reorganization. The lawyer, however, has a duty of competence and diligence under Rule 1.1 and 1.3 to effectively counsel the client as to the risks and benefits of relief under both chapters. It would be a violation of those rules if the attorney placed the client in Chapter Thirteen merely to enhance his ability to collect his fee.

[2] "Informed Consent" denotes the agreement by a person to a proposed course of action after the lawyer has communicated adequate information and explanation of the material risks of and reasonably available alternatives to the proposed course of action. See Rule 1.1(f).

[3] Those statements may be unlawful under the Utah Consumer Sales Practices Act. See U.C.A. 13-11-4(d). Such statements are Misconduct pursuant to Rule 8.4 as they involve criminal conduct reflecting adversely upon a lawyer's honesty and the lawyer engages in conduct involving dishonesty, fraud, deceit or misrepresentation.
