2022 Winter Leadership Conference

Ethical Dilemmas in Consumer Practice and How to Handle Them: Where Do You Draw the Line?

Hosted by the Consumer Bankruptcy and Ethics & Professional Compensation Committees

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CONCURRENT SESSION

2022

Common Ethical Dilemmas in Consumer Practice and Practical Advice

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Hypothetical #1: A Two for One

- Bill operates and is the sole member of Bill's Big Boxes, LLC, which is struggling and has substantial debts.
  - $150,000 credit cards
  - $150,000 SBA loans, personally guaranteed by Bill and also secured by a lien against a whole life policy owned by Bill's brother, Bob (who now needs to borrow from the policy to pay his own bills).
- Bill also has personal debt—credit cards, mortgages, and joint tax debt with his non-filing spouse.
- Bob filed chapter 13 himself two years ago, and refers Bill to his attorney, Cassie.
- Bill wants to retain Cassie to:
  - File a personal bankruptcy for Bill
  - File a chapter 7 for the LLC to liquidate and obtain a release of the lien on Bob's whole life policy.

Hypothetical #1: A Two for One (continued)

Model Rule 1.7

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Hypothetical #1: A Two for One (continued)

Other Relevant Model Rules:

- Model Rule 1.6 (Confidentiality of Information)
- Model Rule 1.9 (Duties to Former Clients)
- Model Rule 1.16 (Declining or Terminating Representation)

Relevant Bankruptcy Code sections and cases:

- 11 U.S.C. § 101 (Definitions of: Affiliate, Claim, Creditor, Corporation, Debt, Disinterested Person, Entity, Insider)
- 11 U.S.C. § 1301 (Co-debtor Stays)
- *Kohut v. Lenaway (In re Lennys Copy Ctr. & More LLC)*, 515 B.R. 562 (Bankr. E.D. Mich. 2014)

Hypothetical #2: There's No Place Like Home

- Counsel is a consumer bankruptcy practitioner in the Northern District of Wherever. During the pandemic, the NDWE issued a general order allowing attorneys to file petitions and schedules with electronic client signatures in place of original "wet ink."
- As a result, Counsel's firm now does all client intake remotely, and Counsel works from home almost exclusively, which she enjoys (even though home is a cramped apartment with her spouse, twin toddlers, two dogs and a cat). At times, Counsel works at a cabin just across the state line. When at home, she meets with clients at her kitchen table, with her spouse coming and going from the kitchen.

Hypothetical #2: There's No Place Like Home (Continued)

- Counsel has an intake appointment with Dan and Darla Debtor. She meets with Dan for an hour, but Darla is only able to join for five minutes of the meeting. Counsel advises the Debtors to file a chapter 7 to deal with overwhelming medical and credit card debt. Dan assures Counsel that he will explain everything to Darla, and to go ahead with preparing the petition and schedules.
- Counsel's paralegal prepares the documents and emails them to Dan for signature. He sends back electronically signed copies, along with the Debtors' required tax returns, pay stubs, and (grainy) copies of IDs and Social Security cards.
- Should Alma file the case?

Hypothetical #2: There's No Place Like Home (Continued)

Model Rule 1.1 (Competence)

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Model Rule 1.3 (Diligence)

A lawyer shall act with reasonable diligence and promptness in representing a client.

Hypothetical #2: There's No Place Like Home (Continued)

Model Rule 1.4 (Communications)

(a) A lawyer shall:

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

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

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

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

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

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

Hypothetical #2: There's No Place Like Home (Continued)

Model Rule 1.6 (Confidentiality of Information)

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may order; or reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Hypothetical #2: There's No Place Like Home (Continued)

Unauthorized Practice of Law Issues:

- Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law)
- *In re Josephson*, No. 04-60004-13, 2008 Bankr. LEXIS 110 (Bankr. D. Mont. Jan. 9, 2008)
- Ethics Opinions:
    - ABA Formal Opinion 495 (December 2020) on Working Out of Jurisdiction
    - ABA Formal Opinion 498 (March 2021) on Virtual Practice
    - Florida- FAO #2019-4
    - Pennsylvania Joint Formal Opinion 2021-100
    - Utah Opinion No. 19-03

Hypothetical #3: Is It Really You?

A prospective client's family is seeking bankruptcy relief on behalf of their mother, who they represent is ill with dementia.

- Can counsel proceed with the representation, even if mother is unable to communicate, or sign her bankruptcy paperwork?

Hypothetical #3: Is It Really You? (continued)

Model Rule 1.4 (Communications)

(a) A lawyer shall:

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

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

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

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

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

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

Hypothetical #3: Is It Really You? (continued)

Other Authorities:

- Bankruptcy Rules:
  - 1004.1 (Petition for an Infant or Incompetent Person)
  - 1016 (Death or Incompetency of Debtor)
  - 7017 (Real Party in Interest)
  - 9010 (Representation and Appearances; Power of Attorney)
  - 9011 (Signing of Papers; Representations to the Court)
- Cases:
  - *In re Drenth*, No. 15-04217, 2015 Bankr. LEXIS 3160 (Bankr. W.D. Mich. Sep. 10, 2015).
  - *United States v. Spurlin*, 664 F.3d 954, 959 (5th Cir. 2011).
  - *In re Mattern*, No. 98-13090, 2006 Bankr. LEXIS 355 (Bankr. E.D. Va. Jan. 31, 2006).

Hypothetical #4: A Tale of Two Fees

- Feeling the impact of decreased filings and competitive pressure from firms offering "no money down" chapter 7 cases, Counsel creates a model to bifurcate her fees and offer clients a zero-down, payment over time model.
- Under Counsel's model, a pre-petition retainer agreement presents clients with two fee options:
  - A traditional, upfront pre-petition flat fee of $1,500, plus the filing fee; or
  - No payments due before filing, and a total fee (including the filing fee) of $3,000, paid over 12 months by automatic debit.
- If the client chooses the second option, the pre-petition agreement provides that Counsel will file a "skeletal" petition for free, then gives client three "post-petition" options:
  - Execute a post-petition agreement for the $3,000 fee, under which Counsel will complete and file all remaining mandatory documents and attend the 341 meeting;
  - Hire other counsel to complete the case; or
  - Proceed pro se.

Hypothetical #4: A Tale of Two Fees (Continued)

- Neither of Counsel's retainer agreements mentions the district's local rule under which an attorney who files the case is deemed counsel of record for almost all purposes unless and until they are permitted to withdraw.

- To finance her new model, Counsel enters into an agreement with a third-party finance company. The finance company pays Counsel a discounted lump sum of the face value of the fee agreement, and exchange collects the full amount owing from the client. Counsel grants the finance company a lien on her accounts receivable attributable to the cases she finances.

Hypothetical #4: A Tale of Two Fees (Continued)

Model Rule 1.2 (Scope of Representation & Allocation of Authority Between Client & Lawyer)

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

Hypothetical #4: A Tale of Two Fees (Continued)

Model Rule 1.5 (Fees)

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

Hypothetical #4: A Tale of Two Fees (Continued)

Model Rule 5.4 (Professional Independence of a Lawyer)

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

Hypothetical #4: A Tale of Two Fees (Continued)

Other Authorities:

Model Rule 1.6
Model Rule 1.7

U.S. Trustee Program Bifurcated Fee Enforcement Guidelines

11 U.S.C. §§ 329, 526-528, 707(b)(4).
Fed. R. Bankr. P. 2016, 9011

In re Suazo, No. 20-17836, 2022 WL 2197567 (Bankr. D. Colo. June 17, 2022)
In re Siegle, 639 B.R. 755 (Bankr. D. Minn. 2022)
In re Baldwin, 640 B.R. 104 (Bankr. W.D. Ky. 2021)
In re Prophet, 628 B.R. 788 (Bankr. D.S.C. 2021), rev'd and remanded, 639 B.R. 664 (D.S.C. 2022).
In re Rosema, No. 20-40366, 2022 WL 2662869 (Bankr. W.D. Mo. July 8, 2022)
In re Kolle, No. 17-41701-CAN, 2021 WL 5872265 (Bankr. W.D. Mo. Dec. 10, 2021)
In re Brown, 631 B.R. 77 (Bankr. S.D. Fla. 2021)

Hypothetical #5: A Change of Heart

Your married clients have been joint debtors in a chapter 13 case for two-and-a-half years, but they have contacted you to let you know they are divorcing.

- Can you stay on to represent both parties in the bankruptcy going forward?

Relevant Model Rules:

Model Rule 1.6 (Confidentiality of Information)

Model Rule 1.7 (Conflicts of Interest)

Model Rule 1.9 (Duties to Former Clients/Conflicts Between Prospective Clients

Model Rule 1.16 (Declining or Terminating Representation)

Hypothetical #5: A Change of Heart (continued)

Model Rule 1.9 (Duties to Former Clients/Conflicts Between Prospective Clients)

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Hypothetical #5: A Change of Heart (continued)

Other Authorities:

- 11 U.S.C. § 362(b)(2)—automatic stay does not operate as a stay against establishment or modification of DSO orders, or dissolution of a marriage (except for division of estate property).
- *In re Baum*, 639 B.R. 721, 722 (Bankr. E.D. Mich. 2022)

Hypothetical #6: Something's Gotta Give

- Counsel has spent many months trying to save Debtor's chapter 13 plan, including resolving a stay relief motion, the Trustee's motion to dismiss, and excusing tax refunds.
- Counsel submits her fee application for $7,000, and it is approved.
- A month later, Debtor tells counsel she wants to sell her house.
    - Counsel does all the work to have the 363 sale approved—only for the deal to fall through before closing because black mold is discovered, and the substantial equity expected to be paid into the plan has disappeared.
- Debtor now decides to retire, can no longer can afford to fund her case, and wishes to convert to chapter 7.
    - At this point, Counsel is owed $7,000 in fees to be paid through the plan, plus another $2,000 for the failed 363 sale.

Hypothetical #6: Something's Gotta Give (continued)

Questions:

- Is a separate retainer agreement required for Counsel to represent Debtor in converting the case to chapter 7? Can Counsel receive a new retainer or flat fee for the conversion?
- What about Counsel's fees—the unpaid $7,000 approved fee and the $2,000 in earned, but not yet approved, fees for the sale motion? Is counsel now a creditor in the converted case?
- On the other hand, is Counsel able to walk away and withdraw from the case? What obligations does Counsel have to either continue with or withdraw from representing Debtor?

Hypothetical #6: Something's Gotta Give (continued)

Model Rule 1.2 (Scope of Representation & Allocation of Authority Between Client & Lawyer)

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Hypothetical #6: Something's Gotta Give (continued)

Model Rule 1.16 (Declining or Terminating Representation)

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

Hypothetical #6: Something's Gotta Give (continued)

Model Rule 1.16 (Declining or Terminating Representation) (continued)

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Other Authorities:

- 11 U.S.C. § 1307 (Property of the Estate)
- *In re Brooks*, No. 99-11125, 2000 Bankr. LEXIS 2164 (Bankr. D. Vt. Dec. 23, 2000).
- *In re Meyers*, 120 B.R. 751, 752 (Bankr. S.D.N.Y. 1990).


American Bankruptcy Institute
WINTER LEADERSHIP CONFERENCE
DECEMBER 8-10, 2022

Questions?

Common Ethical Dilemmas in Consumer Practice, and Practical Advice
ABI 2022 Winter Leadership Conference Ethics Panel

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Melissa Davey Standing Chapter 13 Trustee, Northern District of Georgia
Adam Herring Nelson Mullins Atlanta, Georgia
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A Two For One

Can counsel represent an individual in a personal case, and their small business in a chapter 7 or sub chapter V?

Bill is the owner and operator of Bill's Big Boxes, an LLC of which he is the sole member. Bill's box business has fallen upon hard times; the business owes close to $150,000 in business credit cards, and another $150,000 in SBA loans which Bill personally guaranteed. Bill's brother Bob also granted the SBA a lien against a whole life insurance policy to help Bill get the loan. Bob now needs to borrow from his policy to make ends meet. The business has some equity in its assets that can be liquidated, with proceeds transferred to the all asset lienholder(s), which would reduce some of the corporate liability. Bill also has his own personal credit card debt, mortgages on his home, and joint tax debt with his wife, who is not filing. Bob is no stranger to bankruptcy, having filed his own Chapter 13 2 years ago. He refers Bill to his attorney, Cassie Consumer Counsel for a consult. After meeting with Cassie, Bill instantly feels comfortable working with her. Bill implores Cassie to represent him in his personal case, and represent the box business in a chapter 7 to liquidate the corporate assets, relieving him of his personal liabilities and obtaining a release of his brother's whole life insurance policy as collateral for the SBA loan. Can Cassie represent Bill and his business in separate bankruptcies at the same time? Is Cassie prevented from representing Bill due to her current representation of Bob?

ABA Model Rule 1.7 Conflicts of interest amongst current clients; directly adverse to another client; the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client or a former client; the representation must not involve the assertion of a claim by one client against another client in the same litigation or other proceeding; obtain written informed consent from each affected party in writing.

ABA Model Rule 1.6 Confidentiality of Information
ABA Model Rule 1.9 Duties to Former Clients
ABA Model Rule 1.16 Declining or Terminating Representation

11 U.S.C. 101; Affiliate; Claim; Creditor; Corporation; Debt; Disinterested Person; Entity; Insider
11 U.S.C. 1301 Co-debtor stay
Kohut v. Lenaway (In re Lennys Copy Ctr. & More LLC), 515 B.R. 562 (Bankr. E.D. Mich. 2014); Law firm that represented an LLC while LLC was in Chapter 7 bankruptcy was prohibited under Mich. Prof. Cond. R. 1.7(a) and 1.10(a) from representing LLC's members in action bankruptcy trustee filed against members to recover preferential transfers they allegedly received from LLC because members' interests were directly adverse to LLC's interests.

A Change of Heart

After spending 2.5 years in their joint chapter 13 bankruptcy, your clients contact you to let you know they are getting a divorce. Can counsel stay on to represent both parties in the bankruptcy going forward?

ABA Model Rule 1.7 Conflicts of interest amongst current clients; directly adverse to another client; the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client or a former client; the representation must not involve the assertion of a claim by one client against another client in the same litigation or other proceeding; obtain written informed consent from each affected party in writing.

ABA Model Rule 1.6 Confidentiality of Information
ABA Model Rule 1.9 Duties to Former Clients / Conflicts between prospective clients
ABA Model Rule 1.16 Declining or Terminating Representation

Practical advice: If a current or potential future conflict can be waived in writing, refer clients to family law mediator / separate divorce counsel. File amended schedules for separate budgets and plan modification to excuse any missed plan payments used for purposes of paying for mediation / family law attorney / moving expenses.

11 U.S.C. 362(b)(2); the filing of a petition does not operate as a stay against the debtor(s); for the establishment or modification of an order for domestic support obligations; for the dissolution of a marriage (except to the extent that the proceeding seeks to determine the division of property that is part of the estate) – obtain stay relief from the bankruptcy court to accomplish division of assets of the estate previously disclosed and exempt in a post-confirmation matter.

In re Baum, 639 B.R. 721, 722 (Bankr. E.D. Mich. 2022); An attorney and his law firm had a conflict of interest in representing the debtor in this Chapter 13 case that could not be waived. The attorney was a pre-petition creditor, holding a claim for attorney fees that was potentially very large, but that was entirely unliquidated and in part contingent. Mich. Prof. Cond. R. 1.7(b) required disqualification of the attorney and his firm. The debtor needed, and her attorney had a duty to provide, independent and objective advice and representation about numerous issues regarding the attorney's pre-petition fee claims. It was not objectively reasonable to believe that the attorney could give such independent, objective advice and representation to the debtor.

Is It Really You?

A prospective client's family is seeking bankruptcy relief on behalf of their mother, who they represent is ill with dementia. Can counsel proceed with the representation, even if mother is unable to communicate, or sign her bankruptcy paperwork?

ABA Model Rule 1.4 Communications

Bankruptcy Rule 1004.1 Petition for an Infant or Incompetent Person
Bankruptcy Rule 1016 Death or Incompetency of Debtor
Bankruptcy Rule 7017 Real Party in Interest
Bankruptcy Rule 9010 Representation and Appearances; Power of Attorney
Bankruptcy Rule 9011 Signing of Papers; Representations to the Court

In re Drenth, No. 15-04217, 2015 Bankr. LEXIS 3160 (Bankr. W.D. Mich. Sep. 10, 2015); "nothing in the Bankruptcy Code imposes upon a debtor a requirement of competency as a condition for relief." *1 (citing *In re Myers*, 350 B.R. 760 (Bankr. N.D. Ohio 2006) (appointing aged debtor's long-time spouse as next friend, nunc pro tunc).

United States v. Spurlin, 664 F.3d 954, 959 (5th Cir. 2011); A general power of attorney may be used to file for bankruptcy on another's behalf. General powers of attorney allow someone to manage another person's affairs. Although certain matters are too personal to be entrusted to another, bankruptcy is primarily for property protection and is not as profoundly personal as divorce or enlistment. Declaring voluntary bankruptcy is about saving a person's assets where all else fails, and entrusting management of one's property to that someone includes giving him the tools to protect as much as he can if the worst happens. *Ballard* allows the holder of the power of attorney to declare bankruptcy but prevents abuse by requiring the debtor to be informed and dismissing if the debtor feels bankruptcy is improper. This gives the holder of the power of attorney flexibility to protect and manage that person's assets, while including a failsafe to prevent abuse.

In re Mattern, No. 98-13090-SSM, 2006 Bankr. LEXIS 355 (Bankr. E.D. Va. Jan. 31, 2006); Although there do not appear to be any reported federal cases specifically

addressing guardians filing pro se legal pleadings on behalf of their wards, there are a number of decisions involving the analogous situation of parents attempting to file pro se on behalf of their minor children or executors attempting to file pro se on behalf of the estate they represent. Those cases consistently hold that a non-attorney cannot appear pro se on behalf of another even in those situations.

Something's Gotta Give

After many months of working to save debtor's chapter 13 plan (resolved MTLS, resolved TMTD, excused tax refunds) counsel files her fee application, and an order approving fees of $7,000 is entered. The fees leave little room for counsel to do any further work over the remaining months left in the plan, without the need for an increase in debtor's plan payment. Difficult debtor approaches counsel a month after the fee application is entered to advise that she wishes to sell her home that purportedly has significant equity. Counsel obtains approval from the mortgage company and the Court allowing debtor to sell her home free and clear of liens, with proceeds from the sale transferred to the lien. The Order on Motion to Sell Free and Clear of Liens allowed debtor to retain her homestead exemption and pay all remaining net proceeds from the sale into the plan. Prior to closing, black mold is discovered and the deal falls through. Counsel now has fees approved in the amount of $7,000 pending payment through the plan and has racked up another $2,000 in fees while trying to help debtor sell the home – which sale was expected to yield a large lump sum remittance to the Trustee. Debtor decides to throw the towel in with her house upon learning she cannot get any equity out of it. Even though she is not of official retirement age, she calls counsel to advise that she is now retired. She further states that she on a fixed source of income consisting solely of SSI. She can no longer afford to remain in chapter 13 and wishes to convert to chapter 7 immediately. Assuming that there are no issues with converting debtor's case (no assets with equity and no prior bankruptcy discharges) how does counsel proceed in the representation? Is conversion a separate matter requiring a separate engagement? How can counsel take a retainer or a flat fee to do the conversion while debtor remains in chapter 13 (debtor's wages and income constitute property of the estate); furthermore, with $2,000 in outstanding fees for work performed in the 13 which are not yet an approved administrative expense, does that make counsel a creditor in the case once it converts to 7? Can counsel simply jump off this sinking ship, and leave debtor to resolve her unfeasible plan in 13? What ethical and moral obligations exist from the standpoint of the attorney in either continuing the representation, or, withdrawing from the representation?

11 U.S.C. 1307 Property of the Estate
11 U.S.C. 101 Disinterested Person; Creditor

ABA Model Rule 1.2 Scope of Representation
ABA Model Rule 1.16 Declining or Terminating Representation

In re Brooks, No. 99-11125 cab, 2000 Bankr. LEXIS 2164 (Bankr. D. Vt. Dec. 23, 2000); A court denied a motion to withdraw filed by a Chapter 13 debtor's attorney following confirmation of the plan because on balance, the need for Chapter 13 debtors to be assured of continuous representation by their legal counsel throughout the case outweighed the attorney's right to withdraw during the case for non-payment of fees.

In re Meyers, 120 B.R. 751, 752 (Bankr. S.D.N.Y. 1990); An attorney was not allowed to withdraw as counsel to a Chapter 7 debtor because the demands made upon him were clearly foreseeable, his retainer was higher than that normally charged, and the debtor did not deliberately disregard their agreement.

There's No Place Like Home

Alma Attorney is a consumer bankruptcy practitioner located in the Northern District of Wherever (NDWE). At the start of the pandemic, the Bankruptcy Court for the NDWE issued a general order allowing attorneys to file petitions and schedules with electronic signatures in place of original wet ink signatures. As a result, the firm now does all client intake remotely. Alma's firm now allows her to work from home almost exclusively, which she loves because she can do laundry and cook dinner while she is working. However, her home life is also quite chaotic. She is married to Home Dad and they live in a cramped 2 bedroom apartment with their twin toddlers, 2 dogs and a cat. As a result, Alma spends some work days at their lake cabin located just over the state line just to get some peace and quiet.

When at home, Alma meets with clients in her home office, aka her kitchen table, mostly via Zoom. Home Dad comes in and out of the kitchen all day but Alma has her webcam set up so only she can be seen. On Monday, Alma has an intake appointment with a couple, Dan and Darla Debtor. Alma meets with Dan via Zoom for 1 hour and advises that the Debtors should file a Chapter 7 to deal with their overwhelming medical and credit card debt. Unfortunately, Darla Debtor is working during their intake session and is only able to call in by telephone for the first 5 minutes of the appointment. Dan says he will explain everything to Darla and advises Alma to go ahead and prepare the petition and schedules. Alma prepares the plan and schedules with the assistance of Paula Paralegal. Paula emails the petition and schedules to Dan Debtor and he sends the electronically signed documents back to Alma for filing. Dan also send Alma copies of their most recent tax returns, pay stubs and grainy copies of the Debtors' driver's licenses and SSN cards. Should Alma file the petition?

11 U.S.C. Sections 526-527-debt relief agencies
Bankruptcy Rule 1008-verification requirement
Bankruptcy Rule 9011

Practicing Remotely-
ABA Model Rule 1.1- Competence
ABA Model Rule 1.3-Diligence
ABA Model Rule 1.4-Communications
ABA Model Rule 1.6-Confidentiality
ABA Model Rule 5.5

See *In re Josephson*, No. 04-60004-13, 2008 Bankr. LEXIS 110, (Bankr. D. Mont. Jan. 9, 2008) regarding filing pleadings without debtor's express authorization; Chapter 13 debtors' attorney violated Fed. R. Bankr. P. 9011 and Bankr. D. Mont. R. 9011-1 when he filed an addendum to the debtors' repayment plan without talking to both debtors and getting their permission to file the addendum, and the court ordered him to disgorge the sum of $ 2,345.91 in attorney's fees he collected to the bankruptcy trustee.

See ABA Formal Opinion 498 (March 2021) on Virtual Practice

See also ABA Formal Opinion 495 (December 2020) for working out of jurisdiction; state specific opinions- Florida- FAO #2019-4; Pennsylvania Joint Formal Opinion 2021-100; Utah Opinion No. 19-03

A Tale of Two Fees: Fee Bifurcation

Counsel is a solo bankruptcy practitioner in a medium-to-large-sized city. Traditionally the district has a relatively high volume of consumer filings—enough that two consumer bankruptcy "mill" firms exist. Although those firms file the bulk of cases in the district, enough are normally left over for practitioners like counsel to flourish. However, in the past few years consumer filings have decreased dramatically, seriously impacting counsel's income. To make matters worse, her largest competitors—the two "mill" firms—have recently begun to advertise "no money down" chapter 7 cases by "bifurcating" their attorney's fees under pre- and post-petition contracts.

After reading some articles, Counsel devises her own bifurcation model in an effort to compete. She prepares a pre-petition retainer agreement that presents chapter 7 clients with two options: (1) her traditional model, a flat fee of $1,500 plus the filing fee, to be paid in full before the case is filed, or (2) a total fee of $3,000, with no payments due before filing and the total payable in monthly automatic debits over 12 months after filing. The pre-petition retainer tells clients that counsel will complete and file a "skeletal" petition at no charge, at which point the client has three options: (A) execute a post-petition agreement with Counsel for Counsel to complete representation in the case, including preparing and filing the schedules, SOFA and other mandatory documents and attend the 341 meeting; (B) hire other counsel to complete the case, or (C) proceed pro se. The retainer agreement doesn't mention the district's Local Rule governing debtor attorney representation, under which an attorney who files a case is deemed counsel of record for almost all purposes until permitted to withdraw.

Additionally, to support her bifurcated model, Counsel enters into an arrangement with a third-party finance company. Under this arrangement, Counsel assigns the accounts receivable attributable to her bifurcated cases to the finance company, which pays her a discounted lump sum and in exchange collects the full amount owing under the post-petition agreement from Counsel's client.

Will Counsel run into legal or ethical issues using her new model?

Relevant Model Rules and Authority

ABA Model Rule 1.2(c)
ABA Model Rule 1.5
ABA Model Rule 1.6
ABA Model Rule 1.7
ABA Model Rule 5.4(a)

U.S. Trustee Program Bifurcated Fee Enforcement Guidelines – Bifurcated fees not prohibited by the Bankruptcy Code *per se*, absent controlling local authority, but (1) fees must be fair and reasonable, (2) the attorney must provide adequate disclosures to the client and the client must give fully informed consent, and (3) the attorney must make sufficient public disclosures related to the fee agreement.

11 U.S.C. § 329
11 U.S.C. §§ 526—528
11 U.S.C. § 707(b)(4)
Fed. R. Bankr. P. 2016
Fed. R. Bankr. P. 9011

In re Suazo, No. 20-17836, 2022 WL 2197567 (Bankr. D. Colo. June 17, 2022)
In re Siegle, 639 B.R. 755 (Bankr. D. Minn. 2022)
In re Baldwin, 640 B.R. 104 (Bankr. W.D. Ky. 2021)
In re Prophet, 628 B.R. 788 (Bankr. D.S.C. 2021), *rev'd and remanded*, 639 B.R. 664
Each of these four cases held generally that bifurcation is *per se* impermissible because it necessarily contradict a local rule—common in many jurisdictions—under which the attorney who files a case is responsible counsel of record until permitted to withdraw by the bankruptcy court.

In re Rosema, No. 20-40366, 2022 WL 2662869 (Bankr. W.D. Mo. July 8, 2022)
In re Kolle, No. 17-41701-CAN, 2021 WL 5872265 (Bankr. W.D. Mo. Dec. 10, 2021)
In re Brown, 631 B.R. 77 (Bankr. S.D. Fla. 2021)
Each held that there is no blanket prohibition against bifurcated fee models, but that fee agreements must be reasonable, entered into with informed consent, and fully and accurately disclosed. In *Brown*, Chief Judge Isicoff provided detailed, district-wide guidance for proper bifurcation, including requirements for disclosures to permit fully informed consent and the attorney's pre- and post-petition duties.

U.S. Department of Justice

Executive Office for United States Trustees

Office of the Director *Washington, DC 20530*

June 10, 2022

MEMORANDUM

TO: United States Trustees

FROM: Ramona D. Elliott RAMONA ELLIOTT
Acting Director

Digitally signed by RAMONA ELLIOTT
Date: 2022.06.08 11:13:03 -04'00'

SUBJECT: Guidelines for United States Trustee Program (USTP) Enforcement Related to Bifurcated Chapter 7 Fee Agreements

I. Introduction

In our role as the "watchdog" of the bankruptcy process, one of the USTP's core responsibilities is to protect and preserve the integrity of the bankruptcy system. In doing so we seek to promote fair access to the bankruptcy system while ensuring that no participant is treated improperly. Enhancing access to justice not only includes removing barriers to entry but also ensuring that all debtors who seek bankruptcy protection in good faith and comply with the Bankruptcy Code's requirements receive the relief the law affords them. This includes ensuring that debtors are properly and adequately represented by their attorneys, who in turn are negotiating the terms of their fee arrangements and representation in good faith.

The Bankruptcy Code's[1] statutory framework generally prohibits postpetition payment of attorney's fees arising from prepetition retention agreements in chapter 7 cases. The Supreme Court held in *Lamie v. United States Trustee*[2] that chapter 7 debtors' attorney's fees may not be paid out of the bankruptcy estate, and almost all courts that have considered the issue have held that attorney's fees owing under a prepetition retainer agreement are a dischargeable debt.[3] As a

[1] 11 U.S.C. §§ 101 *et seq.*
[2] 540 U.S. 526, 537 (2004). The Court's reasoning was that 11 U.S.C. § 330(a) only authorizes compensation to professionals employed under § 327, which does not include the debtor's attorney in a chapter 7 case unless employed by the trustee under § 327(e).
[3] *See, e.g., Rittenhouse v. Eisen*, 404 F.3d 395, 397 (6th Cir. 2005).

result, the traditional model for representation in chapter 7 cases is payment of the entire attorney's fee for the case[4] in full before the case is filed.

"Bifurcated" fee agreements—which split an attorney's fee between work performed prior to the filing of a bankruptcy petition and work performed postpetition—have become increasingly prevalent in chapter 7 consumer bankruptcy cases.[5] Bifurcated agreements are generally structured so that minimal services—limited to those essential to commencing the case—are performed under a prepetition agreement for a modest (or no) fee, while all other services are performed postpetition, under a separate postpetition retention agreement, arguably rendering those fees nondischargeable.

Courts and stakeholders in the bankruptcy community have expressed differing views on the propriety of bifurcated fee agreements.[6] Some courts have held that bifurcation by its nature violates certain local rules governing the professional responsibilities of counsel owed to their debtor clients.[7] Other courts have held that nothing is inherently improper about bifurcation, provided that certain guardrails are obeyed.[8]

Absent contrary local authority, it is the USTP's position that bifurcated fee agreements are permissible so long as the fees charged under the agreements are fair and reasonable, the agreements are entered into with the debtor's fully informed consent, and the agreements are adequately disclosed. Bifurcated agreements provide an alternative under the current statutory framework to the traditional attorney's fee model, which some have noted present a barrier to accessing the bankruptcy system for debtors who may need relief but are unable to pay in full before filing. The benefits these type of agreements provide—increasing access and relief to those in need—must be balanced against the risk that these fee arrangements, if not properly structured, could harm debtors and deprive them of the fresh start afforded under the Bankruptcy Code.

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[4] Typically, a flat fee for all services essential to the successful completion of the case.

[5] This Memorandum only addresses enforcement guidelines for bifurcated fee arrangements. The exclusion from these guidelines of other alternative fee arrangements—such as the practice of filing chapter 13 cases solely to pay attorney's fees over time—should not be construed as acceptance of the propriety of such arrangements. When any fee arrangement violates the Bankruptcy Code or Rules, the USTP will take enforcement actions as appropriate.

[6] *See, e.g.,* Terrence L. Michael, *There's A Storm A Brewin: The Ethics and Realities of Paying Debtors' Counsel in Consumer Chapter 7 Bankruptcy Cases and the Need for Reform*, 94 AM. BANKR. L.J. 387 (2020); Adam D. Herring, *Problematic Consumer Debtor Attorney's Fee Arrangements and the Illusion of "Access to Justice"*, ABI JOURNAL, Vol. XXXVII, No. 10, Oct. 2018; Daniel E. Garrison, *Liberating Debtors from "Sweatbox" and Getting Attorneys Paid*, ABI JOURNAL, June 2018, at 16. *See also* Adam D. Herring, "Great Debates" at the ABI Consumer Practice Extravaganza (Nov. 5, 2021).

[7] *See, e.g., In re Baldwin*, No. 20-10009, 2021 WL 4592265 (Bankr. W.D. Ky. Oct. 5, 2021); *In re Prophet*, 628 B.R. 788 (Bankr. D.S.C. 2021), *rev'd and remanded* No. 9:21-cv-01082-JMC, 2022 WL 766352 (D.S.C. Mar. 14, 2022).

[8] *See, e.g., In re Kolle*, No. 17-41701-CAN, 2021 WL 5872265 (Bankr. W.D. Mo. Dec. 10, 2021); *In re Brown*, 631 B.R. 77, 101 (Bankr. S.D. Fla. 2021); *In re Carr*, 613 B.R. 427 (Bankr. E.D. Ky. 2020); *In re Hazlett*, No. 16-30360, 2019 WL 1567751 (Bankr. D. Utah Apr. 10, 2019).

The USTP's enforcement approach to bifurcated agreements balances these concerns. The USTP will review bifurcated fee agreements to ensure that they harm neither the debtors who rely on the bankruptcy system to obtain relief nor the integrity of the system. When appropriate, we will bring enforcement actions to address these harms. This document sets forth general guidelines that United States Trustees and their staff should use to assist them in determining whether to take enforcement action with respect to bifurcated fee agreements.

II. Attorney's Fees Under Bifurcated Agreements Must Be Fair and Reasonable

When reviewing attorney fee agreements in consumer cases, our first consideration is to ensure that the agreements serve the best interests of clients, not their professionals. This tension is most evident—and the potential for the greatest harm to debtors exists—in the structuring of fees under bifurcated agreements. The three most common fee-related issues we see in cases involving bifurcated fee agreements relate to the allocation of fees and services, the reasonableness of the fees, and third-party financing.

First, it is important to ensure that there is a proper allocation of prepetition and postpetition fees and services. This issue commonly arises in no- or low-money down cases. It is the USTP's position that fees earned for prepetition services must be either paid prepetition or waived, because the debtor's obligation to pay those fees is dischargeable. This is particularly important to ensure—and to clearly document—that debtors receive appropriate prepetition consultation and legal advice, including with respect to exemptions and chapter selection.[9] Debtors who enter into bifurcated fee agreements should receive the same level of representation as debtors who enter into traditional fee agreements. Bifurcation must not foster cutting corners in properly preparing the case for filing by eliminating tasks that should be performed prepetition or postponing all or some of those services until after the petition is filed to ensure that the attorney can bill for those services postpetition. Additionally, fees for postpetition services must be rationally related to the services actually rendered postpetition,[10] so that a flat postpetition fee is not a disguised method to collect fees for prepetition services. Attorneys also should not advance filing fees and seek their reimbursement postpetition. Advanced filing fees are generally held to be dischargeable prepetition obligations.[11]

Second, attorney's fees charged to debtors in bifurcated cases—as in all cases—must be reasonable.[12] Bifurcated fee agreements should not be viewed as an opportunity to collect higher fees than those collected from clients who pay in full, before filing. For example, it would be inappropriate for an attorney to offer a debtor a fee of $1,500 if they pay upfront, and $2,000 if they pay over time postpetition, particularly given that fees for prepetition work should have been paid or waived.

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[9] The Bankruptcy Code requires attorneys to certify, by signing the petition, that they have performed a reasonable investigation into the facts and circumstances of the case and that the attorney, after performing an adequate inquiry, has no knowledge that the information in the schedules is incorrect. 11 U.S.C. §§ 707(b)(4)(C–D).
[10] *See Brown*, 631 B.R. at 93 (citing *Hazlett*, 2019 WL 1567751).
[11] *See, e.g., Matter of Riley*, 923 F.3d 433, 439-40 (5th Cir. 2019); *Brown*, 631 B.R. at 102-03.
[12] 11 U.S.C. § 329(b).

Third, arrangements that employ outside parties to finance bifurcated fee agreements, including (but not limited to) factoring, assignment of the attorney's accounts receivable, and direct lending to clients, warrant significant additional scrutiny. The particulars of arrangements under which a third party finances the debtor's postpetition attorney's fees must be fully disclosed under Bankruptcy Rule 2016(b), including the details of the attorney's relationship with the entity providing the financing. The nature of these arrangements may incentivize overcharging, because the attorney generally receives only a percentage of the total fee charged or otherwise incurs financing costs. It is improper for an attorney using third-party financing to pass along the cost of that financing to their clients. Third-party financing arrangements may also create unwaivable conflicts of interest between the attorney and their clients and may violate applicable state ethical rules.[13]

The USTP should bring enforcement actions where bifurcated fee agreements adversely affect the client's representation, seek recovery of unreasonable fees, improperly allocate fees or services, improperly burden debtors with financing costs, or otherwise result in conflicts of interest.

III. Ensuring Adequate Attorney Disclosure and Fully Informed Debtor Consent to Bifurcated Agreements

In addition to ensuring that bifurcated agreements are fair and reasonable, courts examining and permitting bifurcated agreements have emphasized the importance of adequate disclosure and the client's fully informed consent. One court permitting the use of bifurcated agreements noted that "the propriety of using bifurcated fee agreements in consumer chapter 7 cases is directly proportional to the level of disclosure and information the attorney provides to the client and the existence of documentary evidence that the client made an informed and voluntary election to enter into a postpetition fee agreement."[14] Similarly, professional conduct standards governing fee sharing and limited scope representation[15] reinforce the need for disclosure and informed consent. The requirement of informed consent to bifurcated agreements is derived directly from the Bankruptcy Code's requirements that attorneys representing consumer debtors deal forthrightly and honestly with their clients, that they not make misrepresentations about the services they will provide or the benefits and risks of filing bankruptcy, and that they make certain disclosures and promptly enter into a clear and conspicuous written contract explaining the services the attorney will render and the terms of any fee agreement.[16]

The following disclosure and consent factors can assist your review of bifurcated fee agreements and determination whether an enforcement action is appropriate:

- Whether the attorney has clearly disclosed the services that will be rendered prepetition and postpetition, and the corresponding fees for each

[13] *Brown*, 631 B.R. at 99, n. 34.
[14] *In re Hazlett*, No. 16-30360, 2019 WL 1567751 at *8 (Bankr. D. Utah Apr. 10, 2019).
[15] *See, e.g.,* Model Rules of Prof. Conduct R. 1.2(c), 5.4(a) (AM. BAR ASS'N 1983).
[16] 11 U.S.C. §§ 526–528.

segment of the representation, including that certain listed services may not arise in a particular case.

- Whether the attorney has disclosed their obligation to continue representing the debtor regardless of whether the debtor executes a postpetition agreement, unless the bankruptcy court permits the attorney's withdrawal.

- Whether the attorney has clearly disclosed that the client is being provided the option to choose a bifurcated fee agreement, any difference in the total attorney's fee between the bifurcated fee agreement and a traditional fee agreement,[17] and the client's options with respect to the postpetition fee agreement.[18]

- Whether the agreement includes clear and conspicuous provisions explaining the options, costs, and consequences of entering into a bifurcated fee agreement and providing the debtor with an option to rescind the agreement.

The disclosure and consent considerations described above are not exhaustive and should not be mechanically applied, but instead qualitatively assessed to determine whether adequate disclosures were made and whether those disclosures permit a consumer debtor considering a bifurcated fee agreement to give informed consent. Additionally, when applying these criteria we must consider local authority and act accordingly where local rules or jurisprudence have imposed other clear standards for adequate client disclosures and conditions of informed consent—whether more or less stringent.[19]

IV. Ensuring Adequate Public Disclosure

The Bankruptcy Code and Rules also require public transparency in professionals' dealings with their clients, and the USTP regularly enforces these requirements. All attorneys representing debtors must promptly file disclosures of the particulars of their fee agreements and the amounts they have been paid under section 329(a) of the Bankruptcy Code and Bankruptcy

[17] As discussed *supra*, it is the USTP's position that fees under bifurcated agreements should not be higher than those under traditional fee agreements for the same services.
[18] Generally, these options are for the client to sign the postpetition agreement for the attorney's continued representation; to hire other counsel; or to proceed in the case *pro se*.
[19] We are aware that some courts have found that bifurcation is impermissible under local rules governing representation of debtors. *See, e.g., Baldwin*, 2021 WL 4592265; *Prophet*, 628 B.R. 788. The existence and wording of such local rules varies, and bankruptcy courts within a district may interpret them differently. In determining whether to take an enforcement action with respect to a bifurcated fee arrangement, the USTP will consider and follow applicable local authority but also should be mindful to exercise discretion in accordance with these guidelines to focus on those cases where the debtor is harmed or the integrity of the bankruptcy process is jeopardized.

Rule 2016(b).[20] The nature of bifurcated agreements requires detailed disclosures in order to satisfy the Bankruptcy Code's standards. Failure to make adequate public disclosures required under the Bankruptcy Code and Rules may be a basis to bring an enforcement action.[21]

V. Conclusion and Important Notes

It is vital that the USTP acts consistently across jurisdictions in these and other legal matters. Please ensure that all staff who engage in civil enforcement in consumer cases are familiar with these guidelines. Each case will have unique facts that should be considered in a manner consistent with these guidelines.

Please consult the Office of the General Counsel if there are any questions regarding these guidelines or their application in specific cases. This memorandum is an internal directive to guide USTP personnel in carrying out their duties, but the final determination of whether a bifurcated fee agreement complies with the Bankruptcy Code and Rules resides solely with the court. Nothing in this memorandum has any force or effect of law or imposes on parties outside the USTP any obligations beyond those set forth in the Bankruptcy Code and Rules.[22]

Thank you for your continued cooperation and diligence in this important area of responsibility.

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[20] The default remedy for failure to make proper disclosures under section 329(a) is return of all fees. *See, e.g., SE Prop. Holdings, LLC v. Stewart*, 970 F.3d 1255, 1266 (10th Cir. 2020).

[21] Postpetition attorney's fee installment payments should be disclosed as monthly expenses on the debtor's Schedule J. This allows courts and the USTP to quickly evaluate whether the debtor can actually afford the attorney's fees charged under the postpetition contract, which is a factor in determining whether the bifurcated agreement is in the debtor's best interest. However, note that we do not take the position that Rule 2016(b) requires that attorneys using bifurcated agreements file a supplemental compensation disclosure each time they receive a postpetition payment, provided that the terms of the postpetition agreement have been previously disclosed and there have been no material changes.

[22] Additionally, nothing in this memorandum: (1) limits the USTP's discretion to request additional information, conduct examinations under Bankruptcy Rule 2004, or conduct discovery with respect to its review of a particular fee arrangement; (2) limits the USTP's discretion to take action with respect to any particular fee arrangement; or (3) creates any private right of action on the part of any person enforceable against the USTP, its personnel, or the United States.

Faculty

Michelle H. Bass is a partner at Wolfson Bolton PLLC in Troy, Mich., where she manages its consumer bankruptcy practice group. She represents both debtors and creditors in consumer bankruptcy proceedings and primarily represents debtors in chapter 7 liquidations and chapter 13 reorganizations, which span from high-net-worth and high-income-earning individuals to individuals seeking to prevent foreclosure or repossession of secured collateral. She also represents both debtors and creditors in divorce-related bankruptcy proceedings, and is a frequent speaker on the intersection of bankruptcy and family law disputes. Ms. Bass has represented individuals reorganizing under chapter 11, including subchapter V, as well as small businesses going through chapter 7 liquidation, and has stopped foreclosures, the stripping of secured liens and the cramming down of loans on collateral for individuals seeking to reorganize under chapters 13 and 11. She also has successfully defended appeals in the Federal Eastern District for the State of Michigan and the Sixth Circuit Court of Appeals. Ms. Bass is a member of ABI, for which she co-chairs its Consumer Bankruptcy Committee. She also is a member of the Detroit Consumer Bankruptcy Association and the Oakland County Bar Association, for which she chairs its Debtor/Creditor Committee. Ms. Bass is Board Certified in Consumer Bankruptcy Law, has been named by *Michigan Lawyer's Weekly* as one of 2019's 30 Women in Law, and has been consistently recognized by *Super Lawyers* as a Rising Star in consumer bankruptcy since 2014. She received her B.A. from the University of Michigan and her J.D. from the University of Detroit Mercy School of Law.

Melissa J. Davey is a standing chapter 13 trustee in the Northern District of Georgia for the Atlanta and Newnan divisions based in Atlanta, effective Oct. 1, 2017. Her office administers thousands of chapter 13 cases assigned to Hon. Paul M. Baisier and Hon. Lisa Ritchey Craig. Prior to her appointment, Ms. Davey was in private practice in Atlanta as a member of Stites & Harbison, PLLC in its Creditors' Rights and Bankruptcy Group, where she focused primarily on representing institutional lenders and other creditors in bankruptcy and consumer and commercial litigation. Prior to joining Stites and Harbison, she was a staff attorney for a chapter 13 trustee in the Northern District of Georgia for more than six years. She has also previously represented debtors in bankruptcy. Ms. Davey is currently a board member at large for the National Association of Chapter 13 Trustees and serves on the Bench and Bar Committee for the U.S. Bankruptcy Court for the Northern District of Georgia, which she previously chaired. She also serves on the advisory board for ABI's Southeast Bankruptcy Workshop and is a Barrister in the W. Homer Drake, Jr. Georgia Bankruptcy American Inn of Court. In the past, Ms. Davey served as president/officer for the Bankruptcy Section of the Atlanta Bar Association, as co-chair of the Georgia Network of the International Women's Insolvency & Restructuring Confederation, and as president of the Metro Atlanta Consumer Bankruptcy Attorney Group. She received her B.A. in political science and French *magna cum laude* with honors and her J.D. from the Emory University School of Law in 2003. During her junior year of undergrad, she studied at the Sorbonne and the Institut Catholique in Paris.

Hon. Bruce A. Harwood is Chief U.S. Bankruptcy Judge for the District of New Hampshire in Concord, appointed to the bench in March 2013. He also serves on the First Circuit's Bankruptcy Appellate Panel. Prior to his appointment to the bench, Judge Harwood chaired the Bankruptcy, Insolvency and Creditors' Rights Group at Sheehan Phinney Bass + Green in Manchester, N.H., representing

business debtors, asset-purchasers, secured and unsecured creditors, creditors' committees, trustees in bankruptcy, and insurance and banking regulators in connection with the rehabilitation and liquidation of insolvent insurers and trust companies. He was a chapter 7 panel trustee in the District of New Hampshire and mediated disputes arising in debtor/creditor relations. Judge Harwood serves on ABI's Board of Directors on its Communication, Information and Technology Committee. He served as co-chair of ABI's Commercial Fraud Committee, as program co-chair of (and presently as judicial advisor to) ABI's Northeast Bankruptcy Conference; and as Northeast Regional Chair of the ABI Endowment Fund's Development Committee. He also served on ABI's Civility Task Force. Judge Harwood is a Fellow in the American College of Bankruptcy and was consistently recognized in the bankruptcy law section of *The Best Lawyers in America*, in *New England SuperLawyers* and by *Chambers USA*. He received his B.A. from Northwestern University and his J.D. from Washington University School of Law.

Adam D. Herring is Of Counsel with Nelson Mullins Riley & Scarborough LLP in Atlanta, where he focuses his practice on bankruptcy, restructuring, consumer financial services regulation and related litigation. As former associate general counsel in the Department of Justice's U.S. Trustee Program, he provided senior-level strategic guidance for high-profile bankruptcy matters, managed litigation teams for significant multijurisdictional cases, and negotiated resolutions in nationwide matters involving financial institutions and other parties. Mr. Herring has experience representing debtors and creditors in chapter 11 bankruptcy cases and parties in bankruptcy-related litigation, including as first-chair trial counsel in fraudulent and preferential transfer avoidance actions. He regularly speaks and writes about emerging issues of bankruptcy law. Previously, Mr. Herring was in private practice in Atlanta, representing parties in chapter 7, 11 and 13 bankruptcy cases and in bankruptcy and commercial litigation. He is a 2019 honoree of ABI's "40 Under 40" program, received a Director's Award from the U.S. Trustee Program, and was named Volunteer of the Year for the Atlanta Legal Aid Society in 2015. Mr. Herring currently serves as Newsletter Editor for ABI's Ethics and Professional Compensation Committee. He received his undergraduate degree with distinction from the University of North Carolina at Chapel Hill and his J.D. from Emory University School of Law.