Ethics Presentation: Ghostwriting and Limited Representation

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UNBUNDLED LEGAL SERVICES AND GHOSTWRITING: PURCHASING THE MEAL ALA CARTE

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In 1999, the Kansas Citizens Justice Initiative issued a report on unbundling and limited scope representation. It noted that limited scope representation

> "could have substantial benefit to consumers by increasing access to legal services."[1]

The report recommended that the state bar:

> "study the extent to which unbundling of legal services can be accomplished without undermining the lawyers' ethical obligation to the client it at recommendation."

Kansas state courts have responded by enacting Rule 115A – Limited Representation. See **Exhibit A**.

The attorney must file a Notice of Limited Entry of Appearance and note in any pleading or motion that he/she is the attorney for the client under the scope of a limited entry of appearance. A form of the Limited Entry of Appearance is attached as **Exhibit B**. Under Kansas Supreme Court Rule 115A, a Notice of Withdrawal Attorney a form of which is attached hereto as **Exhibit C**.

The Kansas Federal District Court has enacted Rule 83.5.8. This Rule states as follows:

(a) **In General**. A lawyer may limit the scope of representation in civil cases if the limitation is reasonable under the circumstances and the client gives informed consent in writing.

(b) **Procedures**. A lawyer who provides limited representation must comply with Kansas Supreme Court Rule 115A, as later amended or modified, with two exceptions. First, the lawyer must use the federal forms rather than the Kansas State Court forms. Second, Rule 115A(c) does not apply in the District of Kansas. Any attorney preparing a pleading, motion or other paper for a specific case must enter a limited appearance and sign the document. The Bankruptcy Court may have additional Local Rules that govern its limited scope practice.

(c) **Participation**. The United States District Court for the District of Kansas allows any attorney registered as active to practice before this court to offer limited scope representation.

The United States Bankruptcy Court for the District of Kansas enacted Standing Order No. 14.1, which abrogates Kansas Federal District Court Rule 83.5.8 because:

> "Attorneys practicing in this Court routinely and permissively limit the scope of their representation in certain situations, such as adversary proceedings and appearances for specific purposes."

The Bankruptcy Court felt that the procedures of the Kansas Federal District Court practically could not apply in Bankruptcy Court.

Thus, limited scope representation is recognized in all courts in Kansas.

Criminal law is replete with the Sixth Amendment Right to Counsel. See *e.g. Iowa v. Tovar*, 541 U.S. 77, 87; 124 S.Ct. 1379, 158 L.Ed 2d 209 (2009); *Maine v. Moulton*, 474 U.S. 159, 170; 106 S.Ct. 477, 88 L.Ed 2d 481 (1985) (right to counsel at "critical stages of criminal process.")

The Corollary Principal further exists, that is, the "right to assistance of counsel implicitly embodies a correlative right to dispense with a lawyer's help." *Faretta v. California,* 422 U.S. 806, 814; 95 S.Ct. 2525, 45 L.Ed 2d 562 (1975); c.f. *Knight v. Phillips*, 2012 WL 5955058 D. E.D. NY (Nov. 28, 2012)

While these cases involve the right of counsel in criminal proceedings, they do suggest the ethical duties that exist for attorneys in limited scope representation.

The Model Rules of Professional Conduct permits limited scope representation. Rule 1.2(c) provides:

> "[A] lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent." *Model Rules of Professional Conduct* Rule 1.2(c) (2000).

Official comments provide as follows:

> "The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms in which the lawyer's services are made available to the client…. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly, that the lawyer regards as repugnant or imprudent." *Id.* at Rule 1.2, Comment 6

Nationally, the degree of enthusiasm for limited scope representation varies. Various Courts have held that while unbundling of services is permissible, it potentially may constitute a violation of Model Rule 1.1, 1.2, 1.4 and 1.5, as well as 11 U.S.C. §707(b)(4)(C). In *In Re Seare*, 515 B.R. 599, (9th Cir. BAP, 2014), the attorney sought engagement under a 19 page limited scope retainer agreement. The limited scope retainer agreement provided that services would include analysis of the debtors' financial condition, the review, preparation and filing of the petition, schedules and statement of affairs, representation at the meeting of creditors and reasonable in person or telephone consultation with the client. Additional fees may be applied.

An adversary action was filed in *Seare* seeking a non-dischargeable judgment against the debtors. When counsel failed to represent the debtors in the adversary case, the Bankruptcy Court conducted a show cause hearing as to his potential violations of 11 U.S.C. §707(b)(4)(C).[1]

The Bankruptcy Court held that counsel had violated his duty of competence under Model Rule 1.1 by deciding to unbundle adversary proceedings in the debtors' case. The Court also found that counsel has violated Model Rule 1.2(c) because unbundling the service of representation in the adversary proceeding was not reasonable in light of the debtors' circumstances.

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[1] 11 U.S.C. §707(b)(4)(C) – the signature of an attorney on a petition, pleading or written motion shall constitute a certification that the attorney has –

- (i) performed a reasonable investigation into the circumstances that give rise to the petition, pleading or written motion; and
- (ii) determine that the petition, pleading or written motion –
  - (I) is well grounded in facts; and
  - (II) is warranted by existing law or good faith argument for the extension, modification, or reversal of existing law does not constitute an abuse under paragraph (1).

The Court did not find fault with counsel using pre-prepared forms that limit the scope of services, including a flat fee. It, however, did find that deciding to unbundle services reasonably necessary to achieve a client's discharge objectives before even meeting the client was unreasonable and violated Rule 1.2(c). (*In Re Seare*, 493 B.R. 158, 194 (Bankr. D. Nev. 2013))

The Court also faulted the debtors' counsel for not communicating his intent not to represent the debtors in the adversary proceeding until after the complaint had been filed. Finally, the unbundling was counsel's idea, which the Court found ran contrary to the American Bar Association's guidance that should be client driven.[1]

The Bankruptcy Appellate Panel further found that the debtors' counsel violated Model Rule 1.5 because he did not sufficiently explain the scope of the services required under the flat fee and the scope of services available for additional fees. The retainer agreement was found to be in legal jargon as opposed to plain English. There was no explanation what adversary proceedings were, although the debtors understood that they were excluded and the debtors knew that non-dischargeable allegations were excluded, but did not know what they were.

Further, the debtors were not aware that they would likely have to pay for additional services because of the presence of the non-dischargeable claim that would likely result in an adversary action under 11 U.S.C. §523.

The debtors' counsel violated Model Rule 1.4 by failing to adequately communicate with the debtors and violated 11 U.S.C. §707(b)(4)(C) by his failure to adequately investigate the circumstances underlying the judgment held by the garnishing creditor.

Finally, the Court found that the debtors' counsel violated 11 U.S.C. §526 and 11 U.S.C. §528 finding that it was by definition a debt relief agency and had violated the prohibitions. The Appellate Court affirmed the decision concluding:

> "Consumer bankruptcy attorneys can unbundle their services in Nevada, particularly adversary proceedings. However, unbundling, or limited scope representation, needs to comply with the rules of ethics and the Bankruptcy Code. A qualitative analysis of each individual debtor's case must be done at intake to insure that his or her reasonable goals and needs are being met. That

[1] Bankr. D. Nev. 2013 citing Model Rule 1.2(c). Thus the retainer agreement was seen as a contract of adhesion. The debtors did not understand what services were unbundled and that the unbundling of services and a flat fee was unlikely to meet their objectives.

calculus was not being applied in this case. For the foregoing reasons, we AFFIRM."[1]

Judge Jury in his concurring opinion offered a punch list for attorneys to avoid the violation of ethical rules when undertaking limited scope representation of consumer debtors. This punch list was as follows:

a. At the initial intake interview with the debtor, identify fully and completely the debtor's goals;

b. Do not rely solely on the debtor's input to help him or her ascertain the debtor's goal. Conduct a reasonable investigation of the debtor's assets and liabilities. If a judgment has been taken against the debtor, the attorney must make a reasonable inquiry as to the nature of the judgment in order to determine as to whether it may be non-dischargeable;

c. If, after ascertaining the debtor's goals, the attorney believes that a limited scope representation is consistent with those goals, the attorney will then fully explain to the debtor the consequences and inherit risks which might arise if an adversary action is filed against the debtor and the attorney has not included representation in that proceeding in the unbundled services to be performed. Do not use "legal jargon." Informed consent requires a detailed explanation;

d. The attorney must customize the retainer agreement to the goals of the debtor;

e. After describing to the debtor the risks of limited scope representation, the attorney must give the debtor the opportunity to "shop elsewhere" for an attorney who will provide full representation before entering into the contractual agreement with the debtor for a limited scope representation;

f. The attorney should document as fully as possible all the steps taken to comply with these requirements.

(See also *In Re Cuomo*, 9th Cir. BAP 2014 WL 5358180, October 21, 2014, where the 9th Circuit BAP affirmed the imposition of monetary sanctions against the same debtor's attorney that represented Seare.)

[1] *In Re Seare*, 515 B.R. at 622

In *Cuomo* the BAP found a violation of the Nevada version of the Model Rules of Conduct and 11 U.S.C. §727(b)(4)(C). The Appellate Court affirmed the Bankruptcy Court's determination that the retainer agreement between the debtor and counsel "went too far" in transferring all responsibility for the accuracy of the information to the debtor.

Restatement (Third) of the Law Governing Lawyers, Section 19, Comment C (2000 Notes) offers guidance concerning the reasonableness of a limited scope representation agreement. The guidelines offered by the restatement include:

a. A client must be informed on the consent to any problems that may arise related to the limitation;

b. A contract limiting the representation shall be construed "from the standpoint of a reasonable client";

c. If a fee is charged, it must be reasonable in light of the scope of the representation;

d. Changes to representations made a reasonably long time after beginning the representation must meet the more stringent test for post inception, contracts or modification;

e. The limitation terms must be reasonable in light of the client's sophistication level and circumstances.

See also *Hale v. United States Trustee*, 509 F.3d 1139, 1148 (9th Cir. 2007) (counsel may not exclude critical and necessary services from representation of the debtor); *In Re* Burrton, 442 B.R. 421, 452-453 (Bankr. W.D. NC 2009) (disapproving of a limited scope representation agreement which excluded filing of lien avoidance or defending against stay relief motions, finding that these constitute "key services" to the bankruptcy); In *Re Johnson*, 291 B.R. 462, 469 (Bankr. D. Minn. 2003) (attorneys may not "unbundle the core package of ordinary legal representation reasonably anticipated in every case.")

A Kansas case of *In Re Wagers*, 340 B.R. 391, 398 (Bankr. D. Kan. 2006) offers guidance upon the attempt to limit services:

> "[W]hile bankruptcy courts have taken different views of the obligations of attorneys undertake by representing clients in filing chapter 7 bankruptcy petitions, none appears to have allowed the exclusion of all post-petition services [in a limited scope agreement]. Attorneys are almost required to accompany their clients to the meeting of creditors, scheduled and held only after the petition is filed. Some bankruptcy courts also require attorneys who prepare chapter 7 petitions to continue to represent the debtors at a minimum in post-petition matters that arise in the main bankruptcy case, such as stay relief motions. Indeed, some matters that may arise – objections to exemptions the debtors have claimed, objections to discharge based upon alleged errors or omissions in the Schedules or Statement of Financial Affairs, and motions to dismiss under §707(b) for substantial abuse – are so closely related to the advice the attorney gave in the pre-petition preparation for filing, that the attorney would at least be morally bound, and might be legally bound, to defend the debtors' position against such attacks. Some courts go even further and require the attorneys who represent the debtors in any adversary proceeding that might be brought against them. To the extent that the court before which an attorney files a position takes the view that the representation automatically extends to post-petition matters, the attorney could not effectively limit the representation to pre-petition matters as a way to improve the chances of getting paid for the post-petition representation the debtor needs." (340 B.R. at 398-399)

In Re Wood, 408 B.R. 841 (Bankr. D. Kan. 2009). In a fee disgorgement case, Chief Judge Nugent considered the issue of ghost writing unbundled legal services and out-of-state lawyers unauthorized to practice within the state of Kansas offering legal services in pleadings on a pro se basis. Judge Nugent found that it was a violation of the Kansas Rules of Professional Conduct and the outsource of the preparation of bankruptcy filings to non-lawyers or lawyers not licensed in Kansas constituted an unauthorized practice. The provision of a "help-line" service by out-of-state lawyers for Kansas bankruptcy clients to call and receive advice concerning their bankruptcy cases from either non-lawyers or non-Kansas lawyers is the unauthorized practice of law. Thus, the local lawyers association with the out-of-state law firm in filing bankruptcy cases prepared by the out-of-state lawyers violated Rule 5.5 of Kansas Rules of Profession Conduct concerning the Prohibition of Assisting Others in the Unauthorized Practice of Law.

See also In Re Kinderknecht, 470 B.R. 149 (Bankr. D. Kan. 2012) (out of state consumer debt settlement services which employed no attorneys on its staff who were licensed to practice in Kansas violated the Kansas Credit Services Organization Act (KCSOA). Out of state consumer debt service qualified as a "supplier" of goods and services so as to be subject to the provisions of the Kansas Consumer Protection Act.)

But see Hayes v. Ruther, 298 Kan. 402, 313 P.3d 782 (2014) (under the Kansas Credit Services Organization Act (KCSOA) a law firm of an attorney who is exempt from the duties, limitations and sanctions provisions of the KCSOA is also exempt from the requirements of the act, abrogating *Consumer Law Associates v. Stork*, 47 Kan. App. 2d 208, 276 P.3d 226 (2012) and *In Re Kinderknecht*, 470 B.R. 149 (Bankr. D. Kan. 2012).

Other Courts are even more emphatic –

> *In Re Bulen*, 375 B.R. 858, 866 (Bankr. D. Minn. 2007) (noting that unbundled legal representation is like putting "a bandaid on a gun shot.")
>
> *In Re Castorena*, 270 B.R. 504, 529 (Bankr. D. Idaho 2001) (unless debtors truly understand what they are bargaining away, the bargain is a sham. Attorney refused to appear at 341 meeting and did not sign pleadings.)
>
> c.f. *In Re Kieffer*, 306 B.R. 197, 207 (Bankr. N.D. Ohio 2004) (routine services include motion for turnover of tax refunds, Rule 2004 examination, objection to exemption, objection to motion for relief from stay, simple notice of sale.)
>
> *In Re Johnson,* 291 B.R. 462 (Bankr. D. Minn. 2003) (counsel sanctioned for not attending 341 meeting. Client agreement specifically excluded attendance at 341 meeting.)
>
> *In Re Egwim*, 291 B.R. 559 (Bankr. N.D. Ga. 2003) (debtor's attorney must represent debtor in connection with any contested matter or adversary action involving debtor.)

Castorena identified the following services as essential services to be provided in any limited scope representation:

a. The proper filing of required schedules, statements and disclosures, including any required amendments;

b. Attendance at the §341 meeting;

c. Turnover of assets and cooperation with the trustee;

d. Compliance with tax turnover and other orders of the Bankruptcy Court;

e. Performance of the duties imposed by 11 U.S.C. §521;

f. Counseling in regard to and the reaffirmation, redemption, surrender and retention of secured consumer goods;

g. Responding to issues that arise in the bankruptcy case, such as violations of stay and stay relief requests, objections to exemptions and avoidance of liens (exemptions).

In order to gather the informed consent of the client:

> "Attorneys must explain the benefits, burdens and consequences of bankruptcy to their clients to the extent reasonably necessary to permit informed decisions about the case." *In Re Pereira Santiago*, 457 B.R. 172, 176 (Bankr. D. P.R. 2011)

Because the statutory definition of "debt relief agency" under 11 U.S.C. §101(12)(A) was broad enough to include an attorney, a statutory basis exists for determining the attorney's conduct under 11 U.S.C. §526, 11 U.S.C. §527 and 11 U.S.C. §528. The disclosure that is required under 11 U.S.C. §527 include that:

a. All information that the debtor is required to provide with a petition and throughout the case be complete, accurate and truthful;

b. All assets and liabilities are required to be completely and accurately disclosed in the bankruptcy documents and the replacement value of each asset must be stated in the documents;

c. Monthly income and disposal income is required to be provided;

d. The debtor's information may be audited and the failure to provide such information to the auditor may result in the dismissal of the case or other sanctions;

e. The attorney must provide a written contract of representation.

In Re Taylor, 655 F.3d 274, 286 (3rd Cir. 2011) (attorneys in a bankruptcy case must review or have an obligation to review information provided by clients and determine its reasonability and value. If such information calls into question its reasonableness or accuracy, the attorney has an affirmative duty to determine which facts can be reasonably supported.)

Taylor ultimately involved creditor counsel misconduct in which the lawyer relied to his detriment on computerized information with a high volume of practice and a failure to verify such information for its accuracy, thus leading to the attorney misconduct before the Court.

Ghostwriting itself may be a form of unbundled legal services. *See* John C. Rothermich, *Ethical and Procedural Implications of "Ghostwriting" for Pro Se Litigants: Towards Increased Access to Civil Justice*, 67 Fordham L. Rv. 2687 (1999); *Jona Goldschmidt in Defense of Ghostwriting*, 29 Fordham Urban Law Journal Issue 3, Article 17 (2001); Forrest S. Mosten, *Unbundled Legal Services and Unrepresented Family Court Litigants: Current Developments in Future Trends,* 40 Fam. Ct. Rev. 15 n.1 (2002); Ira P. Robins, *Ghostwriting: Filing in the Gaps of Pro Se Prisoners' Access to the Court*, 23 Geo. J. Legal Ethics, 271 (210).

Goldschmidt's and Robins' articles recognize several arguments against ghostwriting:

1. The undue advantage based upon leniency given to a pro se party;
2. Ghostwriting violates the attorney's duty of candor to the Court;
3. Violates the attorney's obligations under Rule 11 and Rule 9011 to sign pleadings and certify the claims and defenses raised and are not frivolous. See *Duran v. Carris*, 238 F.3d 1268, 1273-74 (10th Cir. 2001) (listing federal cases in courts' objections to ghostwriting);
4. Rationales based upon deception;
5. Ethical prohibition against dishonesty, fraud, deceit or misrepresentation;
6. Conduct prejudicial to the administration of justice;
7. The violation of ethics rules through the acts of another.

Rule 11 Violations and Appearance and Withdrawal of Counsel Issues.

Does the lawyer's duty of confidentiality protect the lawyer and the pro se litigant from compelled disclosure of the attorney's ghostwriting?

Rule 1.6 of the Model Rules provides in pertinent part:

1. (a) a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures impliedly authorized in order to carry out the representation, and except as stated in paragraph (b);

   (b) the lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:

   (1) to prevent the client from committing a crime; or
   (2) to comply with the requirements of law or orders of any tribunal; or
   (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; or
   (4) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or
   (5) to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Ghostwriting Court Decisions

Ricotta v. California, 4 F. Supp. 2d 961, 986 (D. S.D. Cal. 1998) (the issue of whether an attorney who ghost writes for a plaintiff can be held in contempt is a matter of first impression of the 9th Circuit.)

The three cases cited by *Ricotta* were: *Ellis v. State of Maine*, 448 F.2d 1325 (1st Cir. 1971); *Johnson v. Board of County Commissioners*, 868 F. Supp. 1226 (D. Colo. 1994); *Laremont-Lopez v. Southeastern Tidewater Opportunity Center,* 968 F. Supp. 1075, 1077 (E.D. Va. 1997).

The Court in *Ellis* held that it could not approve of the practice of ghost writing finding that if a brief is prepared in any substantial part by a member of the bar, it must be signed by the lawyer.

In *Johnson*, the Court found that while it was inappropriate for an attorney to ghost write for a pro se party, the lack of clearly defined rules prohibiting such a practice rendered sanctions inappropriate. The Court found that a pro se litigant's pleadings were afforded greater latitude as a matter of judicial discretion and that such ghost writing would give an unfair advantage to the other side. Second, the Court found that ghost writing delivered an evasion responsibilities imposed by Rule 11 and third, the Court found that such behavior implicated the rules of professional responsibility, specifically DR 1-102, which provides that an attorney:

> "should not engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

In *Laremont-Lopez*, the Court held that ghost writing unfairly gives the pro se litigant a less stringent standard than pleadings drafted by lawyers, nullified the certification requirement of Rule 11 and circumvented local rules concerning withdrawal of lawyers.

Other ghost writing cases include:

In Re Brown, 354 B.R. 535 (Bankr. N.D. Ok. 2006) (attorney with conflict who was forced to withdraw was ghost writing for pro se debtor);

In Re Cash Media Systems, Inc., 326 B.R. 655 (Bankr. S.D. Texas 2005) (suspended attorney ghost writing during period of suspension);

Ligouri v. Hanson, 2012 U.S. Dist. Lexis 376 (D. Nevada 2012) (litigant with counsel using another attorney to ghost write pleadings held not a violation);

In Re Merriam, 250 B.R. 724 (Bankr. Bankr. D. Colo. 2000) ($399 fee not excessive, absent evidence to the contrary, debtor's attorney need not always attend 341 meeting, but counsel cannot ghost write petition and schedules);

In Re West, 338 B.R. 906 (Bankr. N.D. Ok. 2006) (attorney unable to e-file ghost wrote bankruptcy pleadings and schedules for client to file manually);

In Re Smith, 2013 WL 1092059 (Bankr. E.D. Tenn. 2013) (suspended lawyer ghostwriting pleadings for clients is in violation of Model Rule 1.0(d), 1.2(d), 3.3, 3.4 and 8.4 and FRBP 9011. Suspended lawyer argued that ghostwriting is "limited scope representation." Court disagrees finding that: (1) suspended lawyer did not effectively limit the scope of representation; (2) did not obtain the informed consent of the clients; (3) abandoned the clients and left them on their own and required them to make an inaccurate statement under oath. Although the Tennessee Rules of Professional Conduct did not require a limited scope representation in writing, the Bankruptcy Code does require a written engagement agreement that specifies what the lawyer would do under 11 U.S.C. §528(a)(4). The failure to provide the services promised is also in violation of 11 U.S.C. §526(a)(1). The debtors were not given informed consent and the limitations provided were not reasonable and, under the circumstances, neither the debtors, nor the attorney provided candor to the tribunal.);

In Re Mungo, 305 B.R. 762 (Bankr. D. S.C. 2003) (attorney's practice of ghostwriting violates local bankruptcy rules in South Carolina and Rules of Professional Conduct. Ghostwriting must be prohibited because it is deliberate ebasion of a bar member's obligations pursuant to Federal Rule 11 and anonymity afforded by ghostwriting cannot be policed. Federal Courts interpret pro se documents liberally and afford greater latitude as a matter of judicial discretion. Ghostwriting constitutes a misrepresentation that violates an attorney's duty of professional responsibility and candor to the Court. Ghostwriting taxes the Courts because it does not provide for proper service of motions and notices.);

Duran v. Carris, 238 F.3d 1268 (10th Cir. 2001) (authors who author pleadings and necessarily guide the course of litigation [through ghostwriting] with an unseen hand are of concern to the Court. Ghostwriting inappropriately shields attorney from responsibility and accountability for his actions in counsel.);

Wesley v. Don Stein Buick, Inc., 987 F. Supp. 884 (D. Kan. 1997) (defendants filed motions for order of disclosure as to the attorney allegedly ghostwriting for a pro se litigant. The Court finds that ghostwriting creates a legal concern because pro se pleadings are liberally interpreted which would give a pro se litigant unwarranted advantage of having a liberally construed pleading standard applied in its favor, while holding the parties represented by counsel to a more demanding scrutiny. The Court finds that disciplinary Rule 1.02 D. Kan. Rule 83.6.1 is violated by ghostwriting.)

*FIA Card Services, N.*A. *v. Pichette*, *et al.*, 116 A3d 770, 2015 WL 3645261, R.I. Sup. Ct. 2015 (Rule 11 is not applicable to attorneys for the assistance they provided in drafting papers subsequently filed by pro se litigants. In Rhode Island, Rule 11 juris prudence has revealed no instances in which sanctions were imposed for Rule 11 violation absent the filing of pleadings or other papers signed by an attorney. The Rhode Island Supreme Court draws a distinction between conduct that offends Rule 11 and that which may violate the Rules of Professional Conduct. The attorney shall not assist a pro se litigant with the preparation of pleadings, motions, or other documents unless the attorney signs the documents and discloses therein his or her identity and the nature and extent of the assistance that he or she has provided to the tribunal and to all parties to the litigation – full disclosure of the attorney's involvement, albeit limited, is the better practice.)

The case notes that various states have contrary results. See, e.g. Cal. Rules of Court Title 3, Chapter 3, Rules 3.35, 3.37. (no requirement for disclosure of attorney assistance in ghost written pleadings.)

Mass. Sup. Jud. Ct., Order In Re: Limited Assistance Representation (2009) (disclosure on the ghost written document of legal assistance was provided in the preparation of the document, but the attorney may remain anonymous.)

Colo. Rule of Professional Conduct 1.2; Colo. R. Civ. P. 11b (attorneys permitted to assist pro se litigants with document preparation, but require the fact of assistance and the attorney's name to be disclosed in the document.)

Attorneys permitted to provide anonymous assistance in the preparation of documents that will be filed with the Court as long as the notation that the document was "prepared with the assistance of counsel" appears on the document. (Conn. R. Super. Ct. Practice Book §4-2: Signing of Pleadings; Mass. Sup. Jud. Ct., Order In Re: Limited Assistance Representation (2009); N.H. Super. Ct. R. Civ. P. 17(g))

ARDC Supreme Court of Illinois : Adopted July 1, 2009, effective January 1, 2010.

RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND 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.

(e) After accepting employment on behalf of a client, a lawyer shall not thereafter delegate to another lawyer not in the lawyer's firm the responsibility for performing or completing that employment, without the client's informed consent.

Adopted July 1, 2009, effective January 1, 2010.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

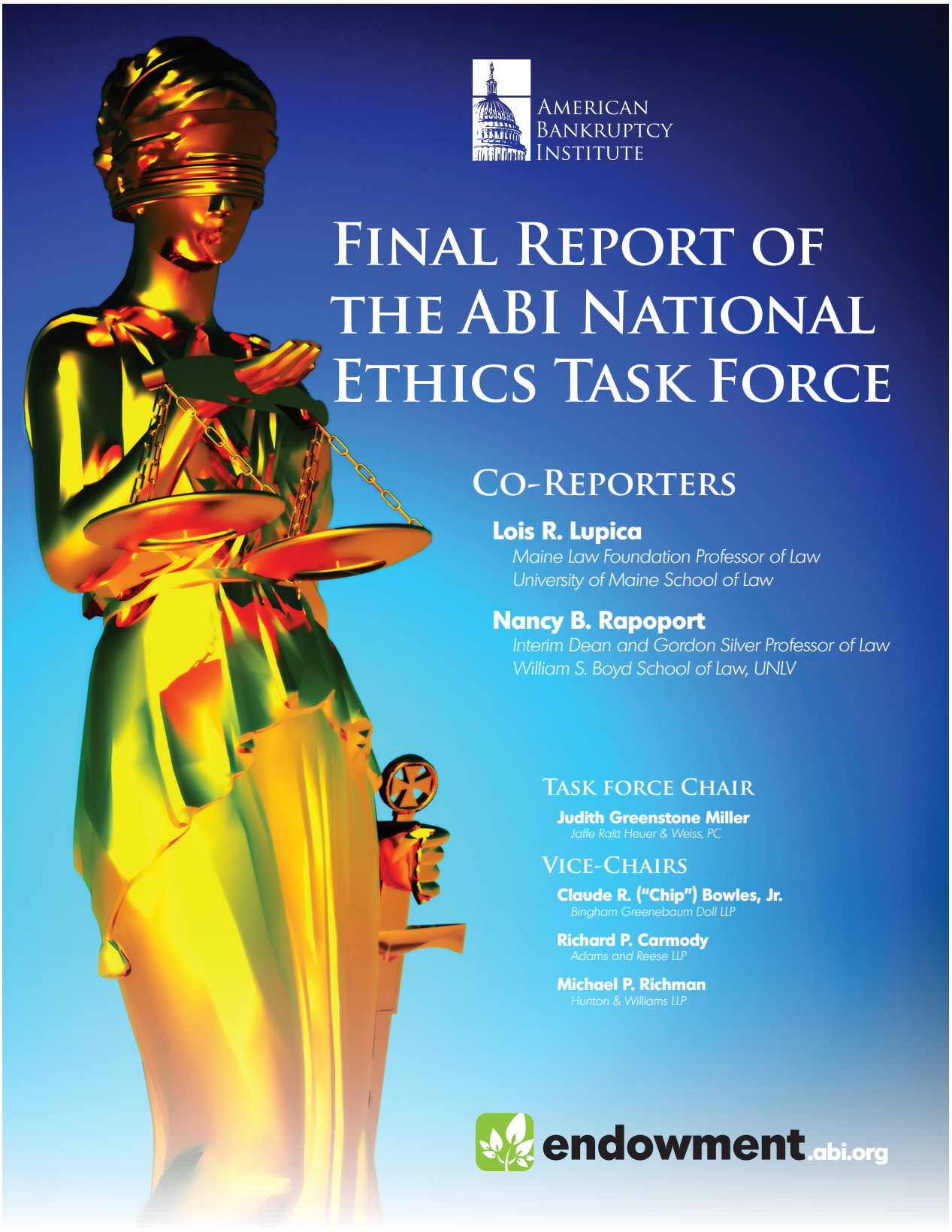
[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, *e.g.*, Rules 1.1, 1.8 and 5.6, and Supreme Court Rules 13(c)(6) and 137(e).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Final Report of the American Bankruptcy Institute National Ethics Task Force

April 21, 2013

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Introduction

In 2011, then-American Bankruptcy Institute President Geoffrey L. Berman established the ABI's National Ethics Task Force[1] to address a problem familiar to all bankruptcy professionals and judges: state ethics rules do not always "fit" with the realities of bankruptcy practice. State ethics rules may also not be a perfect fit in the context of other types of practice, either—for example, states may not yet know how best to handle the increasingly interconnected digital and virtual world—but it is clear that the Model Rules do not fit neatly with the realities of a bankruptcy practice that involves numerous parties with changing allegiances, often departing from the classic two-party adversarial proceeding.[2]

Shortly after President Berman appointed the Task Force's members, the Task Force met to discuss the best way to approach its assignment. At its first meeting, the Task Force promulgated its mission statement:

> *The ABI National Ethics Task Force will consider ethics issues in bankruptcy practice and will make recommendations for uniform standards, where appropriate.*

In essence, the Task Force was charged with answering the question of whether there is a need for national ethics rules, standards, and general practice guidance in the bankruptcy context.[3]

As the Task Force considered the various topics and issues that could potentially be addressed, a few "jumped out."[4] These included the conflicts-related issues that result from the shifting allegiances that can arise during the life of a bankruptcy case, the complexity of disclosure of "connections" when seeking approval of employment, the fleshing out of the duties of counsel for a debtor in possession, and the role of conflicts counsel in business reorganization cases. Other issues implicated in the context of bankruptcy practice, while not specifically at odds with state ethics rules—for example, the concept of attorney competency and the pressing question of how to balance the need for a capable and skilled bar with the need to provide consumers in financial distress access to the bankruptcy system—were addressed in order to provide needed guidance to bankruptcy attorneys.

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[1] Past-President Berman and current President James Markus—with the help of the ABI's Anthony H. N. Schnelling Endowment Fund—have provided significant support for the Task Force's work.

[2] *Cf. In re* Nguyen, 447 B.R. 268, 277 (9th Cir. Bankr. 2011) ("[T]he ABA Standards, which were developed primarily for nonfederal, nonbankruptcy courts by unelected and nonjudicial parties, are ill-adapted to federal bankruptcy proceedings. The ABA Standards were not drafted to address the distinctive context of bankruptcy where, as here, administrative matters rather than litigation may be the focus of an attorney's work.") (referring to the American Bar Association Standards for Imposing Lawyer Sanctions and citing *In re* Brooks-Hamilton, 400 B.R. 238 (9th Cir. Bankr. 2009) (citation omitted)).

[3] The ABI has established a separate Civility Task Force, chaired by James Patrick Shea of Shea & Carlyon.

[4] The Task Force also adopted a set of bylaws.

The Task Force began its work by forming several committees, each focused by topic. Each committee developed initial memoranda on issues that fell within the purview of its subject area. The committees' topics included (1) conflicts of interest, (2) disclosure, retention, and fee issues, (3) consumer issues, (4) committee solicitation issues, and (5) discipline, sanctions, competence, and multi-jurisdictional practice issues. Each committee member attended regular committee meetings, in addition to teleconferences and quarterly meetings of the entire Task Force. The Reporters also held quarterly retreats at which the Reports were researched and drafted.[5] Each Task Force member had the opportunity to comment on the Reporters' draft Reports, and each draft Report was ultimately voted on and approved by the entire Task Force. Although, in its work, the Task Force reviewed several 50-state surveys of particular state ethics rules,[6] it used the American Bar Association's MODEL RULES OF PROFESSIONAL CONDUCT in addressing the issues discussed in this Final Report.[7]

The Task Force also found several worthy topics—including the issue of retainers and employment, standards for practice competency for creditors' counsel, and the issue of ghostwriting a debtor's petition and schedules as a way of addressing bankruptcy access—that the constraints of this Task Force prevented it from fully developing. It is our expectation that these important issues will be taken up in the near future by another ABI working group or committee.

All of the Reporters' White Papers and Proposals are compiled within this Final Report. They are as follows:

1. Proposed Amendments to Rule 2014.[8]
2. Duties of Counsel for a DIP as Fiduciary and Responsibilities to the Estate.
3. A Framework for Pre-Approval of Terms for Retention and Compensation Under 11 U.S.C. § 328.
4. The Use of Conflicts Counsel in Business Reorganization Cases.
5. Best Practices for Limited Services Representation in Consumer Bankruptcy Cases.
6. Competency for Debtors' Counsel in Business and Consumer Cases.
7. Report on Best Practices on Creditors' Committee Solicitation.

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[5] The Reporters were ably assisted by Research Assistants Bridget McMahon, University of Maine School of Law, Class of 2014, and by David Rothenberg and Nicole Scott, William S. Boyd School of Law, UNLV, Class of 2014. The Reporters would also like to thank Heidi Gage for her excellent research and administrative assistance.

[6] The Task Force gratefully acknowledges the research support provided by the reference librarians of the Wiener-Rogers Law Library at the William S. Boyd School of Law.

[7] The Task Force recognizes that the Model Rules do not have the force of law; however, so many states have adopted the Model Rules in part or in whole that the Task Force determined that the discussion of the Model Rules, rather than state ethics rules, would be more useful to most ABI members.

[8] One of the Task Force's Reports—the Report on Proposed Amendments to Rule 2014—has been transmitted to the Advisory Committee on Bankruptcy Rules, which will be reviewing the Report before its Fall meeting.

The Task Force recognizes that much more needs to be done in terms of ethics issues facing the bankruptcy bar and bankruptcy bench—and discussions have already begun with ABI's leadership as to how best to proceed with further review and discussion of ethics issues—but it is pleased to present to you this Final Report and it looks forward to the discussion that will follow.

Lois R. Lupica, Co-Reporter
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April 21, 2013

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

Introduction[2]

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

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

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

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

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

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

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

[4] The Task Force discussed at length the issue of consumers' access to the bankruptcy system, and the tension between the time and skill it takes to responsibly and ethically represent a consumer debtor, and the legal fee the consumer can afford and the market will support. Ultimately the Task Force decided to limit the scope of its report addressing access to the consumer bankruptcy system to a discussion of the issue of Limited Services Representation.

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

[6] *Id.* at 30.

[7] *Id.*

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

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

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

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[8] *Id.* at 116.

[9] *Id.* at 104.

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

[11] As observed:

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

Id. at 33-34 (footnotes omitted).

[12] *Id.* at 31.

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

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

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

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

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

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

> The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client . . . . A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.[19]

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[15] *Id.*

[16] *Id.* at 103.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Informed Client Consent

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

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

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

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

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

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

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

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

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

Best Practices for Limited Scope Representation

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

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

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

1. The initial client interview and counseling should make clear the expected scope of representation and the expected limited fee.
2. Attorneys counseling unsophisticated consumer debtors must be mindful, when gathering initial information to assess a case, to avoid the formation of the debtor's perception that a full-scale attorney-client relationship is being formed.
3. An engagement letter and informed consent should be prepared in plain language and carefully reviewed with the debtor. This letter must clearly and conspicuously set forth the services being provided, the services *not* being provided, and the potential consequences of the limited services arrangement.
4. The engagement letter must also clearly describe the fee arrangement, including a statement of how fees for additional services will be charged.[31]
5. All documents and disclosures filed with the bankruptcy court should be done with full candor consistent with the attorney's duty of confidentiality, disclosing the exact nature of the representation and the calculation of fees for services being provided.
6. In the event that withdrawal from the unbundled representation becomes warranted, attorneys must be mindful of protecting their client's interests to the fullest extent practical when exiting the case.
7. As is the case with all legal representation, if the attorney becomes aware of a legal remedy, problem, or alternative outside of the scope of his or her representation, the client must be promptly informed. The attorney has the further obligation to provide his or her client with a thorough explanation of the potential benefits and harms implicated, in order for the client to make an informed decision as to how to proceed.

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

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

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

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

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

[34] (a) A lawyer shall:

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

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

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

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

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

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

Id. at R. 1.4.

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

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

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

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

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

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

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

Proposed Rule Providing for Limited Scope Representation in Consumer Bankruptcy Cases

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Model Agreement and Consent to Limited Representation in Consumer Bankruptcy Cases

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

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

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

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

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

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

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

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

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

II. For Chapter 7 Debtors Who Have Secured Debts.

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

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

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

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

III. The Fee

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

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

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

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

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

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

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

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

a. that I am not promising any particular outcome;

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

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

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

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

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

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

Signature of client/s 1._____

2._____

Signature of attorney _____

Date: _____

A LOOK AT CASE LAW

By

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CHAPTER 7 DEBTOR'S COUNSEL WHO IS NOT RETAINED BY TRUSTEE MAY NOT RECEIVE COMPENSATION FROM THE ESTATE:

Lamie v. United States Trustee, 540 U.S. 526 (2004)

Justice Kennedy, delivering the opinion for the Court, held that § 330(a)(1) of the Bankruptcy Code governing compensation of professionals does not allow a Chapter 7 debtor's attorney to be compensated from the estate unless the attorney is appointed by the trustee as authorized by § 327 of the Code. Petitioner, a bankruptcy attorney, sought compensation under this section for legal services he provided to a bankrupt debtor after the proceeding was converted from a Chapter 11 to a Chapter 7 bankruptcy. The Court affirmed the rulings of the Bankruptcy Court, District Court, and Fourth Circuit, which all held that in a Chapter 7 proceeding § 330(a)(1) does not authorize payment of attorney's fees unless the attorney has been appointed under § 327. The uncertainty in this case arises from Congress's decision to reform the Code in 1994. The reform Act altered § 330(a) by deleting "or to the debtor's attorney" from what was § 330(a) and is now § 330(a)(1). The Court determined that the plain meaning of § 330(a)(1) did not lead to absurd results; and therefore, it would not read "attorney" in § 330(a)(1)(A) to refer to "debtors' attorneys". Furthermore, the Court stated that compensation for debtors' attorneys in Chapter 7 proceedings is not altogether prohibited. While § 330(a)(1) requires proper authorization for payment to attorneys from estate funds in Chapter 7 filings, the requirement does not extend throughout all bankruptcy law. Section 330(a)(1) does not prevent a debtor from engaging in the common practice

of paying counsel compensation in advance to ensure that a bankruptcy filing is in order.

In re Griffin, 313 B.R. 757 (Bankr. N.D. 2004) – See below.

ATTORNEY FEES DUE DEBTOR'S COUNSEL ARE SUBJECT TO BANKRUPTCY DISCHARGE IN CHAPTER 7

Bethea v. Adams & Associates, 352 F.3d 1125 (7th Cir. 2003)

The Seventh Circuit held that Chapter 7 prepetition debts for legal fees are subject to discharge and any attempt to collect such fees is a violation of the automatic stay. In other words, § 329 of the Code does not protect reasonable attorney's fees from discharge. The Court ruled that the debtors' attorneys' had to refund to the debtors any funds collected after the discharge was entered as well as those funds received prior to discharge but after filing. Section 727(b) provides that a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief, except as provided in § 523. Attorney's fees are not listed as an exception to § 727's discharge provisions. Chapter 7 retainers, agreed to by the debtor and debtor's attorney, that cover the legal services used for preparing and prosecuting debtor's bankruptcy proceedings, constitute prepetition, liquidated debt for discharge purposes. Furthermore, the Seventh Circuit did not share the view of petitioning attorneys' that its reading of § 727 would prevent deserving debtors from receiving legal services, arguing in the alternative that debtors who cannot prepay in full can tender a smaller retainer for prepetition work and later hire and pay counsel once the proceeding begins. The

Court rejected the intermediate position articulated by the Ninth Circuit in *In re Hines,* 147 F.3d 1185 (9th Cir.1998), wherein work done during the bankruptcy process is immune from discharge, as well. The Seventh Circuit refused to distinguish between pre and post work and fees, determining instead that all fees not collected prepetition are discharged. Accordingly, the most a bankruptcy court is allowed to do is give administrative priority to post-petition fees for work relating to the prosecution of the case. That being said, if the debtor's estate is insufficient to pay administrative claims then those fees are discharged as well.

Ritterhouse v. Eisen, 404 F.3d 395 (6th Cir. 2005)

The Sixth Circuit, addressing an issue of first impression, held that in a Chapter 7 proceeding unpaid, prepetition attorney fees are discharged by the bankruptcy judgment. The Court explained that § 727(b) provides that a discharge under Chapter 7 relieves a debtor of all debts incurred prior to the filing of a petition for bankruptcy, except those nineteen categories of debts specifically enumerated in 11 § 523(a). A debt for prepetition legal services is not one of the non-dischargeable debts enumerated in § 523(a).

In re Griffin, 313 B.R. 757 (Bankr. N.D. 2004)

According to the Supreme Court's ruling in *Lamie*, debtors' attorneys can only be compensated under § 330(a)(1) if the trustee, pursuant to § 327, employs the attorneys. In the instant case, the trustee never retained or otherwise authorized counsel to represent the Chapter 7 debtors' in their motion to redeem their motor vehicle; and therefore, counsel is not eligible for compensation from the estate

under § 330. Furthermore, the Court found two independent reasons for disgorgement of fees; first the law firm was barred by automatic stay from attempting to collect any installment payments or fees for alterative services from debtors on prepetition claims; and second, the law firm's failure to timely supplement its fee disclosure, to reveal that it had received a $600 fee for its legal work in representing debtors' in connection with their redemption motion. Additionally, the Court stated that defective fee disclosure by counsel is not a minor matter; rather, an attorney's failure to provide the required disclosure will alone justify a bankruptcy court's denial of any or all fees requested. Under § 329(b), if compensation paid to debtor's counsel exceeds the reasonable value of such services, the court may cancel the agreement or order the amount considered excessive to be returned. This requirement underscores the importance of disclosure; and yet, the Court cannot review the transaction between debtor and his attorney or order a remedy under § 329 if it is never aware that the transaction existed or is kept in the dark regarding its details. Finally, the Court raised concerns about the Seventh Circuit's decision in *Bethea*, specifically the possibility of allowing the debtor to rehire his bankruptcy counsel after the Chapter 7 petition is filed in order to perform post-petition services in light of Rules 1.7 and 1.8 of Illinois Rules of Professional Conduct.

UNBUNDLING PREPETITION SERVICES FROM POST PETITION SERVICES IS NOT PER SE PROHIBITED BY THE RULES OF PROFESSIONAL CONDUCT IN A CHAPTER 7

In re Slabbinck, 482 B.R. 576 (Bankr. E.D Mich. 2012)

In *Slabbinick*, the debtor signed two separate fee agreements, one prepetition and one post-petition. The court looked to the Michigan Rules of Professional Conduct (MRCP) to determine whether, in a Chapter 7 case, unbundling legal services performed prepetition from services performed post-petition violated an attorney's obligation to provide competent representation to a client. After reviewing the MRPC, the Official Comments to the MRPC, and two Michigan Ethics Opinions (RI–184 and RI–384), the court held that "an agreement to limit an attorney's legal services in connection with an individual Chapter 7 bankruptcy case by unbundling the prepetition legal services from the post-petition legal services is not *per se* prohibited by the MRPC." The court clarified that a prepetition agreement to pay an attorney gives rise to a dischargeable debt, but a post-petition agreement does not. A Chapter 7 debtor's attorney may bifurcate legal services as long as he or she competently performs those services that the debtor has hired the attorney to perform, provides an adequate consultation, and obtains fully informed consent to such arrangement. From the Court's perspective, to insist on an all or nothing approach, in the name of promoting attorneys' competence, would deprive individual debtors of access to the bankruptcy process.

UNBUNDLING NOT PERMITTED IN CHAPTER 7

In re Collmar, 417 B.R. 920 (Bankr. N.D. Ind. 2009)

The issue before the Court is whether debtor's counsel can contract around services it agreed to provide the debtor in Chapter 7 proceedings; specifically whether debtors' counsel can permissibly exclude reaffirmation agreements from the scope of its representation. Previous decisions have emphasized that an

attorney's representation of a debtor is for the entire bankruptcy process, and not simply for various steps along the way unless there is a compelling reason or exceptional circumstance for withdrawal of counsel. Here, the Court concluded that debtor's counsel could not contractually limit the scope of representation without the debtor's informed consent. Since there was no evidence of consent and the reaffirmation agreement was completed without the participation of debtor's counsel, the court could not approve it. The court expressed in dicta that the decision to reaffirm an otherwise dischargeable debt is a critical part of bankruptcy process, so critical that to provide competent representation, counsel must advise a chapter 7 debtor about the reaffirmation process.

In re Egwin, 291 B.R. 559 (Bankr. N.D. GA. 2003)

In this case, counsel represented the debtors' when they filed their Chapter 7 petition, but appeared *pro se* in the following two proceedings. The Court *sua sponte* issued an order for the attorney to show cause why sanctions should not be imposed for failure to represent the debtors'. The decision considers three issues concerning an attorney's representation of a Chapter 7 Debtor: 1) whether an attorney may limit the scope of representation of a chapter 7 debtor by excluding certain matters; 2) the duties of an attorney, regardless of the arrangement between the debtor and the lawyer, until the court grant's permission to withdraw; and 3) under what circumstances will the court grant leave to withdraw when the reason is the debtor's payment of attorney's fees. As to the first issue, the Court held that an attorney representing a Chapter 7 debtor in an ordinary case may not limit the

scope of that engagement, particularly when the debtor has not given informed consent. As to the second issue, the Court held that a debtor's attorney is obligated by rules of bankruptcy court as well as by standards of professional responsibility to represent debtor in connection with any contested matter or adversary proceeding involving debtor's interests until the attorney is granted permission to withdraw. While debtor's attorney is not required to provide services without compensation, a debtor's failure or refusal to pay for attorney's services does not justify the attorney's failure to provide representation. As to the third issue, when the reason for withdrawal is debtor's failure to pay, debtor's attorney must demonstrate that a reasonable arrangement for payment of fees is not possible, and that debtor's attorney has taken actions to protect debtor's rights. The Court decided that sanctions or disciplinary actions were not appropriate given that the attorney acted in good faith.

UNBUNDLING IN CHAPTER 13 NOT PERMITTED

In re Pair, 77 B.R. 976 (Bankr. N.D. GA 1987)

In this case, the Court reviewed debtors' attorneys' fees in five Chapter 13 cases. The Court held that the attorney's failure to appear at an adversarial proceeding without court approval for withdrawal from the case warranted imposition of sanctions, and that the practice of collecting post-filing attorneys' fees, without prior application and court approval, warranted imposition of sanctions as well. When the fee is not collected prepetition, the Bankruptcy Code allows attorneys' fees to be paid, after court approval, through the debtor's plan. To that

end, Debtor's attorney must represent debtor at adversarial proceedings until the Court grants withdrawal, regardless of the fact that debtor's case became more involved than originally anticipated, and that debtor did not pay additional fees requested by debtor's attorney. The Court noted that Chapter 13 cases typically last 3 to 5 years; and therefore, attorneys should anticipate issues to arise throughout the bankruptcy process. The Court will grant withdrawal only where an unreasonable burden on counsel exists and where withdrawal is justified based on considerations of fairness, reasonableness, and proper protection of the debtor's rights given the circumstances of the case.

FEE ONLY CHAPTER 13 IS NOT PER SE FILED IN BAD FAITH

In re Puffer, 674 F.3d 78 (1st Cir. 2012)

The First Circuit, addressing an issue of first impression, held that fee-only Chapter 13 plans are not per se filed in bad faith. The Court adopted the totality of circumstances test to determine whether a debtor with the advise of counsel has presented a Chapter 13 plan in good faith. The Court emphasized the narrowness of the ruling and that its decision should not be interpreted as a blanket endorsement of fee-only plans. The fundamental purpose of Chapter 13 is to allow a debtor to pay his creditors over time and as such, fee-only plans will by definition leave many debts unsatisfied. Further, the Court recognized that fee-only arrangements may be vulnerable to abuse by attorneys seeking to advance their own interests without due regard for the interests of debtors or at the very least, by their nature, create the

appearance of such abuse. Therefore, a debtor has a heavy burden of demonstrating special circumstances to justify this type of arrangement.

Ingram v. Burchard, 482 B.R. 313 (N.D. Cal. 2012)

The District Court held that the bankruptcy court did not clearly err in determining that Chapter 13 debtors' amended plan was not proposed in good faith and refused confirmation. To determine whether to confirm a Chapter 13 plan over a good faith objection, the Ninth Circuit requires courts to consider the totality of the circumstances, including all mitigating factors, on a case-by-case basis. The good faith inquiry focuses on whether debtors acted equitably in proposing the plan. Courts may take into consideration that "veiled Chapter 7" proceedings parading as Chapter 13 plans are strongly disfavored as well. The Court found that the bankruptcy court correctly applied the totality of circumstances standard, but also noted that the Ninth Circuit has not ruled as to whether a per se rule against fee-only Chapter 13 plans would be permissible. Furthermore, Congress's preference for Chapter 13 plans over complete liquidation under Chapter 7 does not extend to plans that propose lien stripping, zero percent distribution to creditors or other attempts to unfairly manipulate the Bankruptcy Code.

In Re Crager, 691 F.3d 671 (5th Cir. 2012)

The Fifth Circuit held that the bankruptcy court did not clearly err in finding that the proposed Chapter 13 plan, where virtually the entire amount that debtor paid to trustee would go to her attorney, was not an attempt to abuse Chapter 13, but rather was a responsible decision given her particular circumstances. The

district court's decision was reversed and the bankruptcy court's confirmation of the Chapter 13 plan affirmed. The Fifth Circuit has no per se rule that zero percent plans, violate the good faith requirement for plan confirmation. The Court of Appeals standard of review for a bankruptcy court's award of attorney fees is abuse of discretion. In the Fifth Circuit, courts apply a fact-intensive totality of the circumstances test to determine whether a Chapter 13 petition is filed in good faith; specifically, courts consider whether the plan shows an attempt to abuse the spirit and purpose of the Bankruptcy Code.

In Re Molina, 420 B.R. 825 (Bankr. N.M. 2009)

The Court held that the Chapter 13 plan proposing to pay only part of administrative attorney fees over thirty-six months, filed by debtor ineligible for Chapter 7 discharge due to prior Chapter 7 discharge less than eight years earlier, met the requirements for a good faith filing. Specifically, the court refused to read a per se requirement of minimum payment into the Bankruptcy Code, and instead found that debtor complied with the letter and spirit of the Code as written. To assess whether the Chapter 13 plan is confirmable, the Court applied the non-exhaustive list of factors compiled by the Tenth Circuit. The Court distinguished this case from the parallel decision in Paley, stating that the Paley Court added a requirement that Congress did not put into the statute: that a minimal-payment chapter 13 plan will not be confirmed if the debtor is ineligible for chapter 7 relief. Moreover, in this case, the debtor had committed to a full 36 months of payments and there was no evidence debtor attempted to manipulate the Bankruptcy Code.

FEE ONLY CHAPTER 13 CASES LACK GOOD FAITH TAKING TOTALITY OF CIRCUMSTANCES INTO CONSIDERATION

In Re Paley, 390 B.R. 53 (Bankr. N.D.N.Y 2008)

In this case, debtors' who were ineligible for Chapter 7 discharges petitioned for another round of debt forgiveness under Chapter 13. The Court held that debtors' Chapter 13 plans were not proposed in good faith, and thus, refused confirmation. The Court reaffirmed the use of the totality of circumstances test to determine whether a Chapter 13 plan was filed in good faith, but declined to perform an exhaustive analysis of all relevant factors. The Court's underlying reasoning was that a plan whose duration was tied only to payment of attorney's fees, as the case herein, was an abuse of the purpose and spirit of the Bankruptcy Code. Otherwise stated, "[c]hapter 7 cases hidden within Chapter 13 petitions, blur the distinction between the chapters into a meaningless haze" and over time would judicially invalidate § 727(a)(8)'s time restrictions between Chapter 7 discharges. The Court emphasized that the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) did not displace the good faith analysis required under § 1325(a)(3). In fact, establishing good faith is still a perquisite for the confirmation of Chapter 13 payment plans.

In re Montry, 393 B.R. 695 (Bankr. W.D.Mo. 2008)

The Court held that the debtors' Chapter 13 plan, which proposed payment of their Chapter 13 attorney's fees and included nothing on payment to any prepetition creditors, has not been filed in good faith and could not be confirmed. This Court employs a totality of circumstances standard to determine whether a Chapter 13 plan has been proposed in good faith as required for confirmation under § 1325(a)(3) of the Bankruptcy Code. The Court noted that contrary to the debtors' assertion, the totality of circumstances test is the prevailing standard even after the enactment of the BAPCPA. The Court, reaffirming the reasoning of the Paley court, stated that when the only benefit of filing a Chapter 13 plan is payment of attorney fees over time, the plan runs counter to the spirit and purpose of the Code, and as such, an exhaustive fact-specific analysis is unnecessary. Additionally, the Court feared that confirming Chapter 13 petitions equally suited for Chapter 7 would "subvert the Supreme Court's holding in Lamie v. U.S. Trustee prohibiting the payment of post-petition attorney's fees from a debtor's Chapter 7 bankruptcy estate" as well as raise bankruptcy filing costs.

In re Arlen, 461 B.R. 550 (Bankr.W.D.Mo. 2011)

The Court held that a Chapter 13 plan, which proposes no payment to any creditors, secured or unsecured, and satisfies only the fees of debtors' attorney, is inconsistent with the spirit and purpose of Chapter 13; and therefore, has not been filed in good faith. In applying the totality of circumstances test, the Court stated that performing an exhaustive analysis of the factors for good faith is unnecessary, rather the key inquiry is whether a plan violates the spirit and purpose of Chapter 13. This Court relied heavily on the reasoning of the Paley Court, maintaining that

the purpose of Chapter 13 is to enable debtors to adjust their debts and reorganize their financial affairs by servicing debts out of future income pursuant to a plan. Additionally, the Court reaffirmed that debtors were not required to include Social Security income in their plans or commit such income in any way to unsecured creditors.

In Re Lehnert, 2009 WL 1163401 (E.D. Mich. Jan. 14, 2009)

The Court held that debtors' Chapter 13 plan was proposed in bad faith and it was not entitled to confirmation where the largest creditors had non-dischargeable claims and debtors' underestimated their income by $1000 dollars per month. In determining whether a plan has been proposed in good faith, courts examine the totality of the circumstances. While good faith does not necessarily require a substantial repayment to creditors, a plan proposing payment of attorney fees and a zero percent distribution for unsecured creditors does not strike the Court as a good faith effort to repay pre-petition creditors.

In Re Barnes, 2013 WL 153848 (Bankr.E.D.N.C. Jan. 15, 2013)

The Court held that early termination language is in direct conflict with § 1325(b)(4) of the Bankruptcy Code; and therefore, Chapter 13 plans that included such language will fail good faith analysis. In the case at bar, the issue is whether debtor, who has zero disposable income, may obtain confirmation of a Chapter 13 plan, which in effect will terminate before the applicable commitment period, and which proposes to discharge substantial amounts of unsecured debt while agreeing to pay the trustee's commission and the debtor's attorney's fees. Based on the

Supreme Court decisions in Lanning and Ransom, and lower court interpretations of these decisions, this Court adopted a forward-looking approach to determine projected disposable income, and ruled that the applicable commitment period is a temporal requirement for all debtors. Under the forward-looking approach, a debtor must commit all projected disposable income for thirty-six or sixty months; and if disposable income is zero or less, then the court must look to projected disposable income based on income minus expenses to determine what actual income or expenses are known or nearly certain at the time of confirmation. This approach is antithetical to the concept of a Chapter 13 plan, which includes an early termination provision. Underscoring this point, the Court stated that if Congress intended for Chapter 13 plans to contain early termination provisions, Congress would have explicitly allowed for them. Additionally, the Court decided that a Chapter 13 plan, which proposes to pay only attorneys' fees and discharges substantial unsecured debts has not satisfied subsections (a)(3) and (a)(7) of §1325 and confirmation would be refused. The Court found that fee only plans are not per se proposed in bad faith, meaning that a debtor may be able to prove circumstances that would justify a fee only arrangement. That being said, the Court concluded that there is little doubt that these types of plans are attempting to manipulate the Bankruptcy Code to discharge debts at the expense of creditors.

In Re Buck, 432 B.R. 13 (Bankr. Mass. 2010)

The Court held that Chapter 13 plans where the singular purpose is to pay counsel's fees over time will not satisfy any fair interpretation of the term "good faith" and will not be confirmed. Here, debtors' attorney was not entitled to compensation for his services because counsel advised debtors', who were eligible for Chapter 7 relief and who had overwhelming likelihood of retaining all of their assets and obtaining immediate discharge of their debts in Chapter 7, to file for fee-only Chapter 13 relief. The Court stated "such filings have the inherent effect of placing the interests of the attorney above those of his client, the Court and the bankruptcy system as a whole" and "allowing attorneys to utilize Chapter 13 for the sole purpose of ensuring payment of fees runs afoul of these manifest purposes of Chapter 13." Additionally, in this Circuit, reasonable compensation is generally analyzed using the lodestar approach, and should take into account the type of work performed, who performed it, the expertise that it required, and when it was undertaken. The court must consider prevailing market rates in determining the lodestar rate, including the customary rates in the jurisdiction, but there is no presumption that the Professional is entitled to the amount he or she requests. While judges should exercise special care in characterizing the services of an

attorney as excessive or unnecessary, deference on the part of the court was not appropriate in this case. The debtors' plans would clearly fail a good faith inquiry under § 1325(a)(3).

WHAT NOT TO DO

In re Brent, 458 B.R. 444 (Bankr. N.D. Ill 2011)

The Court held that counsel violated Rule 9011 when he represented, in 317 Chapter 13 fee applications that he had entered into a Model Retention Agreement (MRA) with the debtor, but failed to disclose that he had altered the MRA by tacking on an addendum, which allowed him to charge fees beyond the district's flat fee. The Court determined such actions warranted imposition of sanctions. Rule 9011 governs representations to the bankruptcy court and in particular, subsection (b)(3) prohibits misstatements, half-truths and assertions of fact without sufficient support whether about the merits or about the case itself, including attorneys fees. To be sanctionable, a misstatement or omission must have been "culpably careless". Generally speaking, attorneys are compensated under § 330(a) using the lodestar method wherein a reasonable number of hours is multiplied by a reasonable hourly rate to determine attorney fees; however, courts do not require the lodestar method. Additionally, the Court recognized that flat fees or no look fees used for compensation of a Chapter 13 debtor's attorney are presumptively reasonable standard fees and may be awarded without the kind of detailed application and

itemization of services that the bankruptcy rules would otherwise demand. The Court noted that flat fees represent a kind of agreement not only with the Chapter 13 debtor, but with the court as well.

In Re Dicey, 312 B.R. 456 (Bankr. N.H. 2004) (Pre-BAPCPA)

The Court held that debtors' did not meet their burden of demonstrating that their Chapter 13 plan was filed in good faith; and, therefore, confirmation was denied. For confirmation purposes, debtor bears the burden of demonstrating that the Chapter 13 plan was proposed in good faith, and this burden is especially heavy when debtor seeks superdischarge of a debt that would not be discharged in Chapter 7 proceedings. The Court applies the totality of circumstances standard and uses six factors to analyze whether a Chapter 13 plan has been filed in good faith. The facts of this case are noteworthy, in that debtors' sought protection of bankruptcy two weeks after an adverse state court judgment for intentional torts of assault and battery, which would have been non-dischargeable under § 526 (a)(6). While the purpose of Chapter 13 is to give qualified debtors another option to the total liquidation proceeding in Chapter 7, the Court stated that Chapter 13 is not a shield to allow tortfeasors to avoid payments already adjudicated.

UNBUNDLED LEGAL SERVICES AND GHOSTWRITING: PURCHASING THE MEAL ALA CARTE

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In 1999, the Kansas Citizens Justice Initiative issued a report on unbundling and limited scope representation. It noted that limited scope representation

> "could have substantial benefit to consumers by increasing access to legal services."[1]

The report recommended that the state bar:

> "study the extent to which unbundling of legal services can be accomplished without undermining the lawyers' ethical obligation to the client it at recommendation."

Kansas state courts have responded by enacting Rule 115A – Limited Representation. See **Exhibit A**.

The attorney must file a Notice of Limited Entry of Appearance and note in any pleading or motion that he/she is the attorney for the client under the scope of a limited entry of appearance. A form of the Limited Entry of Appearance is attached as **Exhibit B**. Under Kansas Supreme Court Rule 115A, a Notice of Withdrawal Attorney a form of which is attached hereto as **Exhibit C**.

The Kansas Federal District Court has enacted Rule 83.5.8. This Rule states as follows:

(a) **In General**. A lawyer may limit the scope of representation in civil cases if the limitation is reasonable under the circumstances and the client gives informed consent in writing.

(b) **Procedures**. A lawyer who provides limited representation must comply with Kansas Supreme Court Rule 115A, as later amended or modified, with two exceptions. First, the lawyer must use the federal forms rather than the Kansas State Court forms. Second, Rule 115A(c) does not apply in the District of Kansas. Any attorney preparing a pleading, motion or other paper for a

[1] See *Kan. Citizens Justice Initiative*, draft final report of the Kansas Justice Commission (May 4, 1999, http://www.kscourts.org/kcji/draft/index.htm

specific case must enter a limited appearance and sign the document. The Bankruptcy Court may have additional Local Rules that govern its limited scope practice.

(c) **Participation**. The United States District Court for the District of Kansas allows any attorney registered as active to practice before this court to offer limited scope representation.

The United States Bankruptcy Court for the District of Kansas enacted Standing Order No. 14.1, which abrogates Kansas Federal District Court Rule 83.5.8 because:

> "Attorneys practicing in this Court routinely and permissively limit the scope of their representation in certain situations, such as adversary proceedings and appearances for specific purposes."

The Bankruptcy Court felt that the procedures of the Kansas Federal District Court practically could not apply in Bankruptcy Court.

Thus, limited scope representation is recognized in all courts in Kansas.

Criminal law is replete with the Sixth Amendment Right to Counsel. See *e.g. Iowa v. Tovar*, 541 U.S. 77, 87; 124 S.Ct. 1379, 158 L.Ed 2d 209 (2009); *Maine v. Moulton*, 474 U.S. 159, 170; 106 S.Ct. 477, 88 L.Ed 2d 481 (1985) (right to counsel at "critical stages of criminal process.")

The Corollary Principal further exists, that is, the "right to assistance of counsel implicitly embodies a correlative right to dispense with a lawyer's help." *Faretta v. California,* 422 U.S. 806, 814; 95 S.Ct. 2525, 45 L.Ed 2d 562 (1975); c.f. *Knight v. Phillips*, 2012 WL 5955058 D. E.D. NY (Nov. 28, 2012)

While these cases involve the right of counsel in criminal proceedings, they do suggest the ethical duties that exist for attorneys in limited scope representation.

The Model Rules of Professional Conduct permits limited scope representation. Rule 1.2(c) provides:

> "[A] lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent." *Model Rules of Professional Conduct* Rule 1.2(c) (2000).

Official comments provide as follows:

> "The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms in which the lawyer's services are made available to the client.... A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly, that the lawyer regards as repugnant or imprudent." *Id.* at Rule 1.2, Comment 6

Nationally, the degree of enthusiasm for limited scope representation varies. Various Courts have held that while unbundling of services is permissible, it potentially may constitute a violation of Model Rule 1.1, 1.2, 1.4 and 1.5, as well as 11 U.S.C. §707(b)(4)(C). In *In Re Seare*, 515 B.R. 599, (9th Cir. BAP, 2014), the attorney sought engagement under a 19 page limited scope retainer agreement. The limited scope retainer agreement provided that services would include analysis of the debtors' financial condition, the review, preparation and filing of the petition, schedules and statement of affairs, representation at the meeting of creditors and reasonable in person or telephone consultation with the client. Additional fees may be applied.

An adversary action was filed in *Seare* seeking a non-dischargeable judgment against the debtors. When counsel failed to represent the debtors in the adversary case, the Bankruptcy Court conducted a show cause hearing as to his potential violations of 11 U.S.C. §707(b)(4)(C).[2]

The Bankruptcy Court held that counsel had violated his duty of competence under Model Rule 1.1 by deciding to unbundle adversary proceedings in the debtors' case. The Court also found that counsel has violated Model Rule 1.2(c) because unbundling the service of representation in the adversary proceeding was not reasonable in light of the debtors' circumstances.

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[2] 11 U.S.C. §707(b)(4)(C) – the signature of an attorney on a petition, pleading or written motion shall constitute a certification that the attorney has –

- (i) performed a reasonable investigation into the circumstances that give rise to the petition, pleading or written motion; and
- (ii) determine that the petition, pleading or written motion –
  - (I) is well grounded in facts; and
  - (II) is warranted by existing law or good faith argument for the extension, modification, or reversal of existing law does not constitute an abuse under paragraph (1).

The Court did not find fault with counsel using pre-prepared forms that limit the scope of services, including a flat fee. It, however, did find that deciding to unbundle services reasonably necessary to achieve a client's discharge objectives before even meeting the client was unreasonable and violated Rule 1.2(c). (*In Re Seare*, 493 B.R. 158, 194 (Bankr. D. Nev. 2013))

The Court also faulted the debtors' counsel for not communicating his intent not to represent the debtors in the adversary proceeding until after the complaint had been filed. Finally, the unbundling was counsel's idea, which the Court found ran contrary to the American Bar Association's guidance that should be client driven.[3]

The Bankruptcy Appellate Panel further found that the debtors' counsel violated Model Rule 1.5 because he did not sufficiently explain the scope of the services required under the flat fee and the scope of services available for additional fees. The retainer agreement was found to be in legal jargon as opposed to plain English. There was no explanation what adversary proceedings were, although the debtors understood that they were excluded and the debtors knew that non-dischargeable allegations were excluded, but did not know what they were.

Further, the debtors were not aware that they would likely have to pay for additional services because of the presence of the non-dischargeable claim that would likely result in an adversary action under 11 U.S.C. §523.

The debtors' counsel violated Model Rule 1.4 by failing to adequately communicate with the debtors and violated 11 U.S.C. §707(b)(4)(C) by his failure to adequately investigate the circumstances underlying the judgment held by the garnishing creditor.

Finally, the Court found that the debtors' counsel violated 11 U.S.C. §526 and 11 U.S.C. §528 finding that it was by definition a debt relief agency and had violated the prohibitions. The Appellate Court affirmed the decision concluding:

> "Consumer bankruptcy attorneys can unbundle their services in Nevada, particularly adversary proceedings. However, unbundling, or limited scope representation, needs to comply with the rules of ethics and the Bankruptcy Code. A qualitative analysis of each individual debtor's case must be done at intake to insure that his or her reasonable goals and needs are being met. That

[3] Bankr. D. Nev. 2013 citing Model Rule 1.2(c). Thus the retainer agreement was seen as a contract of adhesion. The debtors did not understand what services were unbundled and that the unbundling of services and a flat fee was unlikely to meet their objectives.

calculus was not being applied in this case. For the foregoing reasons, we AFFIRM."[4]

Judge Jury in his concurring opinion offered a punch list for attorneys to avoid the violation of ethical rules when undertaking limited scope representation of consumer debtors. This punch list was as follows:

a. At the initial intake interview with the debtor, identify fully and completely the debtor's goals;

b. Do not rely solely on the debtor's input to help him or her ascertain the debtor's goal. Conduct a reasonable investigation of the debtor's assets and liabilities. If a judgment has been taken against the debtor, the attorney must make a reasonable inquiry as to the nature of the judgment in order to determine as to whether it may be non-dischargeable;

c. If, after ascertaining the debtor's goals, the attorney believes that a limited scope representation is consistent with those goals, the attorney will then fully explain to the debtor the consequences and inherit risks which might arise if an adversary action is filed against the debtor and the attorney has not included representation in that proceeding in the unbundled services to be performed. Do not use "legal jargon." Informed consent requires a detailed explanation;

d. The attorney must customize the retainer agreement to the goals of the debtor;

e. After describing to the debtor the risks of limited scope representation, the attorney must give the debtor the opportunity to "shop elsewhere" for an attorney who will provide full representation before entering into the contractual agreement with the debtor for a limited scope representation;

f. The attorney should document as fully as possible all the steps taken to comply with these requirements.

(See also *In Re Cuomo*, 9th Cir. BAP 2014 WL 5358180, October 21, 2014, where the 9th Circuit BAP affirmed the imposition of monetary sanctions against the same debtor's attorney that represented Seare.)

[4] *In Re Seare*, 515 B.R. at 622

In *Cuomo* the BAP found a violation of the Nevada version of the Model Rules of Conduct and 11 U.S.C. §727(b)(4)(C). The Appellate Court affirmed the Bankruptcy Court's determination that the retainer agreement between the debtor and counsel "went too far" in transferring all responsibility for the accuracy of the information to the debtor.

Restatement (Third) of the Law Governing Lawyers, Section 19, Comment C (2000 Notes) offers guidance concerning the reasonableness of a limited scope representation agreement. The guidelines offered by the restatement include:

a. A client must be informed on the consent to any problems that may arise related to the limitation;

b. A contract limiting the representation shall be construed "from the standpoint of a reasonable client";

c. If a fee is charged, it must be reasonable in light of the scope of the representation;

d. Changes to representations made a reasonably long time after beginning the representation must meet the more stringent test for post inception, contracts or modification;

e. The limitation terms must be reasonable in light of the client's sophistication level and circumstances.

See also *Hale v. United States Trustee*, 509 F.3d 1139, 1148 (9th Cir. 2007) (counsel may not exclude critical and necessary services from representation of the debtor); *In Re* Burrton, 442 B.R. 421, 452-453 (Bankr. W.D. NC 2009) (disapproving of a limited scope representation agreement which excluded filing of lien avoidance or defending against stay relief motions, finding that these constitute "key services" to the bankruptcy); In *Re Johnson*, 291 B.R. 462, 469 (Bankr. D. Minn. 2003) (attorneys may not "unbundle the core package of ordinary legal representation reasonably anticipated in every case.")

A Kansas case of *In Re Wagers*, 340 B.R. 391, 398 (Bankr. D. Kan. 2006) offers guidance upon the attempt to limit services:

> "[W]hile bankruptcy courts have taken different views of the obligations of attorneys undertake by representing clients in filing chapter 7 bankruptcy petitions, none appears to have allowed the exclusion of all post-petition

> services [in a limited scope agreement]. Attorneys are almost required to accompany their clients to the meeting of creditors, scheduled and held only after the petition is filed. Some bankruptcy courts also require attorneys who prepare chapter 7 petitions to continue to represent the debtors at a minimum in post-petition matters that arise in the main bankruptcy case, such as stay relief motions. Indeed, some matters that may arise – objections to exemptions the debtors have claimed, objections to discharge based upon alleged errors or omissions in the Schedules or Statement of Financial Affairs, and motions to dismiss under §707(b) for substantial abuse – are so closely related to the advice the attorney gave in the pre-petition preparation for filing, that the attorney would at least be morally bound, and might be legally bound, to defend the debtors' position against such attacks. Some courts go even further and require the attorneys who represent the debtors in any adversary proceeding that might be brought against them. To the extent that the court before which an attorney files a position takes the view that the representation automatically extends to post-petition matters, the attorney could not effectively limit the representation to pre-petition matters as a way to improve the chances of getting paid for the post-petition representation the debtor needs." (340 B.R. at 398-399)

In Re Wood, 408 B.R. 841 (Bankr. D. Kan. 2009). In a fee disgorgement case, Chief Judge Nugent considered the issue of ghost writing unbundled legal services and out-of-state lawyers unauthorized to practice within the state of Kansas offering legal services in pleadings on a pro se basis. Judge Nugent found that it was a violation of the Kansas Rules of Professional Conduct and the outsource of the preparation of bankruptcy filings to non-lawyers or lawyers not licensed in Kansas constituted an unauthorized practice. The provision of a "help-line" service by out-of-state lawyers for Kansas bankruptcy clients to call and receive advice concerning their bankruptcy cases from either non-lawyers or non-Kansas lawyers is the unauthorized practice of law. Thus, the local lawyers association with the out-of-state law firm in filing bankruptcy cases prepared by the out-of-state lawyers violated Rule 5.5 of Kansas Rules of Profession Conduct concerning the Prohibition of Assisting Others in the Unauthorized Practice of Law.

See also In Re Kinderknecht, 470 B.R. 149 (Bankr. D. Kan. 2012) (out of state consumer debt settlement services which employed no attorneys on its staff who were licensed to practice in Kansas violated the Kansas Credit Services Organization Act (KCSOA). Out of state consumer debt service qualified as a "supplier" of goods and services so as to be subject to the provisions of the Kansas Consumer Protection Act.)

But see Hayes v. Ruther, 298 Kan. 402, 313 P.3d 782 (2014) (under the Kansas Credit Services Organization Act (KCSOA) a law firm of an attorney who is exempt from the duties, limitations and sanctions provisions of the KCSOA is also exempt from the requirements of the act, abrogating *Consumer Law Associates v. Stork*, 47 Kan. App. 2d 208, 276 P.3d 226 (2012) and *In Re Kinderknecht*, 470 B.R. 149 (Bankr. D. Kan. 2012).

Other Courts are even more emphatic –

> *In Re Bulen*, 375 B.R. 858, 866 (Bankr. D. Minn. 2007) (noting that unbundled legal representation is like putting "a bandaid on a gun shot.")
>
> *In Re Castorena*, 270 B.R. 504, 529 (Bankr. D. Idaho 2001) (unless debtors truly understand what they are bargaining away, the bargain is a sham. Attorney refused to appear at 341 meeting and did not sign pleadings.)
>
> c.f. *In Re Kieffer*, 306 B.R. 197, 207 (Bankr. N.D. Ohio 2004) (routine services include motion for turnover of tax refunds, Rule 2004 examination, objection to exemption, objection to motion for relief from stay, simple notice of sale.)
>
> *In Re Johnson*, 291 B.R. 462 (Bankr. D. Minn. 2003) (counsel sanctioned for not attending 341 meeting. Client agreement specifically excluded attendance at 341 meeting.)
>
> *In Re Egwim*, 291 B.R. 559 (Bankr. N.D. Ga. 2003) (debtor's attorney must represent debtor in connection with any contested matter or adversary action involving debtor.)

Castorena identified the following services as essential services to be provided in any limited scope representation:

a. The proper filing of required schedules, statements and disclosures, including any required amendments;

b. Attendance at the §341 meeting;

c. Turnover of assets and cooperation with the trustee;

d. Compliance with tax turnover and other orders of the Bankruptcy Court;

e. Performance of the duties imposed by 11 U.S.C. §521;

f. Counseling in regard to and the reaffirmation, redemption, surrender and retention of secured consumer goods;

g. Responding to issues that arise in the bankruptcy case, such as violations of stay and stay relief requests, objections to exemptions and avoidance of liens (exemptions).

In order to gather the informed consent of the client:

> "Attorneys must explain the benefits, burdens and consequences of bankruptcy to their clients to the extent reasonably necessary to permit informed decisions about the case." *In Re Pereira Santiago*, 457 B.R. 172, 176 (Bankr. D. P.R. 2011)

Because the statutory definition of "debt relief agency" under 11 U.S.C. §101(12)(A) was broad enough to include an attorney, a statutory basis exists for determining the attorney's conduct under 11 U.S.C. §526, 11 U.S.C. §527 and 11 U.S.C. §528. The disclosure that is required under 11 U.S.C. §527 include that:

a. All information that the debtor is required to provide with a petition and throughout the case be complete, accurate and truthful;

b. All assets and liabilities are required to be completely and accurately disclosed in the bankruptcy documents and the replacement value of each asset must be stated in the documents;

c. Monthly income and disposal income is required to be provided;

d. The debtor's information may be audited and the failure to provide such information to the auditor may result in the dismissal of the case or other sanctions;

e. The attorney must provide a written contract of representation.

In Re Taylor, 655 F.3d 274, 286 (3rd Cir. 2011) (attorneys in a bankruptcy case must review or have an obligation to review information provided by clients and determine its reasonability and value. If such information calls into question its reasonableness or accuracy, the attorney has an affirmative duty to determine which facts can be reasonably supported.)

Taylor ultimately involved creditor counsel misconduct in which the lawyer relied to his detriment on computerized information with a high volume of practice and a failure to verify such information for its accuracy, thus leading to the attorney misconduct before the Court.

Ghostwriting itself may be a form of unbundled legal services. *See* John C. Rothermich, *Ethical and Procedural Implications of "Ghostwriting" for Pro Se Litigants: Towards Increased Access to Civil Justice*, 67 Fordham L. Rv. 2687 (1999); *Jona Goldschmidt in Defense of Ghostwriting*, 29 Fordham Urban Law Journal Issue 3, Article 17 (2001); Forrest S. Mosten, *Unbundled Legal Services and Unrepresented Family Court Litigants: Current Developments in Future Trends,* 40 Fam. Ct. Rev. 15 n.1 (2002); Ira P. Robins, *Ghostwriting: Filing in the Gaps of Pro Se Prisoners' Access to the Court*, 23 Geo. J. Legal Ethics, 271 (210).

Goldschmidt's and Robins' articles recognize several arguments against ghostwriting:

1. The undue advantage based upon leniency given to a pro se party;
2. Ghostwriting violates the attorney's duty of candor to the Court;
3. Violates the attorney's obligations under Rule 11 and Rule 9011 to sign pleadings and certify the claims and defenses raised and are not frivolous. See *Duran v. Carris*, 238 F.3d 1268, 1273-74 (10th Cir. 2001) (listing federal cases in courts' objections to ghostwriting);
4. Rationales based upon deception;
5. Ethical prohibition against dishonesty, fraud, deceit or misrepresentation;
6. Conduct prejudicial to the administration of justice;
7. The violation of ethics rules through the acts of another.

Rule 11 Violations and Appearance and Withdrawal of Counsel Issues.

Does the lawyer's duty of confidentiality protect the lawyer and the pro se litigant from compelled disclosure of the attorney's ghostwriting?

Rule 1.6 of the Model Rules provides in pertinent part:

1. (a) a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures impliedly authorized in order to carry out the representation, and except as stated in paragraph (b);

   (b) the lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:

(1) to prevent the client from committing a crime; or
(2) to comply with the requirements of law or orders of any tribunal; or
(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; or
(4) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or
(5) to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Ghostwriting Court Decisions

Ricotta v. California, 4 F. Supp. 2d 961, 986 (D. S.D. Cal. 1998) (the issue of whether an attorney who ghost writes for a plaintiff can be held in contempt is a matter of first impression of the 9th Circuit.)

The three cases cited by *Ricotta* were: *Ellis v. State of Maine*, 448 F.2d 1325 (1st Cir. 1971); *Johnson v. Board of County Commissioners*, 868 F. Supp. 1226 (D. Colo. 1994); *Laremont-Lopez v. Southeastern Tidewater Opportunity Center*, 968 F. Supp. 1075, 1077 (E.D. Va. 1997).

The Court in *Ellis* held that it could not approve of the practice of ghost writing finding that if a brief is prepared in any substantial part by a member of the bar, it must be signed by the lawyer.

In *Johnson*, the Court found that while it was inappropriate for an attorney to ghost write for a pro se party, the lack of clearly defined rules prohibiting such a practice rendered sanctions inappropriate. The Court found that a pro se litigant's pleadings were afforded greater latitude as a matter of judicial discretion and that such ghost writing would give an unfair advantage to the other side. Second, the Court found that ghost writing delivered an evasion responsibilities imposed by Rule 11 and third, the Court found that such behavior implicated the rules of professional responsibility, specifically DR 1-102, which provides that an attorney:

> "should not engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

In *Laremont-Lopez*, the Court held that ghost writing unfairly gives the pro se litigant a less stringent standard than pleadings drafted by lawyers, nullified the certification requirement of Rule 11 and circumvented local rules concerning withdrawal of lawyers.

Other ghost writing cases include:

In Re Brown, 354 B.R. 535 (Bankr. N.D. Ok. 2006) (attorney with conflict who was forced to withdraw was ghost writing for pro se debtor);

In Re Cash Media Systems, Inc., 326 B.R. 655 (Bankr. S.D. Texas 2005) (suspended attorney ghost writing during period of suspension);

Ligouri v. Hanson, 2012 U.S. Dist. Lexis 376 (D. Nevada 2012) (litigant with counsel using another attorney to ghost write pleadings held not a violation);

In Re Merriam, 250 B.R. 724 (Bankr. Bankr. D. Colo. 2000) ($399 fee not excessive, absent evidence to the contrary, debtor's attorney need not always attend 341 meeting, but counsel cannot ghost write petition and schedules);

In Re West, 338 B.R. 906 (Bankr. N.D. Ok. 2006) (attorney unable to e-file ghost wrote bankruptcy pleadings and schedules for client to file manually);

In Re Smith, 2013 WL 1092059 (Bankr. E.D. Tenn. 2013) (suspended lawyer ghostwriting pleadings for clients is in violation of Model Rule 1.0(d), 1.2(d), 3.3, 3.4 and 8.4 and FRBP 9011. Suspended lawyer argued that ghostwriting is "limited scope representation." Court disagrees finding that: (1) suspended lawyer did not effectively limit the scope of representation; (2) did not obtain the informed consent of the clients; (3) abandoned the clients and left them on their own and required them to make an inaccurate statement under oath. Although the Tennessee Rules of Professional Conduct did not require a limited scope representation in writing, the Bankruptcy Code does require a written engagement agreement that specifies what the lawyer would do under 11 U.S.C. §528(a)(4). The failure to provide the services promised is also in violation of 11 U.S.C. §526(a)(1). The debtors were not given informed consent and the limitations provided were not reasonable and, under the circumstances, neither the debtors, nor the attorney provided candor to the tribunal.);

In Re Mungo, 305 B.R. 762 (Bankr. D. S.C. 2003) (attorney's practice of ghostwriting violates local bankruptcy rules in South Carolina and Rules of Professional Conduct. Ghostwriting must be prohibited because it is deliberate ebasion of a bar member's obligations pursuant to Federal Rule 11 and anonymity afforded by ghostwriting cannot be policed. Federal Courts interpret pro se documents liberally and afford greater latitude as a matter of judicial discretion. Ghostwriting constitutes a misrepresentation that violates an attorney's duty of professional responsibility and candor to the Court. Ghostwriting taxes the Courts because it does not provide for proper service of motions and notices.);

Duran v. Carris, 238 F.3d 1268 (10th Cir. 2001) (authors who author pleadings and necessarily guide the course of litigation [through ghostwriting] with an unseen hand are of concern to the Court. Ghostwriting inappropriately shields attorney from responsibility and accountability for his actions in counsel.);

Wesley v. Don Stein Buick, Inc., 987 F. Supp. 884 (D. Kan. 1997) (defendants filed motions for order of disclosure as to the attorney allegedly ghostwriting for a pro se litigant. The Court finds that ghostwriting creates a legal concern because pro se pleadings are liberally interpreted which would give a pro se litigant unwarranted advantage of having a liberally construed pleading standard applied in its favor, while holding the parties represented by counsel to a more demanding scrutiny. The Court finds that disciplinary Rule 1.02 D. Kan. Rule 83.6.1 is violated by ghostwriting.)

FIA Card Services, N.A. v. Pichette, et al., 116 A3d 770, 2015 WL 3645261, R.I. Sup. Ct. 2015 (Rule 11 is not applicable to attorneys for the assistance they provided in drafting papers subsequently filed by pro se litigants. In Rhode Island, Rule 11 juris prudence has revealed no instances in which sanctions were imposed for Rule 11 violation absent the filing of pleadings or other papers signed by an attorney. The Rhode Island Supreme Court draws a distinction between conduct that offends Rule 11 and that which may violate the Rules of Professional Conduct. The attorney shall not assist a pro se litigant with the preparation of pleadings, motions, or other documents unless the attorney signs the documents and discloses therein his or her identity and the nature and extent of the assistance that he or she has provided to the tribunal and to all parties to the litigation – full disclosure of the attorney's involvement, albeit limited, is the better practice.)

The case notes that various states have contrary results. See, e.g. Cal. Rules of Court Title 3, Chapter 3, Rules 3.35, 3.37. (no requirement for disclosure of attorney assistance in ghost written pleadings.)

Mass. Sup. Jud. Ct., Order In Re: Limited Assistance Representation (2009) (disclosure on the ghost written document of legal assistance was provided in the preparation of the document, but the attorney may remain anonymous.)

Colo. Rule of Professional Conduct 1.2; Colo. R. Civ. P. 11b (attorneys permitted to assist pro se litigants with document preparation, but require the fact of assistance and the attorney's name to be disclosed in the document.)

Attorneys permitted to provide anonymous assistance in the preparation of documents that will be filed with the Court as long as the notation that the document was "prepared with the assistance of counsel" appears on the document. (Conn. R. Super.

Ct. Practice Book §4-2: Signing of Pleadings; Mass. Sup. Jud. Ct., Order In Re: Limited Assistance Representation (2009); N.H. Super. Ct. R. Civ. P. 17(g))

Rule 115A
Limited Representation

(a) **Written Consent Required.** 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.

(b) **Limited Appearance.** An attorney, pursuant to this rule, may make a limited appearance on behalf of an otherwise unrepresented party.

(1) **Notice of Limited Entry of Appearance Required.** An attorney making a limited appearance must file a notice of limited entry of appearance. The notice is sufficient if it is on the judicial council form. The notice must:

(A) state precisely the court proceeding to which the limited appearance pertains; and

(B) if the appearance does not extend to all issues to be considered at the proceeding, identify the specific issues covered by the appearance.

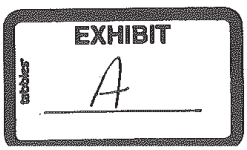
(2) **Scope and Number of Limited Appearances.** An attorney may file a notice of limited entry of appearance for one or more court proceedings in a case. At any time—including during a proceeding—an attorney may, with the client's consent, file a new notice of limited entry of appearance.

(3) **A Paper Filed In a Limited Appearance.**

(A) **Statement Required on Signature Page.** A pleading, motion, or other paper filed by an attorney making a limited appearance must state in bold type on the signature page of the document: "Attorney for [party] under limited entry of appearance dated ____."

(B) **Filing Outside Scope of Limited Appearance Constitutes General Appearance.** If an attorney files a pleading, motion, or other paper that is outside the scope of a limited appearance without filing a new notice of limited entry of appearance, the attorney will be deemed to have entered a general appearance in the case.

(4) **Service.** When service is required or permitted to be made on a party represented by an attorney making a limited appearance under this rule:



(A) for all matters within the scope of the limited appearance, service must be made on both the attorney and the party;

(B) the party must be served at the party's address stated in the notice of limited entry of appearance, but if the party's address has been made confidential by court order or rule, service on the party must be made in accordance with the court order or rule; and

(C) service on the attorney is not required for matters outside the scope of the limited appearance.

(5) **Restrictions on Limited Appearances.**

(A) An attorney may not enter a limited appearance for the sole purpose of making evidentiary objections.

(B) An attorney making a limited appearance and the litigant for whom the attorney appears may not argue on the same legal issue during the period of the limited appearance.

(6) **Withdrawal.**

(A) **On Completion of Limited Appearance.** On completion of a limited appearance—including completion and filing of an order or journal entry resolving the court proceeding for which the attorney was retained—an attorney must withdraw by filing a notice of withdrawal of limited appearance and serving the notice on the client and parties. The notice must state that the withdrawal is effective unless an objection is filed not later than 14 days after the notice is filed. The notice is sufficient if it is on the judicial council form and—unless otherwise provided by law—must include the client's name, address, and telephone number. The attorney must file a notice of withdrawal of limited entry of appearance for each court proceeding for which the attorney has filed a notice of limited appearance. The court may impose sanctions for failure to file a notice of withdrawal under this paragraph.

(B) **Before Completion of Limited Appearance.** If an attorney wishes to withdraw from a limited appearance before it is completed—including before completion and filing of an order or journal entry documenting the court proceeding for which the attorney was retained—the attorney must comply with Rule 117.

(c) **Document Preparation Assistance.** An attorney may help a party prepare a pleading, motion, or other paper to be signed and filed in court by the client. The following rules apply:

(1) The attorney or party preparing a pleading, motion, or other paper under this rule must insert at the bottom of the paper the notation "prepared with assistance of a Kansas licensed attorney";

(2) The attorney is not required to sign the paper; and

(3) The filing of a pleading, motion, or other paper prepared under this rule does not constitute an appearance by the preparing attorney.

[**History:** New Rule adopted March 15, 2012.]

Comment:

Making a legal form available to a self-represented litigant to complete for themselves, whether in person, by mail, electronically, or through the Internet (at no cost), is not considered document preparation assistance and is not covered by this rule.

[CAPTION]

NOTICE OF LIMITED ENTRY OF APPEARANCE

Pursuant to Supreme Court Rule 115A, the undersigned attorney hereby enters a limited appearance on (date) for *(name of client), (petitioner/respondent/plaintiff/defendant)* in this case.

1. This attorney, *(name)* and the *(petitioner/respondent/plaintiff/defendant)* have executed a written agreement whereby the attorney will provide limited representation to the *(petitioner/respondent/plaintiff/defendant)*.

2. This attorney's appearance in this case is limited in scope to the following matter(s):

[Identify all matter(s) that are applicable and provide a detailed description of services, including any scheduled appearances, as needed.]

3. This attorney is Attorney of Record and available for service of a document ONLY for the court events described above. For all other matters, the party must be served directly, unless otherwise ordered by the court. Service on this attorney for any issue not named above shall not be deemed service on the party. **The party's name and, unless it is confidential, address where service will be accepted are provided below for that purpose.**

4. A party or the party's counsel may contact the party represented by this attorney directly regarding matters outside the scope of this limited representation without first consulting this attorney.

5. This attorney's representation of *(petitioner/respondent/plaintiff/defendant)* will terminate after an order or journal entry resolving the matter subject to limited representation has been filed and a Notice of Withdrawal of Limited Appearance has been filed and served on the client and parties.

(Attorney's Signature)
Attorney's Name
Supreme Court Number
Address
Telephone Number
[Fax Number]
[E-mail Address]

Party's Name
*Address
*Telephone Number
*[Fax Number]
*[E-mail Address]

*Provide if nonconfidential

CERTIFICATE OF SERVICE

The undersigned certifies that on the _____ day of _____, 20___, a copy of the above Notice of Limited Entry of Appearance was served as follows:

[*List name and nonconfidential address of each person served*].

_____
(*Signature*)

[CAPTION]

NOTICE OF WITHDRAWAL OF ATTORNEY ON CONCLUSION OF LIMITED APPEARANCE

In accordance with the agreement between the undersigned attorney and *(name of client), (petitioner/respondent/plaintiff/defendant)* for limited representation, the undersigned attorney withdraws as an attorney of record in this case.

1. I was retained for the following limited scope services:

   [Provide a detailed description as was included in the Notice(s) of Limited Entry of Appearance.]

2. I have completed all services within the scope of my representation.

3. The last known service address for *(name of client)* is:

   [*insert address unless confidential by court order or rule*]

4. The last known phone number for *(name of client)* is:

   [*insert address unless confidential by court order or rule*]

My withdrawal pursuant to this Notice will be effective unless an objection is filed not later than 14 days after this Notice is filed.

(Attorney's Signature)
Attorney's Name
Supreme Court Number
Address
Telephone Number
[Fax Number]
[E-mail Address]

EXHIBIT
C

CERTIFICATE OF SERVICE

The undersigned certifies that on the _____ day of _____, 20___, a copy of the above Notice of Withdrawal of Attorney on Conclusion of Limited Appearance was served as follows:

[*List name and nonconfidential address of each person served*].

_____
(*Signature*)