Great Debates!

Roy S. Kobert, Moderator
GrayRobinson; Orlando

1. Eat Dirt! Can Secured Lenders Be Forced to Take Title?

PRO: Harley E. Riedel
Stichter, Riedel, Blain & Prosser, PA; Tampa

CON: Lynn Welter Sherman
Adams and Reese LLP; Tampa

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PRO: John A. Anthony
Anthony and Partners; Tampa

CON: Elizabeth A. Green
BakerHostetler; Orlando

3. Unbundling the Sticks: Can Debtor Counsel Limit Scope of Representation?

PRO: James H. Cossitt
James H. Cossitt, PC; Kalispell, Mont.

CON: Guy G. Gebhardt
Office of the U.S. Trustee; Atlanta

ABI – STETSON UNIVERSITY COLLEGE OF LAW

PASKAY MEMORIAL BANKRUPTCY SEMINAR

(March 5 – 7, 2015)

EAT DIRT: FORCING SECURED CREDITORS TO TAKE TITLE

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Eat Dirt: Forcing Secured Creditors to Take Title

1. Statutory Provisions

   a. 11 U.S.C. §1123(a) provides that a plan of reorganization shall "provide adequate means for the plan's implementation, such as:

   - (a)(5)(A) – "retention by the debtor of all *or any part* of property of the estate;"

   - (a)(5)(B) – "transfer of all or any part of the property of the estate;"

   - (a)(5)(D) – "sale of all or any part of property of the estate, either subject to or free of any line, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;"

   - (a)(5)(E) – "satisfaction or modification of any lien;"

   - (a)(5)(F) – "cancellation or modification of any indenture or similar instrument."

   b. 11 U.S.C. §1123(b)(5) – A plan may "modify the rights of holders of secured claims…."

   c. 11 U.S.C. §1129(b)(1) – Allowing cram down over a non-accepting class of claims, "if the plan does not discriminate unfairly, and is fair and equitable…."

   d. 11 U.S.C. §1129(b)(2) – "For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

      (A)With respect to a class of secured claims, the plan provides—

         (iii) for the realization by such holders of the indubitable equivalent of such claims.

   e. 11 U.S.C. §506(a)(1) – " An allowed claim of a creditor secured by a lien on property in which the estate has an interest …is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . ., and is an unsecured claim to the extent that the value of such creditor's interest … is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest."

2. Legislative History:

"Clause (iii) *requires* the court to confirm the plan notwithstanding the dissent of the electing secured class if the plan provides for the realization by the secured class of the indubitable equivalents of the secured claims. . . . Abandonment of the collateral to the creditor would clearly satisfy indubitable equivalence, as would a lien on similar collateral. However, present cash payments less than the secured claim would not satisfy the standard because the creditor is deprived of an opportunity to gain from a future increase in value of the collateral Unsecured notes as to the secured claim or equity securities of the debtor would not be the indubitable equivalent." H.R. Rep. 95–595, 95th Cong., 2d Sess. (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6544.

3. Treatises:

a. Collier on Bankruptcy:

"[T]he plan proponent must satisfy at least one of the three tests in order to confirm the plan, but not in the sense that compliance with one of the three tests is necessarily sufficient for confirmation purposes. As a number of courts have recognized, the fair and equitable standard also embodies a number of implicit requirements, including the requirement that the plan not unfairly shift risk of loss to the secured creditor. In order to maintain the secured creditor's relative balance of risk, the secured creditor cannot, among other things, be put in a worse off position from a collateral perspective. From a functional point of view, the relevant standard is the equivalent of requiring the maintenance of adequate protection during the relevant chapter 11 repayment period." Alan N. Resnick & Henry J. Sommer, 7 *Collier on Bankruptcy* ¶ 506.03[7][d][iii] (16th ed. 2014).

"As applied, most courts recognize that the test of indubitable equivalence has two (2) requirements: '(1) that the secured creditor receive the present value of its secured claim; and (2) that the Plan 'ensures the safety' of the secured creditor's principal." Alan N. Resnick & Henry J. Sommer *Collier on Bankruptcy* ¶ 506.043[7][d][i] (16th ed. 2014).

"For nonconsensual confirmation purposes, however, there are some definitive statements that can be made. First, abandonment, or other unqualified transfer of the collateral, to the secured creditor satisfies this requirement." Alan N. Resnick & Henry J. Sommer *Collier on Bankruptcy* ¶§1129.04[2][c] (16th ed. 2014).

b. Norton Bankruptcy Law and Practice:

"As suggested by that legislative history, *return of the collateral to the secured creditor is the simplest method of providing indubitable equivalent*. Because the value of a secured claim is necessarily equal to (or less than) the value of the collateral securing the claim, return of the collateral necessarily provides the

indubitable equivalent." §113:18

4. Case law:

Arnold & Baker Farms v. United States (In re Arnold & Baker Farms), 85 F.3d 1415 (9th Cir. 1996)

- Surrender of portion of collateral in full satisfaction of secured claim.
- Affirms BAP, holding that confirmed plan providing for transfer of property valued at $4,135,450 in satisfaction of a claim of $3,837,618 did not provide indubitable equivalent.

Sandy Ridge Development Corp. v La. Nat'l Bank (In re Sandy Ridge Dev't Corp.), 881 F.2d 1346 (5th Cir. 1989), *rhg denied,* 889 F.2d 663 (5th Cir. 1989).

- Plan that proposes to transfer all of the collateral to a secured creditor at a value fixed by the Court provides the indubitable equivalent.
- Fact that market is declining is irrelevant insofar as the value of the collateral will equal the secured claim on any date.
- Technical compliance with the requirements of Section 1129(b)(2) does not assure that the plan is fair and equitable; this section establishes minimum standards.
- Remanded to the Bankruptcy Court to evaluate the creditor's contention that the plan was not proposed in good faith.

In re 3G Properties, LLC, 2011 WL 5902504 (Bankr. E.D.N.C. July 12, 2011)

- Surrender of portion of collateral in partial satisfaction of secured claim.
- 1129(b)(2) standards are minimum, and a plan that satisfies 1129(b)(2) may not be fair and equitable.
- Adopts "conservative" approach to value. Applies discount for present value and anticipated commissions and closing costs to appraisal value.
- Denies confirmation based on negative amortization provided for on unpaid balance of secured claim.

In re Atlanta Southern Business Partners, Ltd., 173 B.R. 444 (Bankr. N.D. Ga. 1994)

- Plan proposing to transfer portion of collateral plus cash to secured creditor provided indubitable equivalent, where value of property to be transferred exceeded total claim, and cash to be transferred equaled estimated holding and disposition costs.
- Valuation is to be determined as of the confirmation date, not the estimated disposition date.
- Valuation should be conservative.
- Plan is not required to provide secured creditor a "safety net" in the form of retaining its lien on property the debtor is retaining.

In re B.W. Alpha, Inc., 100 B.R. 831 (Bankr. N.D. Tex. 1998)

- Plan proposing to transfer creditor 100% of its collateral (a hotel) in full satisfaction of its claim did not provide secured creditor with "indubitable equivalent," where it would take an estimated 5 years to liquidate the collateral and equity cushion was only 10%.
- Plan expressly provided for a credit against guarantor's liability for amount of value of property.

In re Bannerman Holdings, LLC, 2011 U.S. Dist. Lexis 153502 (E.D.N.C. 2011)

- Plan provided for surrender of the parking lot and 11 of the 15 condominium units securing mortgagee's claim in full satisfaction of the debt, and for the release of the debtor and guarantors. On appeal, the District Court reversed the Bankruptcy Court's finding that the plan provided for the indubitable equivalent, where the Bankruptcy Court excluded entrepreneurial discount in arriving at value, and the wide ranging appraisal testimony was indicative of the uncertainty in the value of the property.

In re Bath Bridgewater South, LLC, 2013 WL 968154 (Bankr. E.D.N.C. March 12, 2013)

- Court rejected secured creditor's arguments that: a partial dirt for debt plan can never be filed in good faith; and a partial dirt for debt plan can never satisfy the best interests of creditors test of Section 11129(a)(7).
- Conservative valuation of property adopted. Partial surrender was the indubitable equivalent where sufficient equity cushion existed.
- Partial surrender of collateral in full satisfaction of creditor's secured claim was indubitable equivalent based upon value of property to be surrendered.

In re Centennial Park, LLC, 2011 WL 5520968 (Bankr. D. Kan. 2011)

- Plan provided for the distribution to the secured creditor of that portion of the mortgaged property having a court-determined value equal to the amount of the claim. Prior to confirmation, the Court held a hearing limited to valuation of the property for plan confirmation purposes.
- "Conservative" valuation is appropriate in debt for dirt cases. Opinion provides detailed discussion of competing appraisals.

In re Claredon Holdings, LLC, 2011 WL 5909512 (Bankr. E.D.N.C. Oct. 19, 2011)

- Court valued property for purposes of plan proposing to surrender all collateral to secured creditor in full satisfaction of its secured claims.
- Value to be used for purposes of 1129(b)(2)(A)(iii) is conservative fair market value, not liquidation value.

In re CRB Partners, LLC, 2013 WL 796566 (Bankr. W.D. Tex. March 4, 2013)

- Plan that proposed to convey to secured lender a portion of its collateral in full satisfaction of its claim and to pay any shortfall in value from plan "liquidation fund" to the extent of any shortfall was not fair and equitable.
- Court adopts conservative valuation. Plan should provide a creditor a sufficient equity cushion because a surrender of "only a portion of the collateral shifts the burden of selling the property to the creditor and may increase its risk of exposure." Court must consider the likelihood that the creditor will actually realize the value and receive payment.

In re Hock, 169 B.R. 236 (Bankr. S.D. Ga. 1994)

- Plan providing for the debtor's abandonment of the property to a secured creditor in full satisfaction of its secured claim (in the amount determined by the Court), with the balance to be paid as an unsecured claim, provided the indubitable equivalent.

In re Immanuel, LLC, 2011 WL 938410 (Bankr. W.D. Mich. 2011)

- Plan proposed to transfer portion of one over-secured mortgagee's collateral to it in full satisfaction of its claim, and all of another mortgagee's collateral to it in partial satisfaction of its claim.
- Opinion provides extensive discussion on valuation of collateral.

In re Investors Lending Group, LLC, 489 B.R. 307 (Bankr. S.D. Ga. 2013)

- Confirmation of plan providing for surrender of portion of collateral valued at $691,840 in full satisfaction of $744,000 secured claim was denied.
- Where a plan proposes to surrender property in whole or part, then a foreclosure or liquidation value is appropriate.
- Discounts stipulated liquidation value of property of $752,000 by 8% to cover real estate commission and closing costs to arrive at $691,840 value, and concludes liquidation value of $810,000 or more is required to satisfy "indubitable equivalent."

In re Martindale, 125 B.R. 32 (Bankr. D. Idaho 1991)

- Plan that provided for liquidating secured creditor's collateral in parcels, with one to be surrendered, one to be sold, and one to be retained by the debtor for 10 months and either surrendered or sold, did not provide mortgagee with indubitable equivalent. Equity cushion was too small, the plan did not compensate the secured creditor for the delay in selling or surrendering the parcel to be retained, and all 3 parcels were subject to a joint well agreement.
- Property to be transferred to mortgagee was valued at fair market value, less 10% projected holding and resale expenses.

- In an uncertain market it is doubtful that such a plan offers the creditor the indubitable equivalent of its claim unless the appraised value of the property, demonstrated by competent proof, far exceeds the debt to be paid.

In re May, 174 B.R. 832 (Bankr. S.D. Ga. 1994)

- Plan proposing surrender of 11 of 14 townhouses valued at less than claim amount in full satisfaction of claim did not provide indubitable equivalent; however, plan amendment providing for surrender of additional collateral (13 of 14 townhouses) to provide creditor with a 1.5% equity cushion would be confirmed.
- 14 townhouses owned by Debtor, a portion of which were surrendered to secured lender pursuant to plan, should be valued based upon bulk purchase, not individual retail sale value.
- "Indubitable equivalent" does not require that secured creditor's state court rights not be altered.

In re Park Forest Development Corp., 197 B.R. 388 (Bankr. N.D. Ga. 1996)

- Dirt for debt plan providing for surrender of all collateral was not filed in bad faith, even though it would result in release of all or part of secured creditor's claims against non-debtor guarantors (depending upon valuation of property).
- Opinion provides analysis of the issues raised when a plan provided that the court-determined value of the property surrendered will be credited against the debt for purposes of a guarantor's liability for any deficiency.
- A surrender of all of a creditor's collateral is necessarily the indubitable equivalent.
- Valuation in a dirt for debt case "should be very conservative and allow the secured creditor an ample margin for error."

In re Ponce de Leon 1403, Inc., 2014 WL 6685381 (D. P.R. Nov. 25, 2014)

- Plan that provided for surrender of all property securing lender in full satisfaction of its claim did not satisfy indubitable equivalent, where claim amount exceeded value of the property to be surrendered.
- Appropriate valuation method was bulk value, not aggregate value of individual units. The opinion contains a detailed discussion of the competing appraisals and appropriate appraisal methodology.
- A plan that provides the indubitable equivalent may nevertheless not be fair and equitable if it unfairly shifts the risk of loss to the secured creditor. Section 1129(b)(2) merely establishes minimum standards.
- Collateral is to be valued on the date of confirmation.
- "A creditor's intended use for a property does not alter the standard of valuation or the highest and best use of the subject property." The appropriate standard of valuation is the

highest and best use of the property. Bulk valuation is appropriate where the collateral will be surrendered in bulk.

In re Prosperity Park, LLC, 2011 WL 1878210 (Bankr. W.D.N.C. May 17, 2011)

- Plan that proposed partial surrender of collateral to oversecured creditor in full satisfaction of secured claim did not provide indubitable equivalent.
- "Where there is a wide divergence in opinions on value between competent real estate appraisers engaged by the debtor and the bank, the Court is unable to find indubitable equivalence. To rely solely on the debtor's appraised values would put the Bank in a precarious position if that value turns out not to be correct."

In re Richfield 81 Partners II, LLC, 447 B.R. 653 (Bankr. N.D. Ga. 2011)

- Plan proposed to transfer 1/3 of unimproved acreage in full satisfaction of secured claim. Court denied confirmation because the debtor failed to present sufficient valuation evidence.
- "For illiquid real property to be the 'equivalent' of cash claim, the ability to liquidate the property fairly quickly is a most important consideration because of the impossibility of predicting future market conditions with indubitable certainty."

In re Riddle, 444 B.R. 681 (Bankr. N.D. Ga. 2011)

- Surrender of portion of collateral valued at approximately $940,000 in full satisfaction of lender's claim of $907,000 provided indubitable equivalent, did not unfairly discriminate, and was fair and equitable.
- Adopts $990,000 as "fire sale" value, and deducts anticipated closing costs of $50,000 and ad valorem taxes of $9,000 to arrive at a value of $931,000. "No reasonable doubt exists that the transfer of the …. Property to the Bank will result in full payment of its claim."
- "Indubitable equivalent" must be "completely compensatory."
- "[A]n equivalent is indubitable if no reasonable doubt exists that the creditor will be paid in full."
- "Indubitable equivalent" of secured claim "cannot be said to be unfair."
- Plan that satisfies indubitable equivalent may not be fair and equitable if the provision serves no reorganization purpose. Elimination of bank's lien on other collateral was necessary to pay junior lienholders and unsecured creditors and, therefore, fair and equitable.

In re Sailboat Properties, LLC, 2011 WL 1299301 (Bankr. E.D.N.C. March 31, 2011)

- Plan that proposes to transfer all of a mortgagee's collateral in satisfaction of its secured claim provides the mortgagee with the indubitable equivalent.
- Property is to be valued based upon the highest and best use, regardless of how the mortgagee intends to dispose of the property. Court rejects bulk sale value and instead

values the property based upon aggregate of individual lot sales discounted for projected absorption period.
- Valuation is to be conservative.

In re Simons, 113 B.R. 942 (Bankr. W.D. Tex. 1990)
- Plan that provided for the transfer of a portion of the collateral to the mortgagee in satisfaction of a portion of the mortgagee's secured claim equal to the value of the property transferred, with the balance to be paid over 10 years with interest, was fair and equitable.
- Court adopts a liquidation value because the secured creditor will have to sell the land, and then applied a 10% discount to account for realtor fees and closing costs.

In re SUD Properties, Inc., 2011 WL 5909648 (Bankr. E.D.N.C. Aug. 23, 2011)

- Plan that provided for transfer of 32 of 70 lots in a subdivision did not provide secured creditor with the indubitable equivalent of its claim, where the value of the lots was less than claim amount. Given the wide disparity in the appraisal testimony, projected 3 year absorption, and current market conditions, debtor would be required to transfer all of the collateral to the secured creditor in order to provide the indubitable equivalent.

In re the Legacy at Jordan Lake, LLC, 448 B.R. 719 (Bankr. E.D.N.C. 2011)

- Plan proposed to surrender of a portion of the lots securing the mortgagee in full satisfaction of the mortgagee's secured claim. Based upon the insufficiency of the appraisal testimony, the fact that the debtor and mortgagee would be competing with each other in selling lots, and the absence of evidence that the debtor would ever complete the common areas, the Court held that the debtor failed to satisfy its burden of proving indubitable equivalence.

In re Walat Farms, Inc., 70 B.R. 330 (Bankr. E.D. Mich. 1987)

- Plan providing for transfer of a part of the collateral to the mortgagee in full satisfaction of entire mortgage indebtedness was not the indubitable equivalent where there was no market for farm real estate.

WELCOME TO THE LAUNDROMAT!

Can 363 Orders Scrub All Future Claims?

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Introduction

Bankruptcy Code[1] Section 363 authorizes streamlined asset sales in order to maximize the value of a debtor's assets for the benefit of creditors. Section 363(f) specifically allows a debtor or trustee to sell assets to a buyer "free and clear" of liens, claims and interests[2] where any one of five criteria is satisfied.[3] "Free and clear" sales are particular to bankruptcy and authorize the sale of assets without the "stain" of certain liabilities. Exactly how clean purchased assets can be scrubbed or whether particular stains—in the form of claims against a purchaser or successor— remain post-sale, is the subject of this debate. Most case law on this issue has arisen in the context of successor liability disputes in connection with leasehold interests, discrimination claims, personal injury claims, civil rights claims, products liability claims, tort claims, and tax claims. A sampling of the case law is summarized below.

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[1] Unless otherwise stated herein, the term "Bankruptcy Code" shall refer to Title 11 of the United States Code.

[2] The term "claim" is defined in 101(5) and the term "lien" is defined in 101(37). However, the term "interest" is not defined in Bankruptcy Code.

[3] The five criteria are set forth in 11 U.S.C. § 363(f) as follows: (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; (2) such entity consents; (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property; (4) such interest is in bona fide dispute; or (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

I. Pro view (scrubbed clean)

***In re Trans World Airlines*, 322 F.3d 283 (3d Cir. 2003).**

The Third Circuit affirmed the bankruptcy court's order approving the sale of the assets of Trans World Airlines ("TWA") to American Airlines ("American"), which, pursuant to Bankruptcy Code § 363(f), extinguished the liability of American for employment discrimination claims against TWA and the "travel voucher program" awarded to TWA's flight attendants as part of a settlement of a sex discrimination action. The Third Circuit rejected the view that "interest in such property" under Bankruptcy Code § 363(f) is limited to liens, mortgages, money judgments, and other *in rem* interests, and adopted the broader view that the term "any interest" refers to obligations that are connected to or arise from the property being sold. For instance, the employment claims arose from the TWA airline assets. Without TWA's investment in commercial aviation, it would not have employed the claimants as flight attendants nor would it have had the other employment discrimination claims. Additionally, the claims asserted were capable of monetary valuation and therefore they met the requirements of Bankruptcy Code § 365(f)(5). The Third Circuit also recognized that allowing the claimants to seek recovery from the successor entities while other creditors with higher priority under the Bankruptcy Code could only obtain recovery from the assets of the bankruptcy estate would "subvert the specific priorities which define Congressional policy for bankruptcy distribution to creditors." Finally, the Third Circuit agreed that in the absence of a sale of TWA's assets to American, the claimants would likely receive little value as TWA would be forced to engage in a piece-meal liquidation of all of its assets.

***In re Ormet Corporation*, No. 13-10334, 2014 WL 3542133 (Bankr. D. Del. July 17, 2014).**

The District Court affirmed the Bankruptcy Court in approving a sale of the Debtor free and clear under Bankruptcy Code § 363. The Debtor, a producer of aluminum at locations throughout the country, endeavored to sell assets "free and clear of interests" under Bankruptcy Code § 363, including any successor liability claim of a pension trust (the "Trust") for underfunding an employee pension plan. The Trust attempted to distinguish cases applying a "broad view" to the term "interests" arguing that such cases did not consider successor liability claims under ERISA and MPPAA and that Congress intended to strongly protect employees and that the Bankruptcy Code should not eviscerate their rights. The District Court rejected the

Trust's arguments and noted other "broad view" cases, including *In re Trans World Airlines, Inc.*, 322 F.3d 283 (3d Cir. 2003) and *In re Leckie Smokeless Coal, Co.*, 99 F3d 573 (4th Cir. 1996), affirmed the use of Bankruptcy Code § 363 to extinguishing other highly protected classes of claims, including those for discrimination (*TWA*) and medical benefits (*Leckie*). As such, the District Court concluded that the Congressional policy favoring multi-employer pension plans expressed in ERISA and MPPAA did not trump the express provisions of the Bankruptcy Code permitting the sale of the Debtor's assets free and clear of the Trust's successor liability claim. The overriding policy inherent in the Bankruptcy Code is to maximize value of the debtor's assets for distribution to creditors in accordance with the priority scheme outlined in the Bankruptcy Code. Further, any retention of the successor liability claim held by the Trust would have depressed the value of the Debtor's asset and would also result in the Trust's claim receiving more than other general unsecured claims in violation of the Bankruptcy Code.

***Precision Industries, Inc. v. Qualitech Steel SBQ, LLC*, 327 F.3d 537 (7th Cir. 2003).**

The Seventh Circuit reversed a District Court's judgment that Bankruptcy Code § 363(f) and § 365(h) conflict, and therefore the more specific terms of § 365(h) govern, preserving a lessee's possessory interest even after a sale under § 363(f). The Seventh Circuit disagreed with the District Court, and concluded that the sale order and plain terms of § 363(f) operate to extinguish the lessee's possessory interest in a supply warehouse at the Debtor's steel mill facility in a sale free and clear of all interests. The Seventh Circuit noted that § 363(f) and § 365(h) can be read together in such a manner that they do not conflict, and found that § 363(f), on its face, authorized the sale of the Debtor's property free and clear of the possessory interest of the lessee and § 363(e) provides protection to parties whose interests might be adversely affected, including compensation for the value of the leasehold from proceeds of the sale, rather than from continued possession.

***PBBPC, Inc., v. OPK Biotech, LLC* (*In re PBBPC*), 484 B.R. 860, 862 (1st Cir. BAP 2013).**

The Bankruptcy Appellate Panel for the First Circuit affirmed a Bankruptcy Court's order granting a purchaser's motion to enforce a sale order ("Sale Order") and to compel the reduction of certain rates related to unemployment from 12.27 percent to 2.89 percent. In the Sale Order, the Bankruptcy Court found that the purchaser, OPK Biotech, LLC ("OPK") would not have

purchased the Debtor's assets unless the transfer was "free and clear of all [e]ncumbrances of any kind or nature" including, but not limited to, successor liabilities for unemployment related claims including "claims that might arise under ... state unemployment compensation laws or any other similar state laws."

OPK closed on the purchase of the Debtor's operating assets on September 9, 2009, and commenced operations in Massachusetts on October 1, 2009. Prior to the closing, the Debtor had terminated all but one of its remaining employees. Because the Debtor had laid off nearly all of its employees at the end of 2008, it had a high unemployment contribution rate of 12.27 percent. Following the closing, OPK advised the Massachusetts Department of Workforce Development, Division of Unemployment Assistance ("DUA") that it had acquired the Debtor's assets. The DUA, in turn, notified OPK that it was considered a "successor employer" within the meaning of the Massachusetts unemployment insurance statute, that the Debtor's account had been transferred to it, and that OPK's contribution rate for 2009 and 2010 was 12.27 percent.

The First Circuit BAP approved an expansive reading of the term "any interest" and concluded the term as used in § 363(f) was sufficiently elastic to include the right of taxation that the DUA was charged with enforcing. The right of taxation constituted an interest in estate assets because it imposed a debtor's unemployment rating on a buyer precisely because, and only because, the buyer purchased assets of the bankruptcy estate. By operation of the state statute, the debtor's unemployment rating traveled with the assets and encumbered their purchaser. Because the right to tax at the higher successor rate arose from the sale of the Debtor's property, § 363(f) permitted the bankruptcy court to authorize the sale free and clear of that rate.

II. Con view (stains remain)

***In re Grumman Olson Indus., Inc.* 467 B.R. 694 (S.D. N.Y. 2012).**

The District Court for the Southern District of New York affirmed the decision of a Bankruptcy Court which denied a motion for summary judgment filed by the successor in interest to a purchaser of a debtor's assets seeking a determination that language in a "free and clear" sale order relieved it of any liability on a claim for personal injury and products liability connected to a product which the debtor had manufactured and sold prior to sale of its assets, and

granted a motion for summary judgment filed by the personal injury and products liability claimant.

Prior to the bankruptcy filing, the debtor manufactured and sold truck chassis to various companies, including FedEx. These assets were sold to MS Truck and Body Corp., a predecessor to Morgan Olson, LLC ("Morgan") in July, 2003. The sale order contained several provisions that purported to limit Morgan's potential liability arising from the sale of the assets for tort claims based on allegedly defective products manufactured and sold by the debtor prior to the sale.

Many years after the sale, on October 8, 2009, a personal injury action was filed against Morgan by an employee of FedEx alleging injuries were sustained when the FedEx truck the employee was driving struck a telephone pole in 2008. The issue examined was whether, assuming a viable basis for successor liability existed based on prepetition conduct of the debtor, a bankruptcy court's sale order may be enforced to extinguish those claims where no injury occurred to the claimant until *after* the bankruptcy closed, such that the claimant was not provided with notice of, or an opportunity to participate in, the bankruptcy proceedings resulting in the sale order. In other words, whether a Section 363 "free and clear" sale order can extinguish a claim against a purchaser that is based on pre-bankruptcy conduct of the debtor that did not cause any harm to an identifiable claimant until much later in time. The Bankruptcy Court held, and the District Court affirmed, that enforcing the sale order would take away the right to seek redress under a state law theory of successor liability when the claimant did not have notice or an opportunity to participate in the proceedings that resulted in that order, depriving the claimant of due process.

***Schwinn Cycling & Fitness Inc. v. Benonis,* 217 B.R. 790 (N.D.Ill.1997).**

The District Court for the Northern District of Illinois affirmed a Bankruptcy Court decision that (i) a stay in a Chapter 11 confirmation order against personal injury claims did not apply to persons injured post-confirmation; (ii) the Bankruptcy Code did not preempt the application of state law successor liability claims against the purchaser of the debtors' assets; and (iii) a provision in a 363(f) sale order stating that the purchaser was not a "successor in interest" to the debtors did not preclude suit. The stay of personal injury claims contained in the debtors' Chapter 11 plan and confirmation order did not apply to the products liability action brought

against the purchaser of the debtors' assets by a plaintiff who was injured post-confirmation by a bicycle manufactured by debtor. When the Chapter 11 plan was confirmed, the plaintiff did not have personal injury claim, which the plan defined as one based upon personal injury or product liability occurring prior to the confirmation date.

Further, the sale order finding that the purchaser was not a "successor in interest" to the Debtors was intended to require existing (pre-confirmation) personal injury claimants to bring their claims against asset estates, and was not intended to preempt all possible future successor liability claims. Finally, the claimants were unknown creditors in that their claims did not arise until after the bankruptcy case. As such, the claimants had no notice of the sale order and there claims, therefore, would not be extinguished thereby.

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GREAT DEBATES:

Friday, March 6, 2015

Unbundling the Sticks:

Limited- Scope Representation

Moderator: Roy S. Kobert
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James H. Cossitt, P.C. – Kalispell, MT

Con: Guy G. Gebhardt
Acting United States Trustee, Region 21

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FLORIDA BANKRUPTCY LOCAL RULES ADDRESSING LIMITED-SCOPE REPRESENTATION

Southern District of Florida (effective February, 2014)

2090-1. Attorneys.

(C) Attendance at Hearings Required for Debtor's Counsel.

An attorney who makes an appearance on behalf of a debtor must attend all hearings scheduled in the debtor's case that the debtor is required to attend under any provision of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, or order of the court, unless the court has granted a motion to withdraw pursuant to Local Rule 2091-1.

(1) **Attendance at Initial Debtor Interview (IDI) and Meeting of Creditors (341 Meeting)**. An attorney, or a member of his or her firm, who makes an appearance on behalf of a debtor, must accompany the debtor to the initial debtor interview, where applicable, and to the meeting of creditors. The attorney attending the IDI or meeting of creditors must be familiar with the facts and schedules and have met and conferred with the client prior to appearing. The attorney or firm of record may not use an appearance attorney for either the IDI or the meeting of creditors. If the attorney who has met and conferred with the client is unable to attend the IDI or the meeting of creditors, the attorney must seek a continuance, or, in an unexpected emergency, request appearance counsel attend for the sole purpose of seeking the continuance.

Attendance at Hearing Required for Debtor's Counsel. An attorney who makes an appearance on behalf of a debtor, or a member of his or her firm who is familiar with the client and the file, must attend all hearings scheduled in the debtor's case that the debtor is required to attend under any provision of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, or order of the court, unless the court has granted a motion to withdraw pursuant to Local Rule 2091-1. The attorney may not use appearance counsel for any hearing unless (a) the client consents in advance to the use of the appearance attorney, (b) the client does not incur any expense associated with the use of an appearance attorney, and (c) the attorney complies with all applicable rules regarding disclosure of any fee sharing arrangements.

Middle District of Florida

9011-1. Attorneys – Duties.

Unless allowed to withdraw from a case or proceeding by order of the Court pursuant to Local Rule 2091-1, counsel filing a petition on behalf of a debtor shall attend all hearings scheduled in

the case or proceeding at which the debtor is required to attend under any provision of Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, these rules, or order of the Court; provided, however, counsel need not attend a hearing in regard to a matter in which the debtor is not a party and whose attendance has only been required as a witness.

Northern District of Florida

2090-1. Attorneys – Admission to Practice

D. Attorneys - Appearance and Withdrawal; Representation by an Attorney - When Required:

(1) No attorney, having made an appearance for a creditor in a contested matter or adversary proceeding or having filed a petition on behalf of a debtor, shall thereafter abandon the case or proceeding in which the appearance was made or withdraw as counsel for any party therein, except by leave of Court obtained after giving fourteen (14) days' notice to the party or client affected thereby and to opposing counsel.

(2) (a) The disclosure statement required by Bankruptcy Rule 2016(b) shall include a statement as to whether the attorney has been retained to represent the debtor in discharge and dischargeability proceedings including those initiated via motion under Bankruptcy Rule 4004.

(b) If the disclosure statement recites that the attorney has not been retained to represent the debtor in proceedings as described in D.(2)(a), the attorney shall not be required to represent the debtor in such proceedings.

(c) If the disclosure statement fails to recite whether the attorney has been retained to represent the debtor in proceedings as described in D.(2)(a), the attorney shall be deemed to represent the debtor in such proceedings and shall not be allowed to withdraw from such proceedings except as provided in paragraph (1).

(3) Unless allowed to withdraw from a case, matter, or proceeding by order of the Court, counsel filing a petition on behalf of a debtor shall attend all hearings and meetings scheduled in the case or proceeding at which the debtor is required to attend under any provision of the Bankruptcy Code, the Bankruptcy Rules, or order of the Court; provided, however, counsel need not attend a hearing in regard to a matter in which the debtor is not a party and whose attendance has only been required as a witness.

(4) Any party for whom a general appearance of counsel has been made shall not thereafter take any step or be heard in the case in proper person absent prior leave of Court, nor shall any natural person, having previously elected to proceed in

proper person, be permitted to obtain special or intermittent appearances of counsel except upon such conditions as the Court may specify.

(5) An entity other than a natural person may not file any petition or pleading, except provided, however, that any creditor or party in interest may participate in a Section 341 Meeting of Creditors without an attorney.

Unbundling or Limited Scope of Representation
Case Summaries

UNBUNDLING / LSR NOT ALLOWED

***In re Ruiz*, 515 B.R. 362 (Bankr. M.D. Fla. 2014) – Judge Karen Jennemann**
A law firm received $775 to represent Debtor and argued that their representation of Debtor was limited. The Court held (1) law firm could not contract around its responsibility to appear with debtor at hearings, after it had met with debtor, obtained his information, advised him on proper chapter of the Bankruptcy Code under which to file, and prepared petition and all of the other bankruptcy documents for filing; (2) law firm was obligated to sign petition; and (3) disgorgement of fee was appropriate remedy for firm's improper attempt to "unbundle" services.

The law firm was ordered to pay the full filing fee out of funds it collected from Debtor and turnover the remaining balance of $440 directly to Debtor.

***In re DeSantis*, 395 B.R. 162 (Bankr. M.D. Fla. 2008) – Judge Karen Jennemann**
Attorneys who represent consumer debtors must advise and assist their clients in complying with their responsibilities as debtors, including helping debtors decide whether to surrender collateral or to instead reaffirm or redeem secured debts. If a hearing is scheduled on a reaffirmation agreement, counsel must attend the hearing.

***In re Collmar*, 417 B.R. 920 (Bankr. N.D. Ind. 2009) – Judge Robert Grant**
Chapter 7 debtors sought approval of a reaffirmation agreement they negotiated with their creditor without the assistance of counsel. In denying the motion to approve the reaffirmation agreement, the Court held that the attorney could not limit his representation to exclude assistance with deciding whether to reaffirm a debt and a reaffirmation agreement entered into without advice of counsel could not be approved.

A decision to reaffirm an otherwise dischargeable debt is critical to bankruptcy, and assistance with that decision is one part of what makes up competent representation in a chapter 7 case.

***In re Hale*, 509 F.3d 1139 (9th Cir. 2007) – Judge Susan Graber (for the panel)**
Attorney (same attorney as in *Castorena*) provided pre-petition legal services to debtors, including preparation of the petition and schedules for a fee of $250. The attorney did not represent debtors at the 341 meeting, and his fee agreement did not include "adversary

Court found that counsel attempted to justify his fee by claiming value given for clearly non-compensable services, and by overstating, or overcharging for, other services. Counsel also

proceedings, appeals, and/or conversions, non-dischargeability proceedings, or any other representation."

Court affirmed the Bankruptcy Court's ruling that counsel could not provide limited representation – he is required to sign all petitions that he prepares or directs be prepared, and he must attend 341 meetings with his clients.

***In re Johnson*, 291 B.R. 462 (Bankr. D. Minn. 2003) – Judge Dennis O'Brien**
Order in consolidation of four chapter 7 bankruptcy cases where each debtor was represented by the same attorney. Counsel's 2016(b) statement indicated the fees received included representation at the 341 meeting. Counsel, however, offered each of his clients a reduced fee if they elected to attend the meeting of creditors without him–which each of his clients did. Despite the election to not be represented at the meeting of creditors, counsel did not correct or amend his 2016(b) disclosures.

Counsel was ordered to return $125.00 to each of the debtors, one hour's worth of time which the court found was the likely amount of time the attorney would have spent with each debtor attending the 341 meeting.

***In re Pair*, 77 B.R. 976 (Bankr. N.D. Ga. 1987) – Judge Stacey Cotton**
Order in consolidation of five chapter 13 bankruptcy cases where each debtor was represented by the same counsel. Bankruptcy counsel's representation continues until he is discharged by debtor or permitted to withdraw by the Court. Counsel owes a duty to represent the debtor in the case, even if the case becomes more complicated than originally anticipated, and debtor refuses to pay additional fees.

Court approval to withdraw will involve considerations of fairness, reasonableness, and proper protection of debtors' rights based on the circumstances in each case.

UNBUNDLING / LSR ALLOWED

***In re Seare*, 515 BR 599, 2014 Lexis 3584 (BAP 9th Cir. 2014) affirming In re Seare, 493 B.R. 158 (Bankr. D. Nev. 2013)**

Judge Jury, concurring:

"I write separately to highlight what this disposition, and the lengthy published opinion of the bankruptcy court in In re Seare, 493 B.R. 158, hold and what they do not hold. Importantly, they do not hold that unbundling representation of a debtor in a nondischargeability adversary proceeding from general representation of that debtor in a bankruptcy case is prohibited. What

they do say is that an attorney who wishes to limit her or his scope of bankruptcy representation should be mindful of the ethical minefield he or she must navigate. . . . .

The bankruptcy judge chose to publish his opinion as part of the sanctions of DeLuca "to deter such conduct by all attorneys. "I summarize here my suggestions for such attorneys to avoid violating ethical rules and the Bankruptcy Code when they limit the scope of representation of consumer debtors:

> 1. At the initial intake interview with the debtor, identify fully and completely the debtor's goals. Almost by definition, the attorney therefore cannot have a predetermined business practice that excepts representation in adversary proceedings from the services the attorney will render unless the attorney and debtor identify that exception before deciding to commence representation. As noted by the bankruptcy judge, the decision to unbundle **[**67]** must be driven by the debtor's needs, not the attorneys.
>
> 2. The attorney may not rely solely on the debtor's input to help him or her ascertain the debtor's goal. Both the ethical rules and the Code require the attorney to conduct a reasonable investigation of the debtor's assets and liabilities. If the attorney learns that a judgment has been taken against the debtor, the attorney must make reasonable inquiry into the nature of the judgment in order to determine whether it might be subject to nondischargeability.
>
> 3. If, after ascertaining the debtor's goals, the attorney believes that limited scope representation is consistent with those goals, the attorney must then fully explain to the debtor the consequences and inherent risks which might arise if an adversary is filed against the debtor and the attorney has not included representation in that proceeding in the unbundled services. Informed consent is just that: informed. The debtor must understand the "legal jargon" and the practical effect on him or her of the limited scope representation before the consent is informed.
>
> 4. The attorney must customize the retainer agreement to the goals of debtor. That is not to say that much of the **[**68]** agreement cannot be boilerplate, but boilerplate without the attorney's active role in its preparation will be insufficient for limited scope representation. Just having the debtor read and initial the agreement does not assure the debtor is giving informed consent.
>
> 5. 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 relationship with the debtor for the limited scope.

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

Following these suggestions should go a long way to allowing consumer bankruptcy attorneys to unbundle adversary proceeding representation without violating ethical rules.

***In re Slabbinck*, 482 B.R. 576 (Bankr. E.D. Mich. 2012) – Judge Phillip Shefferly**

A law firm required clients to enter into two separate fee agreements – one for pre-petition services and one for post-petition services, which included preparation of the schedules and attendance at the 341 meeting. The UST sought disgorgement of fees and cancellation of the post-petition fee agreement.

"[C]ompetence of a Chapter 7 debtor's attorney is most appropriately evaluated by looking at the actual work that was agreed to be performed and then was performed by the attorney, not by looking at the remaining work that will have to be done to complete the case when the individual has not hired the attorney to perform those services and the attorney has not performed those services."

Nothing in the law prohibits debtors from hiring an attorney solely to prepare a bankruptcy petition and for pre-petition bankruptcy counseling and then proceeding with the rest of the filings and other aspects of the case post-petition *pro se*.

***In re Egwim*, 291 B.R. 559 (Bankr. N.D. Ga. 2003) – Judge Paul Bonapfel**

Attorney is obligated to represent debtor, including discharge and dischargeability actions, unless there is a valid, professionally appropriate contractual limitation on the scope of representation or the attorney is permitted to withdraw by the court.

In order for there to be a valid limitation on the scope of representation, (1) attorney must consult with client about the limited representation that will be provided; (2) client must provide informed consent, in writing, to the limited representation; and (3) attorney's engagement must be so limited as to prevent competent representation.

If basis for request to withdraw is non-payment of fees, attorney must show that continued representation would be an unreasonable burden on the attorney and withdrawal is justified based on consideration of fairness, reasonableness, and proper protection of debtor's rights. Attorney must show that there is no possible, reasonable arrangement to be made for payment of attorney's fees.

Rule 2016(b) statement is not an effectual way to limit scope of representation, most importantly because it is not signed by debtors.

***In re Castorena*, 270 B.R. 504 (Bankr. D. Idaho 2001) – Judge Terry Myers**

Order in consolidation of 19 chapter 7 bankruptcy cases where each debtor was represented by the same counsel. Counsel collected a fee of $250 to prepare the petition and schedules, but did not sign the petitions nor enter an appearance on the record. Counsel did file a Rule 2016(b) disclosure which described the vast limitations on his representation.

Court found that counsel attempted to justify his fee by claiming value given for clearly non-compensable services, and by overstating, or overcharging for, other services. Counsel also attempted to parse the duties of an attorney accepting an engagement in an unreasonable way. Counsel was ordered to disgorge $125.00 to each of the debtors.

***In re Bancroft*, 204 B.R. 548 (Bankr. C.D. Ill 1997) – Judge William Altenberger**
Order in consolidation of five chapter 7 bankruptcy cases where each debtor was represented by the same counsel. Counsel's model of representation was to charge $150 to prepare and file the petition and schedules. If debtors wanted further representation, including at the 341 meeting, counsel charged an additional fee.

The Court found there is a minimum level of representation in bankruptcy to claim a professional fee, which necessarily includes meeting with the client and attending the meeting of creditors. Legal services can be waived by a client, but only if the client consents after disclosure.

UNBUNDLING UNCLEAR

***In re Abdel-Hak*, 2012 WL 5874317 (Bankr. E.D. Mich. Nov. 16, 2012) – Judge Marci McIvor**
Debtor entered into a pre-petition retainer agreement with counsel. The agreement provided that attorneys' fees would be billed at an hourly rate and charged against the retainer. The law firm would be entitled to additional retainers should the retainer balance dip below $500. Prior to debtor receiving his discharge, the Court granted counsel's motion to withdraw. Debtor received his discharge and then counsel instituted collection activity to obtain an additional $3,295.93 in unpaid legal fees.

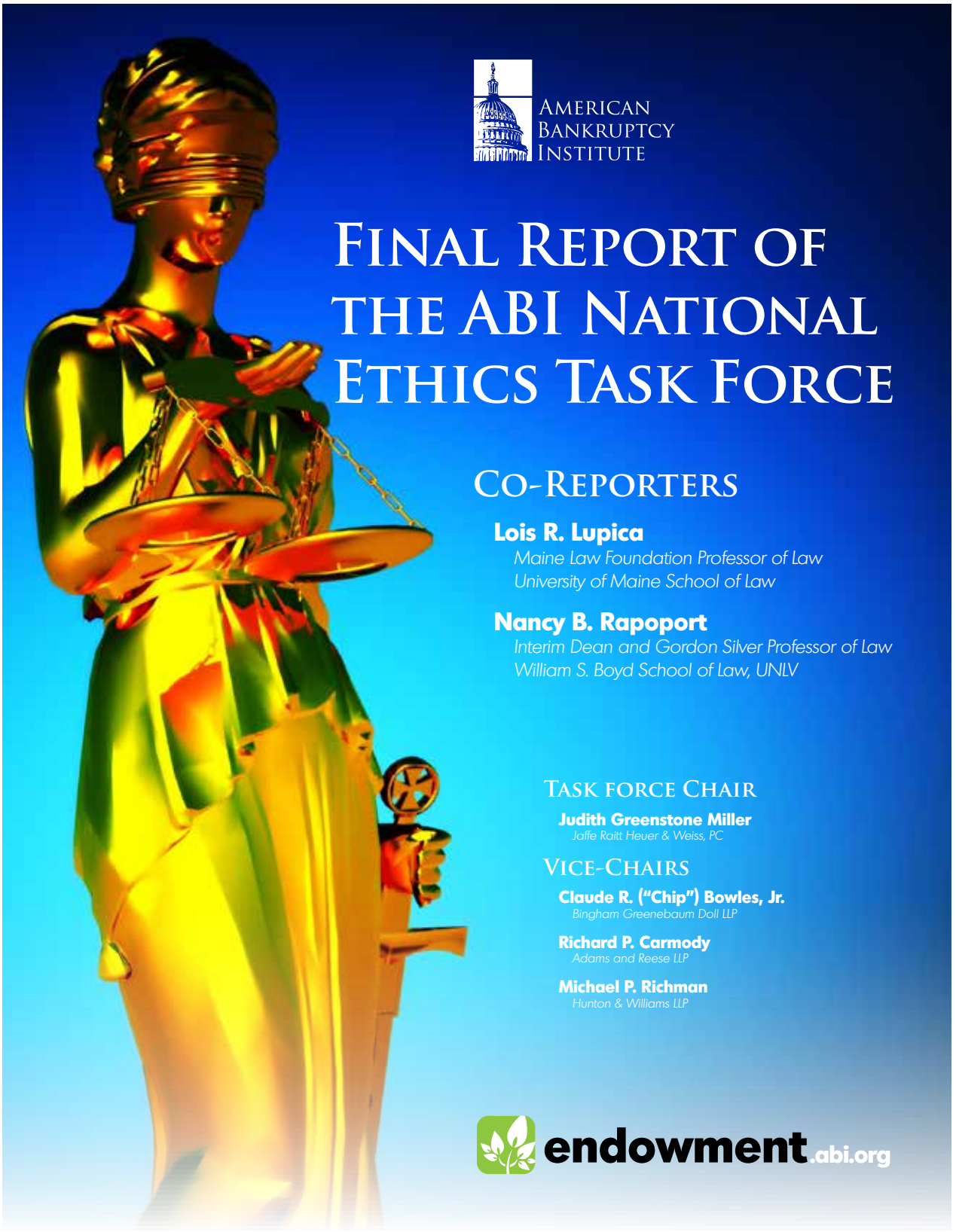
The Court found the fees were due pursuant to a pre-petition agreement, and therefore they were a dischargeable debt. As such, the balance could not be collected from Debtor. The Court made no findings with respect to the reasonableness of the fees or the propriety of the fee arrangement.

***In re Cuddy*, 322 B.R. 12 (Bankr. D. Mass. 2005) – Judge William Hillman**
Chapter 7 counsel moved to withdraw due to nonpayment of fees. The fee agreement between debtor and counsel provided that if debtor failed to pay fees, it would be cause to withdraw. In denying request to withdraw, the Court found the agreement to be like a contract of adhesion.

***In re Wilson*, 282 B.R. 278 (Bankr. M.D. Ga. 2002) – Chief Judge Robert Hershner**

"[N]o attorney may abandon a case or withdraw as counsel for a debtor except by order of court," however, there is no constitutional or statutory right to effective assistance of counsel in a civil case. Court found that the attorney failed to advise debtor as to seriousness of objection to discharge and failed to ensure a timely response to a complaint was filed during the period he was counsel of record.

Despite failings of the attorney, the Court could not consider motion for rehearing of default judgment because the motion was filed more than 10 days after the default judgment was granted.


American Bankruptcy Institute
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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.

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April 21, 2013

Table of Contents

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: _____

Competency for Debtors' Counsel

Introduction[1]

Rule 1.1 of the MODEL RULES OF PROFESSIONAL CONDUCT, adopted by most states and the District of Columbia, sets forth the standard for lawyer competency: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[2] Comment 5 to MODEL RULE 1.1 states that "[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners." In addition to the standard set forth in Rule 1.1, most federal courts, including some bankruptcy courts, have adopted a court-specific competency standard.[3] These standards typically include the requirement that lawyers are familiar with the applicable rules of procedure, evidence, and in some cases, substantive law.

The generalized pronouncement that a lawyer must be "competent," however, does not provide specific needed guidance to lawyers, clients, or judges about what precise skill sets a lawyer must have in order for him or her to provide competent client representation. As such, this Report describes, with some specificity, the substantive information that a bankruptcy lawyer must understand, as well as some of the specific skills that the lawyer must possess, to provide competent representation to a debtor in bankruptcy.

The Bankruptcy Context

Bankruptcy is a complex area of law, practiced in myriad contexts, with very different types of debtors accessing the bankruptcy system. For example, the bankruptcy reorganizations of public companies such as General Motors and American Airlines implicate very different issues and require different sets of skills for debtors' lawyers than the liquidation of small privately-held business enterprises. Further, the representation of a consumer debtor in a Chapter 13 case requires a body of knowledge and strategy significantly different from that required to represent, for instance, a liquidating nursing home.

Because the context and type of client can be so varied across the spectrum of potential debtors, bankruptcy lawyers typically specialize. They usually restrict their practice to consumer bankruptcy *or* business bankruptcy cases.[4] Lawyers within the two broadest bankruptcy categories

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[1] The Reporters would like to thank Task Force members Richard P. Carmody, James H. Cossitt, Steven A. Schwaber, and Andy Vara for their excellent background research that formed the basis of this Report.

[2] Model Rule of Professional Conduct R. 1.1.

[3] S.D. Cal. Civ. Local R. (2011), *available at* http://www.casd.uscourts.gov/uploads/Rules/Local%20Rules/LocalRules.pdf; ARIZ. BANKR. L. R., *available at* http://www.azb.uscourts.gov/default.aspx?PID=16 (last visited Aug. 3, 2012).

[4] Although it is not unusual for lawyers to represent both consumers and small businesses, including sole proprietors (and in fact, there are lawyers with dual certifications as specialists in business and consumer

may further specialize: some attorneys may primarily represent Chapter 13 debtors, while others may primarily represent debtors who file under Chapter 7; yet others may focus on the representation of sole proprietors and small family businesses or individual Chapter 11 reorganizations. Business bankruptcy lawyers may develop a specialization by the type of debtor, using such categories as market capitalization or industry sector. A lawyer must recognize the extent to which each of these individual types of bankruptcy practices requires different bodies of knowledge and skill sets. As noted below, to the extent that the lawyer's client or the type of case implicates issues about which the lawyer has little or no knowledge or with which he has little or no experience, the lawyer should either seek to educate himself (time and resources permitting) or seek counsel or assistance from a professional with experience and expertise in the particular issue or matter.[5]

Although the objective of this Report is to list the core competencies and skills required to represent both consumer and business *debtors* competently, the Task Force is mindful that many, if not all, of these same competencies and skills are required to represent the other parties in interest in bankruptcy cases. Some of these parties include trustees, examiners, ombudsmen, secured and unsecured creditors, various official and *ad hoc* committees, indenture trustees, lenders, asset purchasers and brokers, liquidators, landlords, trade suppliers, franchisers and franchisees, licensors and licensees, and equity owners. The representation of these parties will require lawyers to have similarly specialized skills and knowledge, tailored to their clients' role in the bankruptcy process, in order to provide competent representation to their clients.[6]

The Task Force's primary goal is to ensure that debtors receive the competent representation to which they are entitled. Although this Report detailing "best practices" for bankruptcy lawyers is not seeking to restrict entry into bankruptcy practice, the Report recognizes that bankruptcy practice is complex and specialized and demands a substantial investment of time in the form of education and practical experience over a career. There is no lack of reasonably-priced educational resources available to aspiring bankruptcy lawyers. Lawyers for all parties in a bankruptcy proceeding or case also should realize that there are significant risks in providing less

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bankruptcy law), it is less typical for lawyers to represent consumers and large business debtors in complex reorganizations or liquidations. *See* Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 AM. BANKR. INST. L. REV. 17, 93 (2012). Even if a lawyer typically represents a particular type of debtor or files most of his or her cases under one chapter or category (*e.g.,* chapter 13 and consumer chapter 7 cases), the competency standard requires that the lawyer be able to recognize a range of bankruptcy-related issues that may arise in individual cases, as well as the circumstances when a client may benefit from relief under another chapter.

[5] *See* MODEL RULE 1.1 cmt. 2 and MODEL RULE 1.2 cmt. 6.

[6] The focus of the discussion in this proposal is on counsel for the debtors in consumer and business bankruptcy cases. Similar capacities, skill sets, and competencies are necessary for counsel for other participants in the bankruptcy process (*e.g.,* counsel for creditors, counsel for a standing, panel, or case trustee, and committee counsel), albeit in a somewhat different context. A thorough discussion of specific best practices for counsel for parties other than the debtor in bankruptcy is outside of the scope of this Report. We recognize that competency is not solely an issue with respect to debtors' counsel, but with the debtor's fresh start on the line, competent representation through the bankruptcy process is an 'all or nothing' event for debtors. For this and a variety of other reasons, including time and resource issues, the Task Force chose to focus on the issue of competency of counsel in this one role. Other ABI working groups may choose to pursue competency issues of counsel serving in other roles.

than competent representation, such as being subject to fee reductions, sanctions, civil liability and, in rare instances, criminal liability.

Consumer Practice

Consumer debtors, according to the Bankruptcy Code's definition, are individuals who have incurred debts primarily for personal, family, or household purposes.[7] The vast majority of consumer bankruptcy filers are represented by counsel.[8] Because there are numerous complex legal and strategic decisions to be made in even in the simplest no- or low-asset consumer case, competent counsel serves as a valuable guide through the bankruptcy labyrinth. If a consumer client in financial distress presents a more complicated scenario, such as wanting to retain a home or car by paying the debt over time, then the need for legal advice from a knowledgeable attorney becomes even more compelling.[9] The absence of professional counsel can adversely affect both seemingly simple and complex consumer bankruptcy case outcomes, as well as the long-term value of the remedy of bankruptcy.[10]

A lawyer seeking to represent a consumer debtor must possess certain core competencies and skills.[11] These include an awareness of alternatives to the bankruptcy system, an understanding of bankruptcy as a substantive and procedural remedy, knowledge of the bankruptcy process, the skill to provide counseling to a client in financial and emotional distress, proficiency in the courtroom, the ability to negotiate with multiple parties with adverse interests, the judgment to aid a client to make decisions in his or her best interest, and the diligence to see what can be an arduous process through to its resolution. By agreeing to represent a consumer bankruptcy debtor, a lawyer is certifying that he or she possesses the requisite legal knowledge and skills. Further, the lawyer accepts the trust and reliance of his or her client to provide competent representation in response to the client's oft-changing needs.

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[7] 11 U.S.C. § 101(8). Many individual debtors, however, file for bankruptcy seeking to discharge business debts. The debtor typically incurs these business debts in the course of operating a small business.

[8] In most jurisdictions, a small percentage of consumers file for bankruptcy *pro se*. Lupica, *supra* note 4, at 139. In some jurisdictions, however, the percentage of *pro se* cases is considerably higher than the national mean. *See e.g.*, *In re Castorena*, 270 B.R. 504, 524-26 (Bankr. D. Idaho, 2001)("…fully 90% of the debtors filing in this District [retains] … a licensed lawyer to assist them in successfully navigating the statutory channels of bankruptcy law.")

[9] A recent empirical study of thousands of randomly selected consumer bankruptcy cases found that no *pro se* Chapter 13 debtors received a discharge. Lupica, *supra* note 4, at 81.

[10] "The counseling of a client in financial matters, particularly about his or her choice of remedies under the Bankruptcy Code or whether a bankruptcy proceeding can be avoided, is a serious matter that deserves the attention of a qualified attorney." *Columbus B. Ass'n v. Flanagan*, 77 Ohio St. 3d 381, 383, 674 N.E.2d 681, 683 (Ohio 1997).

[11] This section addresses primarily representation of consumers under chapter 13 and chapter 7. Individual Chapter 11 cases are a hybrid between Chapter 11 business reorganization and Chapter 13 cases. If individuals want or need to reorganize their finances, and they exceed Chapter 13 debt limits, Chapter 11 offers an option. The process of representing an individual under Chapter 11 is considerably different than representing a debtor under Chapter 7 or 13, but there are similarities in the general skills required of an attorney.

The core capacities and skills possessed by a competent lawyer representing consumer bankruptcy debtors include, but are not limited to, the following:

1. A lawyer should understand and be able to communicate to his or her client the advantages and disadvantages of bankruptcy as a debt relief remedy.

Comment: At the first client meeting, prior to any bankruptcy filing, the lawyer should be able to evaluate whether bankruptcy is the appropriate remedy for the particular consumer's problems.[12] As a "debt relief agency" under the Bankruptcy Code,[13] the lawyer must be able to assess the particular facts and circumstances presented by the client in order to weigh them against the advantages and disadvantages of filing a bankruptcy case. If the lawyer and client conclude that bankruptcy is an appropriate remedy, the lawyer's next concern is the appropriate chapter under which to file and the proper timing for filing. The timing consideration requires the lawyer to understand the consequences of a decision to file now in order to address exigent issues (such as a pending foreclosure sale or an eviction proceeding), or to wait in order to engage in acceptable pre-bankruptcy planning.

Pre-bankruptcy planning requires the identification of applicable and available exemptions, a discussion of tax liabilities, and the identification of any pre-petition financial transactions, to name a few. A review of the consumer's eligibility for relief under each chapter includes a consideration of any prior cases filed, the constraint imposed by statutory debt limits, and the balance between the debtor's consumer and non-consumer debts, as well as an appraisal of the benefits, burdens, and intended and unintended consequences offered by each chapter.

2. A lawyer should be familiar with the information necessary to prepare a bankruptcy case. In addition, the lawyer must have developed efficient and effective systems and procedures to obtain from the client the information and documentation required by the Bankruptcy Code.

Comment: Before a bankruptcy case is filed, a lawyer representing a consumer debtor must recognize the need to assemble and evaluate accurate and complete information and documentation from his or her client. This information and documentation should include copies of (a) pay advices; (b) tax returns; (c) bank statements; (d) inventories of all property owned by the debtor; (e) itemizations of all debts owed by the client, with appropriate back-up documentation; (f) itemizations of real estate owned and mortgages obligated on with appropriate back-up documentation; (g) financial statements and other financial information necessary to complete

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[12] *See In re* Pereira Santiago, 457 B.R. 172, 176 (Bankr. D.P.R. 2011) (citing 9 WILLIAM L. NORTON JR., BANKR. L. & PRAC. 3D § 172.25) ("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* DeSantis, 395 B.R. 162, 169 (Bankr. M.D. Fla. 2008) ("Attorneys must explain the rules and assist debtors in making good decisions.").

[13] *See* 11 U.S.C. § 101 (12A) ("The term 'debt relief agency' means any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110, but does not include [certain exceptions]"). Under 11 U.S.C. § 101(3), ('[t]he term 'assisted person' means any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $150,000.").

required schedules; (h) itemizations of all expenses in appropriate detail; and (i) a credit report. This list is not exhaustive, and the lawyer should be mindful of any additional information necessitated by the facts of a particular case.

In addition, the lawyer must be aware of the dictates and prohibitions set forth in the governing state rules of professional conduct on criminal or fraudulent behavior, including engaging in criminal, fraudulent, or prohibited transactions.[14] The lawyer must further be familiar with the evolving case law relating to pre-bankruptcy and exemption planning, including the line between permissible and impermissible conduct. It is the responsibility of the lawyer to apply the relevant rules to his or her client's goals and advise the client as to whether the proposed conduct is clearly proper, clearly improper, or falls within the gray area between the two ends of the spectrum. If the proposed conduct falls in the gray area, the lawyer must provide appropriate guidance and an informed opinion sufficient to allow the client to make an informed decision. The lawyer must make reasonable inquiry to ensure information supplied by the consumer debtor is accurate and complete. The scope of the reasonable inquiry to be performed by debtor's counsel may vary depending upon the type of client, the size of the case and the scope of the issues presented.[15]

3. A lawyer should be aware of the Bankruptcy Code provisions mandating certain disclosures by the lawyer. A lawyer should also know what types of information he or she is required to communicate to consumer debtor clients.

Comment: The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) requires attorneys to make certain disclosures and provide specific information to their consumer debtor clients. A lawyer should know that each of the following should be provided to his or her client: (i) a form notice under 11 U.S.C. § 342(b) and § 527(a)(2) describing bankruptcy's requirements and consequences, (ii) general information about legal services and rights of an assisted person, (iii) a form notice setting forth general information on how to arrive at certain values and information mandated by the official schedules, statements and forms, and (iv) a fully executed written contract (a retention letter) that identifies the services to be provided and the fees or charges for such services.[16]

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[14] MODEL RULES OF PROFESSIONAL CONDUCT R. 1.2(d) prohibits a lawyer from "counseling a client to engage, or assist a client in conduct that the lawyer knows is criminal or fraudulent …." Official Comments 9, 10, and 12 offer lawyers further guidance.

[15] *See, e.g.*, Task Force on Att'y Discipline Best Practices Working Grp., Ad Hoc et. al., *Working Paper: Best Practices for Debtors' Attorneys*, 64 BUS. LAW. 79, 82 (2008).

[16] *Id.; see also* Ad Hoc Comm. on Bankr. Ct. Structure and Insolvency Processes, & Task Force on Att'y Discipline, ABA Section of Bus. Law, *Attorney Liability Under Section 707(b)(4) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 61 BUS. LAW. 697, 717 (2006). If the scope of the representation is limited, the specific services to be provided should be explicitly described. *See* ABI Task Force on National Ethics Standards Report on Best Practices for Limited Services Representation in Consumer Bankruptcy Cases (April 2013); H. SLAYTON DABNEY, JR., STEFANIE BIRBROWER GREER, RICHELLE KALNIT & DANIEL G. EGAN, *RETENTION AND PAYMENT: ESSENTIALS OF BEING RETAINED AND PAID AS DEBTOR'S COUNSEL IN CHAPTER 11 (2008).*

In addition, the lawyer should facilitate the client's enrollment in the credit counseling course required of all consumer debtors as a predicate to filing a petition.[17]

4. A lawyer should know how to efficiently and effectively prepare and file a bankruptcy petition and the related schedules, statements and other necessary documents.

Comment: Once a lawyer has conducted his or her initial client counseling, gathered the necessary information and documentation, made the required disclosures, and provided advice with respect to the appropriate case, the lawyer must then prepare the necessary petition, schedules, statements, and forms. Preparation of these documents requires the lawyer to know how to analyze the available and applicable exemptions, determine the appropriate treatment of collateralized debts, (*e.g.,* surrender, redemption, reaffirmation, or retention), evaluate priority debts and administrative claims, and assess the debtor's ability to repay creditors from income or assets. If the debtor is filing a case under Chapter 13, the lawyer must also prepare the Chapter 13 plan.[18]

As noted above, the lawyer must make reasonable inquiry to ensure information supplied by the consumer debtor is accurate and complete and must conduct an inquiry sufficient to satisfy his or her obligation to sign the petition pursuant to Section 707(b)(4)(D) of the Bankruptcy Code.[19] As recently observed, "[w]here a lawyer systematically fails to take any responsibility for seeking adequate information from her client, makes representations without any factual basis because they are included in a "form pleading" she has been trained to fill out, and ignores obvious indications

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[17] The debtor in a Chapter 7 "asset" case was deemed to have satisfied the Bankruptcy Code's credit counseling requirement without filing his credit counseling certificate; debtor had stated under oath that he had completed the credit counseling required by the BAPCPA and would file his credit counseling certificate, debtor later failed to file the certificate. When debtor later failed to file the certificate and to appear at the first meeting of creditors, the debtor was found to be judicially estopped from denying that he completed the requisite credit counseling. Robin Miller, *Validity, Construction, and Application of Credit Counseling Requirement Under Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), 11 U.S.C.A. § 109(h),* 11 A.L.R. FED. 2D 43 (originally published in 2006); *see also* Lindsay Sherp, *To Strike or To Dismiss, That Is the Question: How Courts Should Dispose of Bankruptcy Cases Filed by Debtors Who Failed to Obtain Credit Counseling,* 60 BAYLOR L. REV. 317, 320 (2008) ("By requiring individual debtors to undergo credit counseling before filing for bankruptcy, Congress 'intended to give consumers in financial distress an opportunity to learn about the consequences of bankruptcy—such as the potentially devastating effect it can have on their credit rating—before they decide to file for bankruptcy relief.' In other words, Congress has determined that bankruptcy should be a last resort instead of 'the first place where an individual consumer debtor turns for help.'").

[18] If the debtor is not eligible for chapter 7 and has debts that exceed the chapter 13 debt limits, an individual chapter 11 case may be appropriate. In such instance, the lawyer for the debtor must be aware of the host of specific issues that arise in such cases. *See, e.g.,* Eduardo V. Rodriguez, *Bankruptcy and Individual Chapter 11s: The Newest Battleground for the Absolute Priority Rule,* 60-FEB Fed. Law. 49 (Jan./Feb. 2013); Hon. Alan R. Jaroslovsky, United States Bankruptcy Court for the Northern District of California, Notice to Bar Regarding *Individual Chapter 11* Cases, *www.canb.uscourts.gov/.../notice%20re%20chapter%2011.pdf* ("A Chapter 11 is not just a big Chapter 13.")

[19] In addition, an attorney is subject to Federal Rule of Bankruptcy Procedure 9011, which requires that an attorney represent to a court that the document being filed is not being presented for an improper purpose, that the claims and defenses are warranted by existing law, and that the factual contentions and denials contained in the filings have evidentiary support.

that her information may be incorrect, she cannot be said to have made reasonable inquiry."[20] A lawyer must also be familiar with the privacy protections afforded debtors pursuant to Federal Rule of Bankruptcy Procedure 9037. These protections include filings with redacted information and filings made under seal. A lawyer should understand the circumstances under which it is advisable for a client to take advantage of the privacy protections afforded by this Rule (including, for example, where a debtor has been subject to domestic violence, or where a minor is listed).

In addition, a lawyer must be familiar with the Electronic Case Filing ("ECF") system, and have hardware, software, and operating systems that allow for efficient access to the ECF system.[21] In addition, consistent with the ABA amendment to Comment 6 to MODEL RULE OF PROFESSIONAL CONDUCT R. 1.1, a lawyer must "keep abreast of changes in the law and its practice, including the benefits and risk associated with relevant technology… .[22] The recent ABA Commission on Ethics 20/20 further recognized and detailed the responsibility of lawyers with respect to technological advances and issues relating to communication and confidentiality.[23] The responsibility to acquire and maintain appropriate technological competency is relevant to lawyers practicing bankruptcy law.[24]

Because of the nature of consumer bankruptcy practices, lawyers often use subordinate lawyers and non-lawyer assistants to perform routine case-related services. Typically, in high-volume consumer bankruptcy practices, non-lawyer assistants are integral to a law firm's efficient functioning. In such cases, the senior lawyer must recognize the high level of responsibility he or she has for thoroughly training and properly supervising such subordinate lawyers and non-lawyer assistants.[25] Attention to detail is imperative in connection with debtor representation in consumer bankruptcy cases, and a lawyer's effort to keep legal fees in individual cases low by engaging in a high volume practice does not diminish a lawyer's professional responsibility to his or her client.

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[20] *In re* Taylor, 655 F. 3d 274, 286 (3d Cir. 2011). Although this case involved the behavior of creditor's counsel, the court was clear to observe that all attorneys in a bankruptcy case have a duty to review information provided by clients and evaluate its reasonability. Moreover, once additional information brings its reasonableness into question, attorneys has an affirmative duty to determine which facts can be reasonably supported.

[21] For a cautionary tale about the misuse of the ECF system, see *In re* Smith, 462 B.R. 783 (Bankr. D. Nev. 2011) (misuse of ECF credentials).

[22] American Bar Association, Commission on Ethics 20/20, Resolution adopted August 2012.

[23] *Id.*

[24] *See In re* Taylor, 655 F.3d 274 (3d. Cir. 2011). ("This case is an unfortunate example of the ways in which overreliance on computerized processes in a high-volume practice, as well as a failure on the part of clients and lawyers alike to take responsibility for accurate knowledge of a case, can lead to attorney misconduct before a court.") *Id.* at 277.

[25] *See* MODEL RULE OF PROFESSIONAL CONDUCT R. 5.1 (Responsibilities of a Partner or Supervisory Lawyer).

5. A lawyer should understand the consumer bankruptcy case process and system and have the skills to represent the debtor's interests diligently in connection with the case proceedings, keep his or her client informed, provide ongoing advice and responses to the debtor's inquiries, and be responsive to inquiries and requests made by the court and by other professionals in the case.[26]

Comment: The lawyer must be familiar with both the relevant facts of his or her client's case as well as with the applicable law. Typically, debtor representation requires a working knowledge of the Bankruptcy Code and the relevant parts of the U.S. Code addressing bankruptcy jurisdiction (Title 28) and bankruptcy crimes (Title 18); the jurisdiction's Local Rules; practice customs in the relevant jurisdiction;[27] the Federal Rules of Bankruptcy Procedure; the Federal Rules of Evidence; state law property rules, such as Article 9 of the U.C.C. and the law regarding real property title and transfer; and state law governing domestic relations. To the extent an issue or matter arises that is outside of the bankruptcy lawyer's area of expertise (*e.g.,* a tax or ERISA matter, or a domestic relations issue), the lawyer must seek counsel from another professional with expertise in that area.[28]

After the bankruptcy petition is filed, the case trustee sets a date for the Section 341 meeting of creditors. The lawyer should explain the process of that meeting to his or her client in order to raise issues in defense of the debtor's interests and to answer questions as they arise. Counseling at this stage in the process includes advice to debtors on the consequences of the incurring of post-petition debt.

In addition, a lawyer should be able to represent his or her client's interest in all proceedings before the bankruptcy court that are within the scope of his or her representation of the client. When appropriate in a particular case, a lawyer should have the knowledge and skills to (i) investigate and defend any avoidance actions initiated by the case trustee against the debtor, (ii) facilitate the turnover of property and documents upon the request of the trustee, (iii) appear at and represent a client's interest during a Rule 2004 examination, (iv) take steps necessary to enforce the automatic stay, including providing advice to debtors on actions for relief from stay, and (v) review reaffirmation requests and provide counsel and advice as to their advisability. A lawyer must also understand and be able to advise debtors on the extent and limits of the bankruptcy discharge, represent the debtor's interest in response to any objections contesting the discharge or the dischargeability of a particular debt, and provide counsel in the event of a violation of the discharge injunction.[29] Prior to discharge, the lawyer should facilitate the client's enrollment in the Personal Financial Management course required of all consumer debtors. Throughout the case, the lawyer should respond to calls and requests for information about the case from his or her client, from

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[26] *See* ABI Task Force on National Ethics Standards Report on Best Practices for Limited Services Representation in Consumer Bankruptcy Cases (April 2013).

[27] If a lawyer practices in a district in which more than one judge sits, a lawyer is well advised to become familiar with each judge's specific style and temperament, as well as the particular requirements each judge imposes upon counsel.

[28] *See* MODEL RULE R. 1.1 cmt. 2 and MODEL RULE 1.2 cmt. 6.

[29] *See* 18 U.S.C. §§ 152-156.

other professionals in the case, including bankruptcy trustees and the United States Trustee's Office, and respond to any and all requests made by the court.[30]

Business Practice

As is true with representing consumers in bankruptcy, lawyers for business debtors must also possess certain core competencies and skills.[31] Though, on the surface, there is considerable overlap in the skills needed to represent debtors in consumer and business cases, the context in which these competencies are required and are applied can be quite different. In both types of cases, a lawyer must have an awareness of alternatives to the bankruptcy system, an understanding of bankruptcy as a substantive and procedural remedy, knowledge of the bankruptcy process, the skills to provide advice to clients in financial distress, the ability to negotiate with multiple parties with adverse interests, the organizational skills to manage an administratively complex process, the judgment to aid a client to make decisions in his best interest, and the diligence to see what can be an arduous process through to its resolution.

In addition, by agreeing to represent a business bankruptcy debtor, a lawyer is representing that he or she possesses the requisite legal knowledge and skills required to navigate a business client through a reorganization or liquidation proceeding.[32] In many cases, this includes a working knowledge of finance, accounting, and asset valuation procedures. Moreover, in some types of cases, a lawyer is also representing that he or she is familiar with (or will become familiar with) the rules and practices that uniquely apply to a debtor's particular industry, market niche, or type of case (*e.g.,* a health care industry debtor, a single-asset real estate case, or an oil and gas producer debtor). To the extent that a lawyer is not competent to provide advice and counsel with respect to an issue in connection with a business bankruptcy case (*e.g.,* a tax matter, a stockbroker debtor, a Chapter 15 debtor's case), the lawyer must seek counsel and advice from another professional with expertise in that area.[33]

By agreeing to represent a business in connection with its bankruptcy case, the lawyer is safeguarding the trust and reliance of his or her client to provide competent representation in response to the client's oft-changing needs. The core capacities and skills possessed by a competent lawyer representing business bankruptcy clients include, but are not limited to, the following:

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[30] "[W]hen a person hires an attorney, he or she is entitled to a certain level of professional services and those services are to be rendered in a competent manner. An attorney should regularly communicate with his clients to insure that the clients understand the impact and scope of their case and the consequences of certain actions that may be taken in the case." *In re* Sledge, 352 B.R. 742, 748 (Bankr. E.D. N.C. 2006).

[31] As noted above, a lawyer representing an individual in a chapter 11 cases must have knowledge of the issues need to represent debtors under both chapter 13 and chapter 11. Competent representation in an individual chapter 11 case also requires an understanding of the issues that are uniquely implicated in these cases. See Sally S. Neely, *How BAPCPA Changed Chapter 11 for Individuals, or No, This is Not Your Mother's Chapter 11* (2012).

[32] *See* MODEL RULE R. 1.1 cmt. 2 and MODEL RULE 1.2 cmt. 6.

[33] Alternatively, the lawyer can ask the client to authorize the lawyer to affiliate with another professional with the needed expertise. At the outset of an engagement, the lawyer should describe in the engagement letter the protocol to be used if it is discovered that the representation involves an issue that is outside of the lawyer's expertise. See MODEL RULE 1.1 cmt 2 and MODEL RULE 1.2 cmt. 6.

1. A lawyer must have the knowledge and skill to provide pre-petition operational and exit strategy counseling and information to a client or prospective client in financial distress.

Comment: Competent handling of a business bankruptcy case begins with one or more pre-petition strategy and information sessions with a bankruptcy client (or prospective bankruptcy client).[34] A lawyer must have the depth of knowledge and experience to offer operational strategies and a sound exit plan. The lawyer should explain the myriad options and remedies available, including non-bankruptcy remedies. This discussion typically involves disclosures by the client or prospective client of financial, management and market information. The lawyer must have the skills to understand the company information, including the financial information, in order to provide useful advice as to the possible courses of action, and each course's potential consequences.

A lawyer must also make clear to the principals contemplating bankruptcy early on that the lawyer will be engaged by and will represent the debtor-in-possession and not any individual members of management.[35] The lawyer should describe the fiduciary duties of the DIP, provide examples of how the interests of the principals and the DIP may diverge, and explain what the lawyer's professional responsibilities are in such situations.[36] Finally, the lawyer should advise the principals that it might be in their best interest to engage their own counsel. The lawyer must recognize the need for a written retention letter, setting forth the scope of the representation and executed by both parties. In addition, the lawyer must be familiar with the required procedures for the retention of professionals under the Bankruptcy Code.

The lawyer must also have the requisite knowledge and skills to negotiate with some or all the client's creditors at this stage in an effort to either avert a bankruptcy filing or, in certain circumstances, to evaluate if a pre-packaged or pre-negotiated bankruptcy is feasible and advisable. In addition, the lawyer should be aware of, and communicate to his or her client, the advantages and disadvantages of: (i) liquidation, (ii) reorganization through a plan, (iii) the sale of assets under § 363 of the Bankruptcy Code, or (iv) an asset sale pursuant to a plan.

2. A lawyer should understand and be able to explain the myriad legal and business issues implicated by the prospect of a client's business bankruptcy filing. A lawyer should also be aware of the pre-petition steps required to be taken to prepare a case for filing. In addition to this substantive knowledge, a lawyer should have systems and procedures to execute the case filing efficiently and effectively.

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[34] See generally, Thomas J. Salerno, et. al, Pre-Bankruptcy Planning for the Commercial Reorganization: A Guide for the CEO, CFO/COO, General Counsel and Tax Advisor (2008).

[35] This of course assumes that this is the case. In the event it is not clear who the client will be prior to the lawyer's engagement, the lawyer should be mindful of any communication that may implicate issues relating to attorney-client privilege, conflicts of interest and Model Rule 1.18 governing communications with prospective clients.

[36] *See* ABI Task Force on National Ethics Standards Report on Duties of Counsel for a DIP as Fiduciary and Responsibilities to the Estate (April 2013).

Comment: The lawyer must have the knowledge and skills to understand and explain the issues of chapter choice and its consequences, as well as the matter of the appropriate venue and the proper timing of the filing.[37] Chapter choice requires an assessment of the client's objectives, its eligibility under each chapter, whether reorganization is desirable and feasible, and whether, if liquidation is the course of action, the case should be filed under Chapter 7, 11, 9, 12, or 15.

In addition, if the substantive and/or procedural bankruptcy law differs in the courts or jurisdictions in which a case may potentially be filed, the lawyer should be aware of these differences and make a determination, in consultation with his or her client, as to which courts or jurisdiction's laws are more in accord with his or her client's interests. Further, the lawyer should have the knowledge and skills to prepare a substantive analysis of the case, based on the available venue options, and taking into consideration the differences, if any, in applicable non-bankruptcy law.

The lawyer should understand the pre-bankruptcy planning steps that may need to be taken, including the identification of pre-petition financial transactions (which in turn affects the timing of the filing), a review of the firm's capital structure, and an assessment of the business's assets and liabilities. The lawyer should also be aware of the need for, and consult with his or her client about, the engagement of a claims and noticing agent, as well as the engagement of other professionals, including financial advisors and accountants. The lawyer should understand the structure of his or her entity client and obtain proper authorization to file the bankruptcy case from the appropriate client body (*e.g.,* a corporation client's board of directors).

Moreover, the lawyer should be aware of and analyze how numerous issues may affect or be affected by the filing of the bankruptcy case. This non-exhaustive list includes:

- The necessity and availability of cash collateral;
- The necessity and availability of post-petition financing;
- The necessity and feasibility of hiring non-lawyer professionals, including financial advisors and accountants;
- The debtor's executory contracts and unexpired leases and their proposed treatment under § 365; and
- Potential avoidance actions and the likelihood, costs and benefits of their being brought.

The number and types of issues to be considered pre-filing will vary from case to case.

In addition, the lawyer must be aware of the nature and type of information and documentation necessary to be collected prior to preparing a case for filing. This information and documentation may include (depending upon the chapter selected) (a) financial statements; (b) insurance policies; (c) tax returns; (d) bank statements; (e) an inventory of all property owned by the debtor, with appropriate documentation; (f) an itemization of all debts owed by the client, with appropriate documentation; (g) real estate and mortgage information; (h) other descriptive information necessary to complete required schedules, plan and disclosure statement; and (i)

[37] A lawyer should be aware that the timing of the case must be in the best interest of the debtor and not in the best interest of the principals or other insiders. *See* Wallach v. Bucheit (*In re* Northstar Dev. Corp.), 465 B.R. 6 (Bankr. W.D.N.Y. 2012).

identification of all going-forward expenses with appropriate detail. The lawyer must make reasonable inquiries to ensure information supplied by his or her client is accurate and complete. In the event that the lawyer recognizes an irregularity or other "red flag," he or she should be aware of the necessity of bringing the matter to the attention of his or her client, or taking other appropriate steps.[38]

Finally, the lawyer must have developed administrative systems to keep the client's information organized and accessible throughout the case. In addition, the lawyer must confirm that the client has the administrative and substantive capacity to prepare periodic financial reports, pay all interim expenses, including attorney's fees, and perform all other necessary administrative duties.

3. A lawyer should know how to prepare and file a bankruptcy petition and the related schedules and statements efficiently and effectively.

Comment: Once the initial client counseling has been conducted, information and documentation gathered, and disclosures made, the lawyer must then prepare the necessary petition, schedules, statements, and forms. The lawyer must have the knowledge and skills to prepare the filing and its related schedules and statements and to conduct a reasonable inquiry into the validity and accuracy of the financial information on the Schedules and Statement of Financial Affairs provided by the client. The lawyer must understand the consequences of the timing of the case filing.

The lawyer must also be familiar with the Electronic Case Filing ("ECF") system and have hardware, software and operating systems that allow for efficient access to the ECF system.[39] Furthermore, a lawyer must "keep abreast of changes in the law and its practice, including the benefits and risk associated with relevant technology… .[40] The recent ABA Commission on Ethics 20/20 further recognized and detailed the responsibility of lawyers with respect to technological advances and issues relating to communication and confidentiality.[41] The responsibility to acquire and maintain appropriate technological competency is relevant to lawyers practicing business bankruptcy law. In addition, if a lawyer is aided in his or her practice by subordinate lawyers and non-lawyer assistants, the senior lawyer is responsible for thoroughly training and properly supervising such subordinate lawyers and/or non-lawyer assistants.[42]

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[38] C.R. Bowles, Jr. & Nancy B. Rapoport, *Debtor Counsel's Fiduciary Duty: Is There a Duty to Rat in Chapter 11?,* 29-FEB AM. BANKR. INST. J. 16 (2010).

[39] For a discussion of the ramifications of abusing ECF credentials, see note 21 *supra.*

[40] American Bar Association, Commission on Ethics 20/20, Resolution Adopted August 2012. For information on the Ethics 20/20 revisions involving technology, *see*
http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/house_of_delegates_filings.html.

[41] *See* American Bar Association, Commission on Ethics 20/20, Resolution Adopted August 2012.

[42] *See* MODEL RULE OF PROFESSIONAL CONDUCT R. 5.1 (Responsibilities of a Partner or Supervisory Lawyer).

4. Lawyers must be aware of and comply with the provisions of the Bankruptcy Code and related rules relevant during the immediate post-filing time period. A lawyer should have the knowledge and skills to argue first-day motions and otherwise take steps to address the substantive and procedural issues that arise at the beginning of a case.

Comment: The business bankruptcy lawyer must be familiar with both the relevant facts of his or her client's case as well as with the applicable law. Typically, debtor representation requires a working knowledge of the Bankruptcy Code and the relevant parts of the U.S. Code addressing bankruptcy jurisdiction (Title 28) and bankruptcy crimes (Title 18); the jurisdiction's Local Rules; practice customs in the relevant jurisdiction;[43] the Federal Rules of Bankruptcy Procedure; the Federal Rules of Evidence; state law property rules, such as Article 9 of the U.C.C. and the law regarding real property title and transfer; and state law governing domestic relations. To the extent an issue or matter arises that is outside of the bankruptcy lawyer's area of expertise or implicates issues that are less commonly encountered, (such as stockbroker debtors, railroads, health care facilities, Chapter 15 cases, Chapter 12 cases, tax and ERISA matters, to name a few), the lawyer should gain an understanding of the relevant issues, or seek counsel from a professional with experience and expertise in the issue or matter.

In addition to being a skilled advisor, negotiator and drafter, in many cases lawyers for debtors in possession must also have the ability to advocate for their clients in bankruptcy court. In a Chapter 11 case, the lawyer typically addresses his or her client's exigent issues by arguing "first-day motions." [44] By way of illustration, these motions may include:

- A motion to employ counsel and other professionals (this process involves the disclosure of connections, as set forth in Rule 2014);
- A motion to extend time to file schedules and statements;
- A motion to retain "ordinary course professionals";
- A motion to authorize procedures for notice;
- A motion to approve investment guidelines;
- A motion to apply cash management procedures;
- A motion to obtain post-petition financing;
- A motion to establish interim professional fees procedures;
- A motion to use cash collateral;
- A motion to pay pre-petition employee wages; and
- A motion to honor pre-petition obligations to vendors and taxing authorities.

A lawyer must be aware of and communicate the numerous issues necessary to be addressed on an exigent basis in each individual case and have the skill to argue in support of his or her client's interests. Moreover, the lawyer must be aware of and comply with the applicable operational provisions in the Bankruptcy Code and related Rules, such as certain required notices, disclosures,

[43] If a lawyer practices in a district in which more than one judge sits, a lawyer is well advised to become familiar with each judge's specific style and temperament, as well as the particular requirements each judge imposes upon counsel.

[44] American Bankruptcy Institute, FIRST DAY MOTIONS (2010).

and filings. These include the noticing rules for motions that must be sent to appropriate parties. The applicability of many of these requirements turns on the nature, size, and type of business case.

In addition, a lawyer for a business DIP must have the knowledge and skills to:

- Facilitate the turnover of property and documents upon request of parties in interest;
- Take steps necessary to enforce the automatic stay, including providing advice to the client on actions for relief from stay;
- Represent his or her client's interests in connection with objections to claims;
- Represent the debtor in possession at the Section 341 meeting; and
- Appear and represent his or her client's interests at Rule 2004 examinations.

A lawyer must provide continuing disclosures to the court, as necessary (*e.g.,* Rule 2014 disclosures).[45] A lawyer must also respond to calls and requests from his or her client, the court, and creditors and other parties in interest, including bankruptcy trustees and the United States Trustee.

5. The lawyer representing a reorganizing DIP must have the knowledge and skills to draft an effective and confirmable plan of reorganization and disclosure statement in compliance with the relevant Bankruptcy Code provisions.

Comment: If a plan is to be drafted, it must satisfy the requirements of Chapter 11 and, more specifically, the plan confirmation requirements of Section 1129(a). This requires the lawyer's familiarity with the nuances for structuring a plan, including the classification of claims, and the satisfaction of the "best interests" test (which in turn requires a liquidation and feasibility analysis). The lawyer must further understand the various methods used to value assets, and be able to assess any such valuations. In addition, the lawyer for the DIP must be familiar with bankruptcy procedure, including the timing of key events in the case, such as the exclusivity period, the deadline for filing a disclosure statement and plan, the timing of vote solicitation, and the confirmation hearing.

The lawyer must also have the knowledge and skills to draft a disclosure statement, which must include thorough and complete information about the proposed plan and its consequences. A lawyer must understand the required standards for disclosure in order to solicit plan votes effectively. In the case of a publicly held DIP, the lawyer should also follow the applicable securities laws.

6. A lawyer should have the substantive and procedural knowledge and skills to manage the bankruptcy case and to effectively represent his or her client in all case proceedings.

Comment: The business bankruptcy lawyer must be aware of the range of matters that may need to be addressed throughout the pendency of the case and must possess the skills and experience to address them. An illustrative list includes:

- The consideration of whether to accept or reject executory contracts and the relevant rules with respect to the timing of such actions;

[45] *See* ABI Report of ABI Task Force on Proposed Amendment to Rule 2014 (April 2013).

- Ongoing assessments of cash collateral availability and need;
- Ongoing assessments of post-petition financing availability and need;
- The providing of advice concerning retaining non-lawyer professionals;
- The pursuit of any avoidance actions determined to be in the client's interest; and
- The monitoring of the DIP's ongoing financial performance.

7. A lawyer must be aware of the need to offer his or her client ongoing advice and provide the court with relevant disclosures throughout the duration of the bankruptcy case.

Comment: During the pendency of the case, the lawyer should continue to confer with and respond to inquiries from his or her client and provide proactive assistance with respect to the DIP's fulfillment of its fiduciary duties to the estate. In addition, a lawyer must be aware of his or her duty to comply proactively with any reporting requirements imposed by the court and by the Office of the United States Trustee.

8. The lawyer should have knowledge and understanding of the process of getting retained by the client, as well as the procedures required to be followed in order to receive professional fees. In addition, the lawyer must ensure that other professionals in the case understand the retention and payment requirements imposed by the Bankruptcy Code.

Comment: As an estate professional, the lawyer for the DIP must understand the process of retention, how time is to be billed, and the procedure necessary to be followed in order to have fees approved by the court. This includes the proper structure and use of pre-petition retainers and payments of pre-petition fees (or waiver of claims for such fees) to preserve continued employability and disinterestedness. In addition, a DIP's lawyer must ensure that any non-bankruptcy professionals, such as securities or corporate counsel, financial advisors, accountants and real estate agents, and fellow professionals within the lawyer's own firm understand the particulars of the bankruptcy retention and fee application process.

9. A lawyer must have the knowledge and skill to provide his or her client with advice concerning plan confirmation and the post-confirmation injunction.

Comment: A lawyer must understand and advise debtors on the extent and limits of the bankruptcy discharge and represent the debtor's interest in response to any objections contesting the discharge.[46] In addition, the lawyer must counsel the debtor about the scope of, and if necessary, respond to actions in violation of the post-confirmation injunction.

[46] *See* 11 U.S.C. § 523; *see also* 18 U.S.C. §§ 152-156.

Maintaining Competence

As Comment 6 to ABA Model Rule 1.1 observes, "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risk associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."

- In the field of bankruptcy, lawyers must be aware of new developments in both statutory and case law. Lawyers should remain cognizant of any changes to the Official Forms and be aware of changes to federal and local rules of procedure and evidence. Lawyers should also be familiar with changes and developments in relevant technology.[47]

- A lawyer representing debtors in both consumer and business cases should adhere to the requirements for admission and continued practice established by local bankruptcy courts.

- A lawyer representing consumer debtors, business debtors, or DIPs should participate in relevant continuing education courses.

- A lawyer desiring to begin a practice representing consumer debtors should participate in education courses, mentoring, and/or individual instruction prior to preparing cases for filing.

- A lawyer desiring to begin practice representing business debtors should similarly participate in education courses and, preferably, gain experience working under the supervision of more experienced attorneys.

[47] American Bar Association, COMMISSION ON ETHICS 20/20, Resolution adopted August 2012.

Proposed Rule

PROPOSED BANKRUPTCY RULE [ADMINISTRATIVE ORDER]
GOVERNING THE ADMISSION AND PRACTICE
OF PRIMARY ATTORNEYS IN BANKRUPTCY
COURT PROCEEDINGS

1.1 An attorney is qualified for admission to and practice in this Court as primary bankruptcy attorney for a party in interest if the attorney:

(a) is currently a member in good standing of the State Bar of _____ and the Bar of the United States District Court for the _____ District of _____; and

(b) certifies that he/she has, and will maintain, a working knowledge of this Court's local rules and administrative orders, the relevant provisions of Title 28 (bankruptcy jurisdiction), the Bankruptcy Code, all of the applicable federal rules of procedure and evidence, Title 18 (bankruptcy crimes), and the Rules of Professional Conduct of the State Bar and any other state bar of which the attorney is a member, and will reasonably supervise the work of others working for with him/her in the representation.

1.2 By appearing in matters before this Court, a primary bankruptcy attorney is continually certifying that, during the past two years, he/she has completed at least ten hours of continuing legal education in the areas of Federal Bankruptcy Law and relevant federal and state law and at least two hours of continuing legal education in bankruptcy-related ethics or has associated with an attorney who makes such a certification.

1.3 In order to represent debtors in bankruptcy cases, the attorney's working knowledge should demonstrate competence requisite to the nature of the case being filed. It may be necessary for an attorney to associate with an attorney who has demonstrated such appropriate working knowledge.

1.4 This rule is not intended to preclude an attorney who is not qualified as a primary bankruptcy attorney from giving emergency representation to a party in interest as long as such representation is limited to that which is reasonably necessary under the circumstances.

1.5 Attorneys residing in other jurisdictions who do not meet the requirements of 1.1(a) may be admitted *pro hac vice* pursuant to Local Rule/Order _____.