Northeast Bankruptcy Conference and Consumer Forum

Representing a Debtor or Creditor in a Bankruptcy Proceeding? It's an Ethical Minefield Either Way!

Hon. Janet E. Bostwick
U.S. Bankruptcy Court (D. Mass.) | Boston

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CONCURRENT SESSION

2022

It's an Ethical Minefield Out There!

Speakers:

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DISTRICT OF MASSACHUSETTS

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ESQUIRE

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EXECUTIVE DIRECTOR

Getting Paid, Limited Scope Representation and the Bifurcation of Fees: The Statutory, Procedural, and Ethical Regulations Implicated During Representation in a Bankruptcy Matter.

Great care as a practitioner

must be taken to avoid any confusion about the lawyer's role and to explain to the client with particularity to ensure compliance with both statutory requirements and rules governing the conduct.

The decision to accept

employment in a consumer bankruptcy case is driven by the professional's expectations of the time and skill required.

The Bankruptcy Code sets certain requirements for attorneys who represent debtors.

1. **Required Disclosures**
   - → Section 329
2. **Compensation**
   - → Section 330(a)(4)
   - → Section 330(a)(1)
   - → Section 327(a)
3. **Debt Relief Agency**
   - → Section 101(12)(A)
   - → Section 526(a)(1)
   - → Section 527
   - → Section 528(a)(1)
4. **Collecting Payment**
   - → Section 362(a)(6)
   - → Section 524(a)(2)
5. **Counsel's Duties**
   - → Section 707(b)(4)(C) and (D)

Federal Rules of Bankruptcy Procedure

a. **Bankruptcy Rule 1006 (b) (3)** states that an attorney may not receive payment from debtor when there is a filing fee balance.

b. **Bankruptcy Rule 2014** sets forth required disclosures for attorneys to be employed by a trustee or a debtor in possession.

c. **Bankruptcy Rule 2016** requires disclosure of fee arrangements between debtor and counsel (including fee sharing agreements). The Rule also sets forth the requirements for compensation.

d. **Bankruptcy Rule 2017** implements procedure for Section 329 disgorgement.

e. **Bankruptcy Rule 9011(b)** outlines sanctions.

Model Rules Regarding the Core Relationship

1.1 Competence

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

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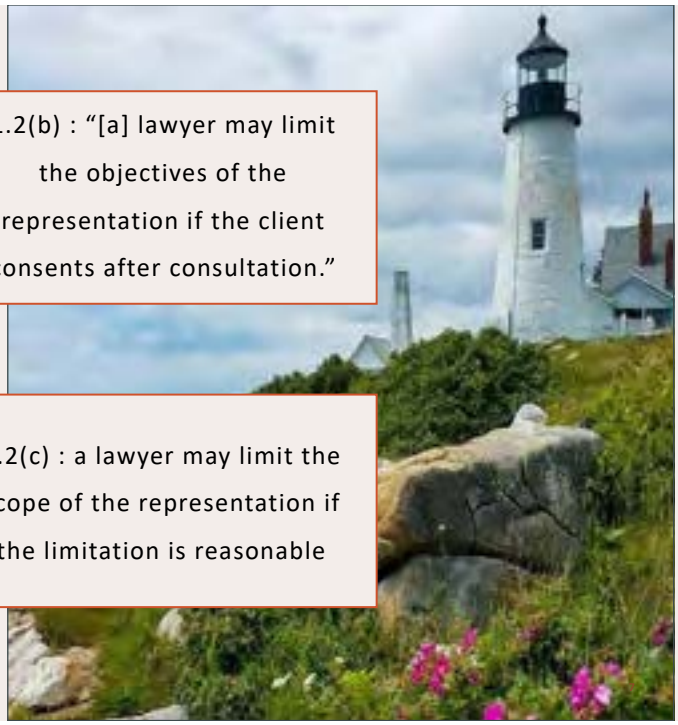
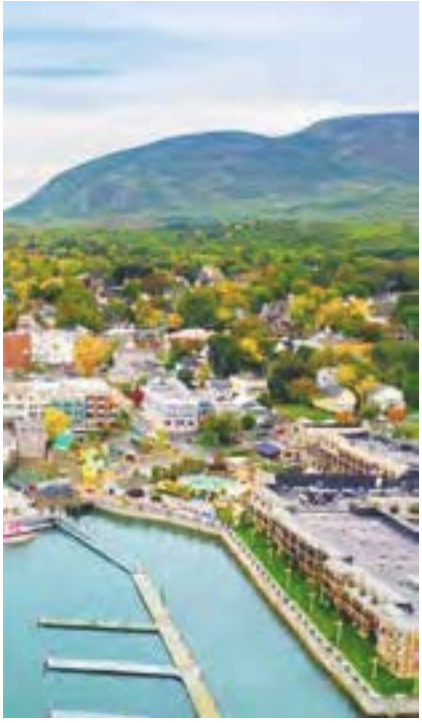
Model Rules and Limited Representation



1.2(b) : "[a] lawyer may limit the objectives of the representation if the client consents after consultation."

1.2(c) : a lawyer may limit the scope of the representation if the limitation is reasonable

Other Model Rules to Consider



- Model Rule 1.5: Fees
  "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."
- Model Rule 1.6: Confidentiality
  "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent…"
- Model Rule 1.7: Conflict of Interest
  "Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest."
- Model Rule 1.8: Conflicts of Interest-Specific Rules
  "A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client…"

Model Rule 1.13: Organization as Client

"A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."

Model Rule 1.16: Withdrawal

"…a lawyer shall not represent a client or…shall withdraw from the representation of a client if… the representation will result in violation of the rules of professional conduct or other law…"

Other Model Rules to Consider

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Other Model Rules to Consider

Model Rule 1.18: Duties to Prospective Client

"A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client…"

Model Rule 1.9: Duties to Former Clients

"A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client…"

Model Rule 2.1: Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

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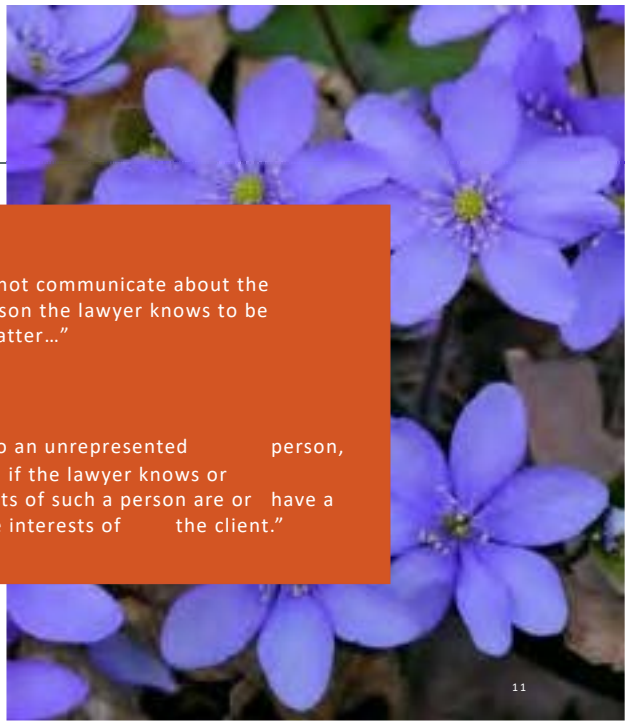
Other Model Rules to Consider



Model Rule 4.2: Represented Persons

"In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter…"

Model Rule 4.3: Unrepresented Persons

"The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."

The Maine Board of Overseers of the Bar

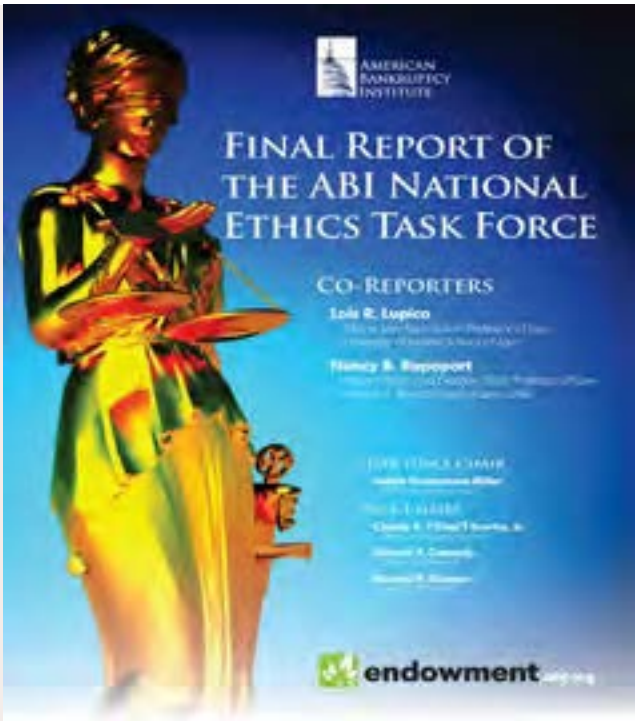
ETHICS HELPLINE
Monday, Wednesday and Friday
11:00 a.m. to 3:00 p.m.
207-623-1122

Additional Resources

AM. BANKR. INST., FINAL REPORT OF THE ABI NATIONAL ETHICS TASK FORCE (2013) (Pictured)

2018 ABI CENTRAL STATES WRITTEN MATERIALS: ETHICAL UNBUNDLING BY HON.JAMES W. BOYD

2018 ABI MID-ATLANTIC BANKRUPTCY WORKSHOP WRITTEN MATERIALS: UNBUNDLING, THE VARIOUS FORMS OF UNBUNDLING BY DAVID COX



Questions?

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AMERICAN BANKRUPTCY INSTITUTE
NORTHEAST CONSUMER FORUM
July 14, 2022

Representing either a Debtor or a Creditor in a Bankruptcy Proceeding? It's an Ethical Minefield no matter who the Client is!

Panelists:

Judge Janet E. Bostwick, District of Massachusetts
Aria Eee, Esq. Executive Director Board of Overseers of the Bar, Maine
Stephen Morrell, U.S. Dept. of Justice, Assistant U.S. Trustee, Maine
Nina M. Parker, Esq. Parker & Associates, LLC (Moderator)

Getting Paid, Limited Scope Representation and the Bifurcation of Fees: The Statutory, Procedural, and Ethical Regulations which are Implicated When Undertaking Representation in a Bankruptcy Case.

Bankruptcy lawyers, and in particular, those who represent small businesses and/or individuals who own businesses in bankruptcy proceedings are frequently confronted with the question of who is the client and how and from whom may they get paid? Great care as a practitioner must be taken to avoid any confusion about the lawyer's role and to explain to the client with particularity to insure compliance with both statutory requirements and rules governing the conduct.

The Bankruptcy Code and Federal Bankruptcy Rules of Procedure, together Local Rules adopted in each jurisdiction detail with great clarity the obligations that a lawyer be disinterested, and the attorney must clearly educate the client, from the moment of engagement so as to avoid future difficulties. This article will provide an outline of various considerations and as a reference guide for counsel to consult to avoid the ethical minefields that lay hidden in every engagement.

Limited Scope Representation and the Bifurcation of Fees

The decision to accept employment in a consumer bankruptcy case is driven by the professional's expectations of the time and skill required. Equally important is the expectation of fair and adequate compensation. It has long been recognized that there is a tension between the effort required of counsel and the cost of that effort. This tension has led to the proliferation of limited scope representation and the bifurcation of fees. Once an attorney commences a chapter 7 case on a consumer's behalf, he or she may be duty bound to perform a set of core functions which arise post-petition. The following identifies the statutory, procedural, and ethical regulations which are implicated when undertaking representation in a bankruptcy case and the mechanisms for compensation.

The Bankruptcy Code sets certain requirements for attorneys who represent debtors. Disclosure regarding fees and relationships is required under the Code and the Rules. In addition, fees are subject to Court approval if representing a debtor. Finally, there are restrictions that require additional information if a "debt relief agency

A. The Applicable Statutory Provisions.

1. Required Disclosures

a. Section 329 requires "any attorney representing a debtor" to disclose payments made within a year of the petition "in a case under this title, or in connection with such a case," and requires that all fees paid for bankruptcy-related services be reasonable.

2. Compensation

a. Section 330 (a) (4) authorizes reasonable compensation to be awarded to attorneys representing chapter 13 and chapter 12 debtors. The Bankruptcy Rules and Local Rules set forth the procedures for applying for court approval of fees.

b. Section 330 (a) (1) omits chapter 7 debtor's counsel from the list of professionals who may seek compensation from the estate. As a result, in a Chapter 7, counsel's ability to be paid after the filing is limited.

c. Section 327(a) authorizes the trustee to employ professionals at the expense of the estate. In a Chapter 11, a debtor in possession has the right to employ professionals. 11 U.S.C. § 1107 (a). Employment is subject to requirements of disinterestedness and other disclosures. Compensation is subject to court approval.

3. Provisions Regarding "Debt Relief Agency"

a. Section 101 (12) (A) defines a "debt relief agency" as anyone who provides a consumer (with nonexempt property valued below a statutory threshold) with "bankruptcy assistance" in return for money. Attorneys can qualify as such.

i) See, *Milavetz, Gallop & Millavetz v. United States*, 559 U.S. 229, 236, 130 S. Ct. 1324, 1331 (2010).

b. Section 526 (a) (1) requires a debt relief agency to perform the services promised and prohibits the making of false statements, by the agency or the debtor, in a bankruptcy case.

c. Section 527 requires a debt relief agency to disclose certain rights to assisted persons, including the right to a written contract with an attorney or a bankruptcy petition preparer.

d. Section 528 (a) (1) requires a debt relief agency to provide "assisted persons" with a contract explaining clearly and conspicuously the services the agency will provide, the fees, and the terms of payment.

4. Collecting payment

a. Section 362 (a) (6) stays any act to recover a claim against the debtor that arose before the commencement of the case. This includes claims for prepetition services.

b. Section 524 (a) (2) enjoins collection of any pre-petition debts (including for services rendered post-petition pursuant to a pre-petition contract).

i) See, *Bethea v. Robert J. Adams & Assoc. 352 F. 3d 1125 (7th Cir. 2003)*.

5. Counsel's duties

a. Section 707 (b) (4) (C) and (D) impose upon attorneys the duty of reasonable inquiry in connection with the petition, pleadings and written motions

B. Bankruptcy Rules and Local Rules

1. Federal Rules of Bankruptcy Procedure

a. Bankruptcy Rule 1006 (b) (3) (attorney may not receive payment from debtor when there is a filing fee balance).

b. Bankruptcy Rule 2014 sets forth required disclosures for attorneys to be employed by a trustee or a debtor in possession.

c. Bankruptcy Rule 2016 (requiring disclosure of fee arrangements between debtor and counsel (including fee sharing agreements). The Rule also sets forth the requirements for compensation.

d. Bankruptcy Rule 2017 (implementing procedure for Section 329 disgorgement).

e. Bankruptcy Rule 9011(b) (sanctions)

2. Local Bankruptcy Rules. Local Bankruptcy Rules can set forth additional requirements for disclosures, fee applications, or scope of representation.

C. The Ethical Rules. Each jurisdiction adopts rules governing the attorney- client relationship. While the rules may differ from state to state, the ABA Model Rules of Professional Conduct ("Model Rules") often form the basis for the rules. While you should consult your own jurisdiction's rules, the following highlights key Model Rules to consider

1. Model Rules regarding the core relationship

    a. Model Rule 1.1, states that "[a] lawyer shall provide competent representation to a client."

    b. Model Rule 1.2(a) states "Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and… shall consult with the client as to the means by which they are to be pursued…"

2. Model Rules that are applicable to limited representation
    a. Model Rule 1.2(b) addresses the scope of an attorney's representation of a client, and states that "[a] lawyer may limit the objectives of the representation if the client consents after consultation."

    b. Model Rule 1.2 (c) provides that a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

        i) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the attorney has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed conduct.

        ii) Comment [5], to Model Rule 1.2 discusses limited representation: "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."

3. Other Model Rules to consider regarding employment, compensation and conflicts:

    a. Model Rule 1.5 on Fees

    b. Model Rule 1.6 on Confidentiality

    c. Model Rule 1.7 on Conflict of Interest

    d. Model Rule 1.8 on Conflicts of Interest-Specific Rules

e. Model Rule 1.9 on Duties to Former Clients

f. Model Rule 1.13 on Organization as Client

g. Model Rule 1.16 on Withdrawal

h. Model Rule 1.18 on Duties to Prospective Client

i. Model Rule 2.1 on Advisor

j. Model Rule 4.2 on Communicating with Represented Persons

k. Model Rule on 4.3 Dealing with Unrepresented Person

D. Other Resources.

- AM. BANKR. INST., FINAL REPORT OF THE ABI National Ethics Task Force (2013) PROVIDES ADDITIONAL INFORMATION AND RESOURCES ON DISCLOSURES, DUTIES OF COUNSEL TO THE ESTATE AND LIMITED SERVICES REPRESENTATION

- 2018 ABI CENTRAL STATES WRITTEN MATERIALS: ETHICAL UNBUNDLING" BY HON. JAMES W. BOYD (W.D. MICH) AND CARRIE A. FOSTER 2018 CONFLICTISSUESGETTING PAIDBOYD UNBUNDLING.PDF (ATTACHED)

- 2018 ABI MID-ATLANTIC BANKRUPTCY WORKSHOP WRITTEN MATERIALS: UNBUNDLING THE VARIOUS FORMS OF UNBUNDLING BY DAVID COX https://abi-org-corp.s3.amazonaws.com/materials/ConsumerAndUSTEthicsIssues.pdf (ATTACHED)

Unbundling the Various Forms of Unbundling

By David Cox
Cox Law Group, PLLC
Lynchburg, Virginia

There is at least one thing that is certain in the world of Chapter 7 bankruptcy practice. Attorneys want to be paid for the services that they render to the debtor. There is a second thing that is almost as certain. Most debtors are willing to pay a reasonable fee for those services in order to receive a discharge of their personal debts. This paper will explore the various forms of unbundling utilized by consumer practitioners in order to reduce the need to charge full attorney's fees prior to the filing of a case and will also review issues related to the factoring of attorney's fees charged post-petition.

I. Background

The bankruptcy code prevents attorneys and Chapter 7 debtors from entering into a contract that will allow them to reach both of these goals if the debtor does not pay the attorney at least some, if not all, of his or her fees before the attorney begins work. The problem arises from the practical fact that at least some of the attorney's services must be rendered pre-petition, thus giving rise to a pre-petition debt owed by the debtor to the attorney, and the legal fact that the bankruptcy code provides that any claim arising from a pre-petition debt is dischargeable.

As one court has observed:

> Chapter 7 attorney fees are not obligations that are compensable from the bankruptcy estate, thus a Chapter 7 lawyer must, in a perfect world, collect his fee in full from the debtor pre-petition. Because Chapter 7 debtors often do not have sufficient funds to pay attorney fees up front, lawyers often enter into pre-petition agreements allowing debtors to pay part of the fees pre-petition and the balance of the fees post-petition. This arrangement, however, runs afoul of the general rule that pre-petition debts are dischargeable.
> *In re Abdel-Hak*, 2012 Bankr. LEXIS 5393 (Bankr. E.D. Mich. 2012).

II. Unbundling Generally

Because debtors do not generally have the funds sufficient to pay Chapter 7 legal fees before the attorney begins rendering services, some Chapter 7 attorneys have devised a variety of methods to ensure payment. These methods are referred to collectively as "unbundling."

> Unbundling is the practice of limiting the scope of services that an attorney will provide—"dividing comprehensive legal

> representation into a series of discrete tasks, only some of which the client contracts with the lawyer to perform."
> *In re Seare*, 493 B.R. 158 (Bankr. D. Nev. 2013).
>
> Instead of traditional representation, where a lawyer handles a case from start to finish, limited scope representation, also known as "unbundling" or "discrete task representation," involves representation in which a lawyer performs some, but not all, of the work. *In re Ruiz*, 515 B.R. 362 (Bankr. M.D. Fla. 2014).

In Chapter 7, unbundling typically consists of dividing legal services into at least two bundles. The first concerns services that are rendered pre-petition and the second concerns services that are rendered post-petition.

III. Forms of Unbundling: How Many Contracts?

Attorneys utilize a number of variations on the unbundling theme in order to achieve the ultimate goal, that is, the payment of their fees. One way to analyze these different themes is to divide the variations into the number of fee contacts that the attorney enters into with the debtor. Attorneys use one, two, and even zero contracts (sometimes referred to as ghostwriting) to set forth the terms of the complete bankruptcy representation in an attempt to assure payment of their fees. Each method has its weaknesses.

A. One Contract.

Under the single contract method, the attorney and the debtor execute a single contract that covers services rendered both pre-petition and post-petition. In some cases, the contract designates what services will be rendered pre-petition and what services will be rendered post-petition. Some of these contracts will also designate what portion of the fees is for pre-petition services and what portion of the fees is for post-petition services. While all courts hold any unpaid debt based upon a claim for pre-petition services to be dischargeable in Chapter 7, the courts are in disagreement regarding whether an attorney can collect unpaid fees for post-petition services based on a pre-petition contract.

1. One Contract – Fees Earned Post-petition Not Dischargeable

Some courts have held that fees earned pre-petition are dischargeable if not paid at the time that the contract is executed and that the fees that are earned post-petition are not dischargeable. These courts tend to require evidence concerning the division of services into those that are rendered pre-petition and those that are rendered post-petition before any post-petition fees may be allowed. These courts also tend to award post-petition fees under a theory of *quantum meruit* if the attorney is discharged by the debtor before all services are rendered.

In *In re Hines*, 147 F.3d. 1185 (9th Cir. 1998), the debtor's first attorney filed a Chapter 13 petition on behalf of the debtor. A year later, the debtor consulted a second attorney who recommended that she convert the case to Chapter 7. The debtor signed a promissory note and

provided the second attorney with seven checks, the first to be cashed pre-conversion and the other six to be cashed post-conversion. The second attorney cashed the first checks prior to conversion. After the case was converted to Chapter 7, the second attorney cashed two more of the checks.

The debtor then returned to the first attorney who advised her that the she should not pay the remaining fees owed to the second attorney because they became dischargeable upon the conversion of the case. The Bankruptcy Court reduced the fees allowed to $375.00, the amount that had been paid to the second attorney by the debtor. The debtor appealed to the Bankruptcy Appellate Panel which reversed and remanded the case to the bankruptcy court for a determination of damages for violating the stay. The second attorney appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit held:

> In sum, we determine that as of the time that [the debtor] fired [the second attorney] to return to [the first attorney] as her attorney, [the second attorney] did have an undischarged claim for any fees earned by him in excess of the $375 that he had already collected via the first three $125 checks. To quantify that claim, [the second attorney] could not look to the entire remaining $500 that was originally contracted for, because [the debtor] (like any client) had the right to discharge him before he had completed his services.

The holdings of the Ninth Circuit were three-fold. First, the Court held that fees based on post-petition services are not dischargeable. It follows that any such debt arising from the rendering of such services are not subject to the automatic stay. Second, the Court held that an attorney cannot be compensated under the contract if all of the services are not provided. Third, the Ninth Circuit held that an attorney who has not performed all services due under the fee agreement does, nonetheless, have a right to payment under the doctrine of quantum meruit to the extent of the value of the services that have been rendered. The Court held that § 362 is not implicated and the attorney could recover the value of services actually rendered because the services in question were rendered post-petition.

Those courts that agree with the holding in *Hines* tend to require that the fee agreement clearly distinguish between services that are to be rendered pre-petition and those that rendered post-petition. In *In re Michel*, 506 B.R. 99 (E.D. Mi. 2014), the debtor and attorney signed a pre-petition "flat fee" agreement and debtor paid $450.00 of the $900.00 fee pre-petition. The contract did not designate what amounts were to be paid for pre-petition services and what amount was to be paid for post-petition services. After the § 341 meeting was concluded, the debtor paid the balance of $450.00. The U. S. trustee filed a motion to compel the attorney to disgorge the fees.

The *Michel* court held that attorney had to return the $450.00 paid post-petition to the debtor because the debtor's single pre-petition contract:

> … draws no distinction between pre-petition services and post-petition services to be rendered, and does not in any way apportion the $900.00 flat fee... into a fee amount for pre-petition services and a fee amount for post-petition services. The Court agrees with those cases holding that this kind of pre-petition flat fee agreement in a Chapter 7 case creates a debt that is entirely a pre-petition debt, which therefore is subject to the automatic stay and is dischargeable in the Chapter 7 case.
> *Michel* at 106.

The Court denied the attorney's motion for compensation under a theory of quantum meruit based on other acts of the attorney that the Court found objectionable.

2. One Contract – Fees For Post-petition Work Under Pre-petition Contract Fully Dischargeable

Other courts have held that the attorney's claim for unpaid fees against the debtor under a Chapter 7 fee agreement gives rise to a debt that is wholly dischargeable in bankruptcy regardless of the distinction between pre and post-petition services. In these cases, the Chapter 7 attorney may not collect any deficiency; the attorney must collect the entire amount of the fees at or before the time that the fee agreement is executed.

In *Bethea v. Robert J. Adams & Assocs.*, 352 F.3d 1125 (7th Cir.2003), *cert*. denied, 124 S.Ct. 2176, 158 L.Ed.2d 733 (2004), the Seventh Circuit Court of Appeals held that a pre-petition fee agreement gave rise to a debt that is subject to discharge. In *Bethea*, the debtors agreed to pay their Chapter 7 legal fees in installments, with some payments to be made pre-petition and some post-petition. The debtors received their discharges before paying all of the fees. They later hired a different attorney to contest the debt arising from the unpaid fees, claiming that it was discharged. The Seventh Circuit concluded that the retainer contract created a pre-petition, liquidated, dischargeable debt, and that § 329 does not create an unenumerated exception to the § 727(b) discharge. Accordingly, the bankruptcy attorneys were required to refund to the debtors any money collected after the discharge and any money collected while the automatic stay was in effect. *Id.*, at 1129.

Thereafter, in *In re Griffin,* 313 B.R. 757 (Bankr. N.D. Ill. 2004), the debtor executed a single pre-petition fee agreement providing for a payment of fees in the amount of $1,150.00. He made a $100.00 down payment before the petition was filed. The *Griffin* court held that the attorney's unpaid claim arising under the Chapter 7 pre-petition fee agreement gave rise to a pre-petition debt that was dischargeable in the Chapter 7 case and therefore subject to the automatic stay. *Id.*, at 770.

3. One Contract – *Quantum Meruit* Considerations Regarding Dischargeability of Attorney Fees

Some courts have held that if the debt is not discharged, the attorney can recover under a theory of *quantum meruit* if the attorney is discharged by the debtor before completing all

obligations under the fee agreement. *Quantum meruit* determines the amount to be paid for services when no contract exists or when there is doubt as to the amount due for the work performed but done under circumstances when payment could be expected.

In *In re Grimmett*, 2017 Bankr. LEXIS 1492 (D. Idaho 2017) (affm'd on appeal), the attorney and debtor executed a fee agreement pre-petition that provided for fees of $500.00 to be paid pre-petition for pre-petition services and $1,500.00 to be paid for post-petition services according a set schedule. The debtor fell behind on the payments. The attorney attempted to collect the fees. The U.S. Trustee filed a motion to cancel the agreement and compel the attorney to disgorge the fees.

The bankruptcy court ordered the disgorgement of all fees, but then allowed the attorney to collect post-petition fees on a theory of quantum meruit:

> The Court disagrees [with the attorney's argument that a debt arising from post-petition services are non-dischargeable]. The Agreement was executed before Debtor's bankruptcy case was filed. As a result, Debtor's obligation to pay him under the Agreement was discharged in bankruptcy, period, and Counsel cannot enforce that contract obligation post-petition. To get paid for any post-bankruptcy services it provided, Counsel must invoke quantum meruit. While *Hines* is a case about the scope of the automatic stay, it also reinforced the holding in *Biggar* that a lawyer cannot collect for pre-petition legal services because that obligation is discharged. Here, Counsel likewise may not rely on his pre-petition fee agreement to collect for fees incurred post-petition. Counsel must instead seek payment for post-petition services based solely upon equity.
> *Grimmett*, at *27-28.

B. Two Contracts

Another approach to solving the fees problem in Chapter 7 attempted by some debtors' attorneys is to employ two contracts, one for pre-petition services and one for post-petition services.

In *Walton v. Clark & Washington, P.C.*, 454 B.R. 537 (Bankr. M.D. Fla.2011) ("*Walton I*"), the Chapter 7 attorney accepted postdated checks from the debtor as a pre-petition retainer. The Bankruptcy Court ruled that the Chapter 7 attorney was prohibited from accepting postdated checks as a pre-petition retainer for post-petition services that were to be provided to the debtor. The Court ruled that the postdated checks gave rise to pre-petition claims as a matter of law and that depositing the checks after the petition date violated the § 362 automatic stay or the § 524 discharge injunction (depending on when the check was deposited). The Court also ruled that the fee arrangement created a conflict of interest.

In response to the Court's opinion, the Chapter 7 attorney instituted a two-contract procedure under which the client executed one agreement for pre-petition services and a second agreement for post-petition services. After the debtor signed the pre-petition retainer agreement, the attorney prepared the petition and schedules. The attorney then filed the petition. Fourteen days after the attorney filed the petition, the debtor was given three options. The debtor could (1) proceed *pro se*; (2) retain the attorney to prosecute the Chapter 7 case; or (3) retain another attorney to prosecute the Chapter 7 case. If the debtor chose the second option, the parties entered into a post-petition retainer agreement. The client then made arrangements to pay the post-petition fees (generally in the form of automatic debits from the client's bank account) Thereafter, the attorney filed the balance of the schedules, statement of financial affairs, and other necessary documents.

The U.S. Trustee filed a motion to determine whether the attorney's new two-contract procedure violated the Court's prior ruling, resulting in a second opinion found at *Walton v. Clark 7 Washington, P.C.*, 469 B.R. 383 (Bankr. M.D. Fla. 2012) ("*Walton II*"). The Court cited two opinions for the proposition that a debtor may pay an attorney post-petition for post-petition legal services. As the Seventh Circuit recognized in *In re Bethea*, debtors "who cannot pay in full can tender a smaller retainer for pre-petition work and later hire and pay counsel once the proceeding begins - for a lawyer's aid is helpful in prosecuting the case as well as in filing it." *Bethea v. Robert J. Adams & Assocs*., 352 F.3d 1125, 1128 (7th Cir.2003). The Supreme Court has also recognized that a debtor is free to use post-petition funds to pay for post-petition legal services. *Lamie v. Trustee*, 540 U.S. 526, 535-36, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004). The *Walton II* court concluded that it must uphold the validity of the two-contract procedure absent some compelling reason not to do so.

The Court further concluded that the attorney had addressed other concerns regarding its prior procedure by (1) more fully setting out the costs and fees associated with filing the client's case; (2) specifying the client's three options for post-petition legal services; and (3) explicitly disclosing in the Rule 2016 disclosure statement that the pre-petition fee was $250 and that the contract between the client and the firm did not include post-petition services; and (4) setting out that the additional fee would be $1,000 in the event the debtor decided to retain the attorney for post-petition services. The attorney also agreed to represent the debtor during the two week period post-petition and to enhance its notice of two-contract procedure that it provided to the debtor. The Court concluded that there is no prohibition against a debtor making post-petition installment payments for post-petition services.

In *In re Slabbinck*, 482. B.R. 576 (Bankr. E.D.Mich. 2012), the Court allowed the attorney to enter into two contracts with the debtor, one contract for pre-petition services and one contract for post-petition services. The Court rejected the U. S. Trustee's argument that the two fee agreements were essentially a single agreement giving rise to a pre-petition debt and the U.S. Trustee's the argument that the attorney could not "legally" unbundle the legal services into pre-petition and post-petition services. If there is a problem with using two contracts, it is generally caused by the local rules.

In *Hines* the Court considered whether executing two fee agreements instead of one fee agreement would help a Chapter 7 attorney in the quest for payment. The Court, considering the

effect of the local rules on the two-contract approach, declined to agree with the *Walton II* holding:

> It has been suggested that a Chapter 7 debtor's attorney might avoid the compensation quandary by initially contracting only to provide pre-bankruptcy services and by initially accepting payment only for those pre-petition services. Then the attorney could later enter into a separate post-petition agreement to provide any necessary post-petition services. In addition to the patent artificiality of any such arrangement, it faces difficulties because of the ethical obligations that are typically imposed on any lawyer who files a bankruptcy (or any other) case on behalf of a client (see, e.g., Rules of the United States District Courts for the Northern District of California (Rule 11-5(a)), the Central District of California (Rule 2.8.2.1), the Eastern District of California (Rule 83-182(b)) and the Southern District of California (Rule 83.3(g)), all precluding an attorney who has filed an appearance from withdrawing from such representation without leave of court).
> *Hines*, 147 F.3d at 1190.

C. No Contract for Full Representation in the Case

In *In re Ruiz*, 515 B.R. 362 (Bankr. M.D. Fla. 2014), the attorney agreed to represent the debtor both before and after the Chapter 7 bankruptcy case was filed but did not sign the petition, attend the meeting of creditors with the Debtor, or perform the other minimal duties required of attorneys representing debtors. The debtor filed a signed petition indicating he was not represented by counsel. The attorney did not sign the petition, but did file a copy of a limited representation agreement with the Debtor. There was no agreement signed for the attorney to represent the debtor in the full bankruptcy case.

The Court framed the issue as follows: Can "an attorney provide services for consultation and preparation of the bankruptcy petition and related papers but then cause the debtor to file *pro se* without making an appearance or representing the debtor at the meeting of creditors?" *Ruiz* at 364. The Court first noted that Florida Rule of Professional Conduct 4-1.2(c) permits the unbundling of legal services if not prohibited by law or rule. The Court then inquired as whether the attorney violated Local Rule 2091-1 which provides that "[u]nless allowed to withdraw from a case ... by order of the Court ... 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...."

The Court next considered *In re Merriam*, 250 B.R. 724 (Bankr.D.Colo.2000) which ruled that the attorney was required to sign the petition under Bankruptcy Rule 9011:

> "When an attorney has the client sign a pleading that the attorney prepared, the attorney creates the impression that the client drafted the pleading. This violates both Rule 11 and the duty of honesty and candor to the court. . . . [t]he failure of an attorney to sign a petition