AMERICAN BANKRUPTCY INSTITUTE

2017 Hon. Steven W. Rhodes Consumer Bankruptcy Conference

Representing Chapter 7 Debtors After the Petition Is Filed and the § 341 Meeting Is Held

Hon. Thomas J. Tucker
U.S. Bankruptcy Court (E.D. Mich.); Detroit

Steve Bylenga
Chase Bylenga Hulst, PLLC; Grand Rapids, Mich.

Ryan F. Beach
The Law Offices of Ryan F. Beach, PLLC; Grand Rapids, Mich.

Kevin C. Calhoun
Calhoun & Di Ponio, PLC; Southfield, Mich.

FEE AGREEMENTS FOR PRE- AND POST-BANKRUPTCY FILING WORK

Ryan F. Beach
The Law Offices of Ryan F. Beach, PLLC
Grand Rapids, Michigan

1. What does the law/ethics require (including show-cause hearings for the Debtor failing to pay the filing fee)?

In most jurisdictions, unbundling or limiting representation of Chapter 7 debtors is not *per se* prohibited, if such limitation is consistent with the applicable rules of professional conduct. Counsel must always provide competent representation, regardless of any agreed upon limitation of representation. A client must give informed consent to any limitation of representation, which requires that its counsel clearly explain the bankruptcy process and what can occur in matters where the debtor is unrepresented.

While the Bankruptcy Code does not specify what services must be provided, local bankruptcy rules often do. When local rules are silent, counsel seeking to limit representation of a debtor must be mindful of the requirements of the applicable rules of professional conduct. Counsel must also comply with the requirements of attorney compensation as set forth the Bankruptcy Code, Federal Rules of Bankruptcy Procedure, and the Official Forms.

A. 11 U.S.C. 329(a)

11 U.S.C. 329(a) requires "[a]ny attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation."

In re Downs, 103 F.3d 472 (6th Cir. 1996): the disclosure requirement under §329(a) applies to post-petition and pre-petition compensation or agreements.

B. Rule 2016(b)

Rule 2016(b) requires "[e]very attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 14 days after the order for relief, or at another time as the court may direct, the statement required by §329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee within 14 days after any payment or agreement not previously disclosed."

See also **§329(b)** and **Rule 2017**: bankruptcy court may determine, after notice and a hearing, that any portion of an attorney's fee for work in a bankruptcy case is excessive.

C. Form B2030 – Disclosure of Compensation of Attorney for Debtor

Form B2030 is an official form issued pursuant to Fed. R. Bankr. P. 9009.[1] The use of this Form may be required by local court rules or general orders, but it otherwise exists for the convenience of the parties.

The official instructions for Form B2030 emphasize the need to cross out any services listed in question 5 that will not be provided.[2] The list of services under question 5 of Form B2030 is the only government-issued guide as to what services are to be rendered in a bankruptcy case. The official instructions also emphasize the need to list under question 6 which services counsel by agreement with the debtor has been excluded from the disclosed fee.

If debtor's counsel uses Form B2030 with no modification, counsel should be prepared to represent the debtor in connection with all aspects or his or her bankruptcy case.

In the Eastern District of Michigan, Local R. Bankr. P. 9010-1(d) requires debtor's counsel to use its Statement of Attorney for Debtor(s) Under F.R.Bankr.P. 2016(b).[3]

---

[1] The official form may be found at: http://www.uscourts.gov/sites/default/files/form_b2030_0.pdf
[2] The official instructions may be found at:
http://www.uscourts.gov/sites/default/files/form_b2030_instructions_0.pdf
[3] The local form may be found at: http://www.mieb.uscourts.gov/forms/all-forms/all_chap

The Western District of Michigan does not require a specific form; however, its Local Bankr. R. 2016-1 details the information that must be included in the required disclosure of compensation.

D. Michigan Rules of Professional Conduct

"Ethical rules involving attorneys practicing in the federal courts are ultimately questions of federal law. The federal courts, however, are entitled to look to the state rules of professional conduct for guidance." El Camino Res. Ltd. v. Huntington Nat'l Bank, 623 F. Supp.2d 863,876 (W.D. of Mich. 2007) (citing In re Snyder, 472 U.S. 634,645 n. 6, 105 S. Ct. 2874, 86 L.Ed.2d 504 (1985) and Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Alticor, Inc. 466 F.3d 456 457-458 (6th Cir. 2006), vacated in part on other grounds, 472 F.3d 436 (6th Cir. 2007)).

The U.S. District Court for the Eastern District of Michigan has determined that "[t]he Rules of Professional Conduct adopted by the Michigan Supreme Court... apply to members of the bar of this court and attorneys who practice in this court as permitted by LR 83.20." Local R. 83.22(b) (E.D. Mich.). Local R. Bankr. P. 9010-1(a)(1) provides that an "appearance before the court on behalf of a person or entity may be made only by an attorney admitted to the bar of, or permitted to practice before, the United States District Court for the Eastern District of Michigan, under E. D. Mich. LR 83.20."

The U.S. District Court for the Western District of Michigan has determined that "[a]n attorney admitted to the bar of this Court or who practices in this Court as permitted by this Rule is subject to the Rules of Professional Conduct adopted by the Michigan Supreme Court, except those rules a majority of the judges of this Court exclude by administrative order, and consents to the jurisdiction of this Court and the Michigan Attorney Grievance Commission and Michigan Attorney Discipline Board for purposes of disciplinary proceedings. L. Civ. R. 83.1(j) (W.D. Mich.). Local Bankr. R. 9010-1(a) provides that "[e]xcept as provided in subparagraph (b) and E 304(g) of Pub. L. 103-394, Oct. 22, 1994, 108 Stat. 4106 (providing special rules for child-support creditors and their representatives), W.D. Mich. L. Civ. R. 83.1 governs the admission, suspension, discipline, and disbarment of an attorney or law student who seeks to practice in the Court or who is practicing in the Court. An attorney or law student who is admitted to practice in the United States District Court for the Western District of Michigan is admitted to practice in this Court."

Relevant Michigan Rules of Professional Conduct (MRPC)

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

Rule 1.2(b) states that "[a] lawyer may limit the objectives of the representation if the client consents after consultation. The Official Comment to this rule warns that a "client may not be asked to agree to representation so limited in scope as to violate Rule 1.1…"

Rule 1.4(b) requires that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Rule 1.5 governs attorney fees and sets forth certain requirements for attorney fee agreements. The Official Comment to this rule acknowledges that limiting the scope of services is proper if the limitation is both explained and does not improperly curtail services in a way that is contrary to the client's interests:

> An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay.

E. Ethics Opinions State Bar of Michigan Standing Committee on Professional and Judicial Ethics

Michigan Ethics Opinion RI-184, 1994 WL 27231 (Jan. 19, 1994): Committee addressed the question of whether a retainer agreement between an attorney and an individual Chapter 7 debtor may permissibly limit the scope of representation to exclude representation of such debtor in a later adversary proceeding. The Committee stated that, when read together, Rules 1.2(b), 1.4(b) and 1.5(b)

> lead to the conclusion that if the lawyer intended to exclude representation of the debtor in bankruptcy adversary proceedings, the lawyer should have so specified and given the client the opportunity to seek counsel who may offer representation on other terms. It is not the client's responsibility to know, without it being explained, that adversary proceedings may occur and the consequences arising from them. Therefore, if a retainer agreement is silent or ambiguous on the subject of representing a debtor client in bankruptcy adversary proceedings, the lawyer would be required to provide that representation.

Michigan Ethics Opinion RI-348, 2010 WL 3011700 (July 26, 2010): Committee addressed the question of whether an attorney for an individual Chapter 7 debtor may exclude representation with respect to a reaffirmation agreement. The Committee reviewed the applicable MRPC, drew on its analysis from Opinion RI-184, and emphasized that any limitation on representation is only permissible if it is adequately explained to the client and the client consents to such limitation after "adequate consultation." The adequate consultation must, "at a minimum," include information on "the risks to the client that the proposed limitations would create," as well as the "technical aspects," "legal ramifications" and "material risks" of reaffirming a dischargeable debt. The opinion concluded

> that the limitation excluding representation as to reaffirmation, if permissible under applicable law, which may vary among jurisdictions, would not of itself result in a violation of Rule 1.1 and is permitted under Rule 1.2(b). In seeking to so limit the scope of the representation, the lawyer will need to obtain the client's consent after consultation, and in connection with obtaining consent, must explain the material risks of reaffirmation and available alternatives, as required by Rule 1.4.

F. Locals Rules

1. Eastern District of Michigan

a. LBR 9010-1(b): “The debtor’s attorney or firm of record must, except as provided in subpart (c) below, attend and represent the debtor at the meeting of creditors, any hearing on any reaffirmation agreement and all hearings within the scope of representation.”

b. LBR 9010(d): "The attorney for a debtor must file a completed form "Statement of Attorney for Debtor(s) Under F.R.Bankr.P. 2016(b)," available on the court's website, in which the scope of the attorney's appearance and representation must be accurately stated. The "Statement of Attorney for Debtor(s) Under F.R.Bankr.P. 2016(b)" must be countersigned by the debtor."

c. LBR 9010 (f): "In a case filed under or converted to chapter 7, the scope of appearance of the debtor's attorney will be as disclosed in the F.R.Bankr.P. 2016(b) statement, as may be amended from time to time."

d. Guideline 10: "As a matter of fulfilling the obligations of counsel for a debtor in a chapter 7 case: (1) Counsel may not exclude from representation services relating to a reaffirmation agreement…"

2. Western District of Michigan

a. LBR 2016-1: "Within 14 days after the order for relief, every debtor's attorney or bankruptcy petition preparer must file a statement disclosing any fee paid or agreed to be paid during the 12 months preceding the filing, the source of any such fee paid or promised, and a description of the services included or excluded from that fee. If the debtor is represented by an attorney, the statement must also disclose the nature of any fee-sharing agreement. In Chapter 7 cases only, the statement must be filed as a separate docket entry from the petition and schedules. In all cases, a supplemental statement must be filed within 14 days of any payment or agreement not previously disclosed."

b. The local rules, orders, and forms are silent as to specific services to be rendered by counsel.

G. Case Law and Application

Unbundling services and complying with applicable rules of professional conduct

In re Slabbinck, 482 B.R. 576 (Bankr. E.D. Mich. 2012): This case includes a thorough discussion of unbundling pre-petition and post-petition bankruptcy services and the applicability of the Michigan Rules of Professional Conduct, including what is adequate consultation and

informed consent. The court held that "an agreement to limit an attorney's legal services in connection with an individual Chapter 7 bankruptcy case by unbundling the pre-petition legal services from the post-petition legal services, is not per se prohibited by the MRPC and does not necessarily warrant any relief under §329 of the Bankruptcy Code." 482 B.R. at 589.

The court further clarified that "[a]lthough § 329 of the Bankruptcy Code does not set forth specific criteria governing the unbundling of legal services in a Chapter 7 case, it is clear that, minimally, the MRPC require that (1) the attorney competently represents the individual debtor despite any limitation on the scope of services; (2) the attorney provides adequate consultation to the individual debtor concerning any limitation on the scope of the attorney's representation and the legal matter in question; and (3) the individual debtor makes a fully informed and voluntary decision to consent to such limitation." *Id*.

Competent Representation: The court also found that "competence 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." *Id* at 593.

Adequacy of consultation: "The standard under the MRPC is not whether the clients *believe* that their attorney provided adequate consultation, but whether the attorney *in fact* adequately advised the clients concerning these matters." *Id* at 595

Informed Consent: "MRPC require that for the Debtors' consent to be meaningful, it must be a fully informed consent." *Id* at 596.

In re Seare, 493 B.R. 158 (Bankr. D. Nevada 2013): This case contains a thorough discussion of unbundling and the application of rules of professional conduct. It also addresses the positions taken by the ABA and ABI on unbundling. The court found that "[b]ecause an adversary proceeding was a near certainty in light of what DeLuca should have known at the time of the initial consultation — that the Judgment was based on fraud — representing the Debtors at an adversary proceeding was not only reasonably necessary to achieve their goal of stopping the garnishment but likely the only way to stop the garnishment. Consequently, DeLuca's decision to unbundle representation in adversary proceedings violated the duty of competence. 493 B.R. at 192.

Excluding routine or fundamental aspects of a bankruptcy case

Other courts have not been as permissive of unbundling services. Several courts have found that attorneys are required to provide the representation needed to achieve the core or fundamental objectives of Chapter 7 bankruptcy, and to do otherwise would be a violation of their duties under the applicable rules of professional conduct.

In re Castorena, 270 B.R. 504 (Bankr. D. ID 2001): "An attorney, in accepting an engagement to represent a debtor in a bankruptcy case, will find it exceedingly difficult to show that he properly contracts away any of the fundamental and core obligations such an engagement necessarily imposes. Proving competent, intelligent, informed and knowing consent of the debtor to waive or limit such services inherent to the engagement will be required." In re Castorena, 270 B.R. at 530.

The court discussed what are "core obligations." The court felt the first and most obvious obligation is the obligation to appears as debtor's counsel and to represent the debtor. The court provided a non-exhaustive list of what it felt were the "normal, ordinary and fundamental aspects of the process":

> the proper filing of all required schedules, statements and disclosures; preparation and filing of necessary amendments to the same; attendance at the § 341 meeting; turnover of assets to the trustee, and cooperation with the trustee; compliance with the tax turnover and other orders of the Court; performance of the duties imposed by § 521(1), (3) and (4); counseling in regard to § 521(2) and the reaffirmation, redemption, surrender or retention of consumer goods securing obligations to creditors, and assisting the debtor in accomplishing those aims; and 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, and the like.

270 B.R. at 530.

In re Eqwim, 291 B.R. 559 (Bankr. N.D. GA. 2003): The court concluded that competency, as defined by the applicable rules of professional connect, requires counsel for debtor to perform all of the legal services needed for the debtor to obtain a discharge and retain their exempt property, whether those services are performed pre-petition or post-petition. See In re Egwim, 291 B.R. 569-70. However, the court did find representation in adversary proceedings may be unbundled if all ethical obligations are met.

In re Collmar, 417 B.R. 920 (Bankr. N.D. Ind): The court addressed whether counsel can exclude reaffirmation agreements from the scope of representation of a Chapter 7 debtor. The court held "[t]he decision to reaffirm an otherwise dischargeable debt plays a critical role in the bankruptcy process—so critical, that assistance with the decision is part of the services that make up the competent representation of a chapter 7 debtor." In re Collmar, 417 B.R. at 924. See also In re Minardi. 399 B.R. 841 (Bankr. N.D. Okla. 2009).

Show-cause hearings for debtor's failure to pay filing fees

If a pre-petition fee agreement contemplates post-petition work and it attempts to create an obligation for debtor to pay his or her counsel for post-petition services, such as appearances at additional hearings, including show-cause hearings for a debtor's failure to pay filing fees, can debtor's counsel collect fees without violating the automatic stay or discharge injunction? If the only fee agreement is a pre-petition contract, the answer is likely no. In most cases, any obligation created under a pre-petition agreement must be paid prior to filing to avoid violating the automatic stay and discharge injunction. Debtor's counsel can avoid these issues by entering into a post-petition fee agreement with the debtor, which would not constitute a dischargeable debt, and filing an amended or supplemental 2016(b) statement. Of course, this is presuming that (1) the pre-petition fee agreement and 2016(b) statement clearly state the scope of services and the subject post-petition services were excluded from the scope of representation; (2) the limitation of representation does not violate any applicable local rules or rules of professional conduct; (3) there was adequate consultation on the limitation of representation; (4) and the client provided informed consent.

Counsel for debtor may also have to ask whether the matter is a core or fundamental aspect of the bankruptcy. If the additional post-petition service was reasonably foreseeable, debtor's counsel may have additional difficulty.

Attorney fees are subject to automatic stay and discharge

Bethea v. Adams & Associates, 352 F.3d 1125 (7th Cir. 2003): Chapter 7 debts for legal fees are subject to discharge and any attempt to collect such fees is a violation of the automatic stay. A retainer agreement is a pre-petition, liquidated debt, and is not among the debts excepted from discharge by §523, and §329 does not create an unenumerated exception to a §727(b) discharge.

"What is discharged is a claim to payment. One contract (the retainer) gives rise to one claim, meaning a "right to payment, whether or not such right is … fixed, contingent, matured [or] unmatured." 352 F3d. at 1129, quoting §101(5). The court rejected the argument that a retainer agreement is broken up into multiple claims under a theory that a "claim" does not accrue until the legal services are performed. "The most a court could do is give administrative priority to post-petition fees for work in the action's prosecution." 352 F.3d at 1129. The court ordered to be returned to the debtors all sums collected after entry of discharge and all sums collected on account of the retainers during the bankruptcy in violation of the automatic stay.

In re Griffin, 313 BR 757 (Bankr. N.D. IL 2004): the court examined debtor's counsel's ability to collect fees associated with prosecuting a redemption motion when the obligation was rooted in the pre-petition retainer agreement. The court, citing Bethea, found that the retainer agreement is a pre-petition contract-based claim, which makes the claim resulting from the motion to redeem a pre-petition contract-based claim subject to automatic stay and discharge injunction.

Rittenhouse v. Eisen, 404 F.3d 395 (6th Cir. 2005): "11 U.S.C. §727(b) provides that a discharge under Chapter 7 relieves a debtor of all debts incurred prior to the filing of a petition for bankruptcy, except those nineteen categories of debts specifically enumerated in 11 U.S.C. §523(a). A debt for pre-petition legal services is not one of the non-dischargeable debts enumerated in §523(a)." 404 F.3d. at 396. A post-petition agreement does not give rise to a dischargeable debt. 404 F.3d at 397.

2. Clearly defining what work is covered and what work is not covered. Does representation continue after discharge?

"Although §329 of the Bankruptcy Code does not set forth specific criteria governing the unbundling of legal services in a Chapter 7 case, it is clear that, minimally, the MRPC require that (1) the attorney competently represents the individual debtor despite any limitation on the scope of services; (2) the attorney provides adequate consultation to the individual debtor concerning any limitation on the scope of the attorney's representation and the legal matter in question; and (3) the individual debtor makes a fully informed and voluntary decision to consent to such limitation." In re Slabbinck, 482 BR 576, 589 (Bankr. E.D. Mich. 2012).

In the context of limiting representation, Michigan Ethics Opinion RI-348 instructs that adequate consultation means "communication of information reasonably sufficient to permit the

client to appreciate the significance of the matter in question." MRPC 1.0, Comment. In other words, adequate consultation must include an explanation of the risks to the client that the proposed limitation creates.

Michigan Ethics Opinion RI-184 opined that the policies underlying MRPC 1.2(b), 1.4(b) and 1.5 (b), when read together, clearly lead to the conclusion that when counsel intends to limit representation, the limitation should be specified, preferably in writing, and the client should be provided the opportunity to find counsel who may offer representation on other terms. Notably, the Opinion states "if the retainer agreement is silent or ambiguous on the subject of representing a debtor client in bankruptcy adversary proceedings, the lawyer would be required to provide that representation."

The MRPC require that for a debtor's consent to be meaningful, it must be fully informed. This determination would require knowing what counsel explained to their client. Therefore, if representation is being limited, counsel is well advised to clearly define the scope of representation in the retainer agreement and the 2016(b) statement.

In most Chapter 7 cases there is a little to do after the discharge order is entered. However, significant and time-intensive issues can arise post-discharge. Assuming counsel has adequately consulted with his client and obtained informed consent, may counsel limit representation so that it ends upon entry of the discharge order? The Bankruptcy Code, Federal Rules of Bankruptcy Procedure, and the local bankruptcy rules in the Eastern District of Michigan and Western District of Michigan are silent on this issue. As such, counsel must look to the MRPC and case law interpreting their ability to limit representation of Chapter 7 debtors.

Counsel must first ask whether the debtor can be competently represented in their Chapter 7 bankruptcy with such a limitation in place. In any limitation of representation, counsel "must determine objectively whether the client would be competently represented in light of the proposed limitations." Michigan Ethics Opinion RI-348. The Comment to MRPC 1.7 provides further guidance, stating that "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provided representation on the basis of the client's consent." This analysis should be applied individually to each debtor, as what constitutes competent representation for one individual may not be competent representation for another. As such, boilerplate retainer agreements and 2016(b) statements may not suffice. See In re Seare, 493 B.R. 158 (Bankr. D. Nevada 2013).

3. Issues about withdrawal as an attorney.

If there is a material breakdown in the attorney-client relationship and debtor's counsel can

no longer provide effective representation, debtor's counsel may seek to withdraw as counsel. Debtor's counsel may also want to withdraw as counsel when a Chapter 7 requires services beyond the scope of representation and debtor is unwilling or unable to retain counsel for additional post-petition services. However, before seeking to withdraw, debtor's counsel must ensure that (1) the remaining work does not include aspects of the case that were included in the scope of services or not clearly excluded from the scope of services, as defined in the retainer agreement and 2016(b) statement; and (2) that failure to provide such services would not run afoul of any local rules or rules of professional conduct. Even if the services have been clearly excluded from the scope of representation and the local rules are silent on the issue, Debtor's counsel is well advised to consider whether any of the remaining services constitute core or fundamental aspects of a Chapter 7 bankruptcy, otherwise they may not be meeting the requirement of competent representation. See MRPC Rule 1.1.

LBR (E.D.M.) 9010-1(g): Withdrawal of Attorney

(1) An attorney who has appeared on behalf of a party may not withdraw without permission of the court. A request for permission to withdraw may be made by stipulation between the attorney and the party or upon motion filed under Local Rule 9014-1. Immediately upon the entry of an order permitting the attorney's withdrawal, the attorney must serve it on parties in interest, file a certificate of service, and to the extent available, provide the parties' contact information and telephone number to opposing counsel upon withdrawal in an adversary proceeding, and to the trustee upon withdrawal in a bankruptcy case.

(2) Except as required under subpart (g)(1), no order is required for a consensual substitution of attorney that is signed by the represented party, the withdrawing attorney and the substituting attorney. A notice of substitution of attorney must be filed and served on the trustee and any interested parties involved in pending litigation.

MRPC 1.16(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if: (1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; (2) the client has used the lawyer's services

to perpetrate a crime or fraud; (3) the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent; (4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; (5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or (6) other good cause for withdrawal exists.

MRPC 1.16, Comment: A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs, or an agreement limiting the objectives of the representation.

Brandon v. Blech, 560 F. 3d 536 (6th Cir. 2009): a court must review a motion to withdraw as counsel and determine whether it meets the requirements set out in MRPC 1.16. The Sixth Circuit held "while these rules stop short of guaranteeing a right to withdraw, they confirm that withdrawal is presumptively appropriate where the rule requirements are satisfied." Id at 538.

In re Edsall, 89 B.R. 772 (Bankr. N.D. Ind. 1988): a court may relieve counsel of its obligation to represent a debtor by allowing them to withdraw; however, doing so, "generally requires compelling reasons, exceptional or unusual circumstances." 89 B.R. at 773-74.

Danvers Savs. Bank v. Cuddy, 322 B.R. 12 (Bankr. Mass. 2005): the court held that failure to replenish fee retainer does not constitute "cause" allowing attorney to withdraw during chapter 7 bankruptcy case.

4. 2016(b) issues related to substitution as counsel and/or post-petition work.

Section 329 is implemented by Rule 2016(b), which states, "[e]very attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit… the statement required by §329 of the Code … A supplemental statement shall be filed and transmitted to the United States trustee within 14 days after any payment or agreement not previously disclosed."

The disclosure requirements imposed by §329 are mandatory and necessary for a court's determination of whether the "compensation exceeds the reasonable value of such services." 11 U.S.C. 329(b). The failure to accurately and timely file required compensation disclosure statements justifies a bankruptcy court's denial of any or all fees requested and can also result in a disgorgement of fees.

Substituting as counsel requires debtor's new counsel to file a 2016(b) statement. When substituting as counsel, it is important to clearly define the scope of services in the retainer agreement and the 2016(b) statement. When crafting the scope of services, Debtor's counsel must consider what stage the case is in and what services are likely to be needed to avoid violating any local rules or rules of professional conduct.

A supplemental statement is necessary when post-petition services beyond the original scope of services are needed. Debtor's counsel must be me mindful of the deadlines included in §329, otherwise they may face disgorgement of fees.

In re Kisseberth, 273 F. 3d 714, 720 (6th Cir. 2001): even without a determination of excessiveness, disgorgement of attorney fees is within the discretion of the court if the §329 and 2016(b) disclosure requirements are not met.

In re Park-Helena Corp., 63 F.3d 877, 882 (9th Cir. 1995): "Even a negligent or inadvertent failure to disclose fully relevant information may result in a denial of all requested fees."

Redemption Motions

In re Griffin, 313 BR, 757 (Bankr. N.D. IL 2004): the court addressed various issues relating to the failure to file a supplemental statement for post-petition services related to a redemption motion. In this case a vehicle was redeemed using 722 Redemption Funding, Inc. as funding source for redeeming the vehicle and paying the debtor's attorney's fees. The court addressed the potential conflict under a professional responsibility rule restricting the third-party payment of attorney fees in situations where the third party will benefit from the legal representation.

MRPC Rule 5.4 (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

MRPC Rule 5.4, Comment: The provisions of this rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

This rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's indepenent professional judgment and the client gives consent.

REMAINING ISSUES AFTER THE 341 MEETING IS HELD WITH RESPECT TO THE CONCLUSION OF THE 341 MEETING AND PRIOR TO DISCHARGE

Steven M. Bylenga
Chase Bylenga Hulst, PLLC
Grand Rapids, Michigan

1. What duty does the Debtor have to cooperate with the Trustee after the 341 meeting of creditors?

A key component of a bankruptcy proceeding, including after the 11 U.S.C. § 341 meeting of creditors, is cooperation with the trustee.

> The bankruptcy process is designed to give honest but unfortunate debtors a fresh start "unhampered by the pressure and discouragement of preexisting debt." *Farouki v. Emirates Bank Intern., Ltd.,* 14 F.3d 244, 248 (4th Cir.1994) (*quoting Lines v. Frederick,* 400 U.S. 18, 19, 91 S.Ct. 113, 27 L.Ed.2d 124 (1970)). At the same time, "the right of debtors to a fresh start depends upon the honest and forthright invocation of the Code's protections...," and are "inherent in the bargain for the discharge." *In re Kestell,* 99 F.3d 146, 149 (4th Cir.1996).
>
> Among other obligations, the bankruptcy bargain includes a duty by a debtor to fully and accurately disclose his finances. 11 U.S.C. § 521(1) requires a debtor to file "a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs[,]" which per, 28 U.S.C. § 1746 are filed under the penalty of perjury. Section 521(3) requires a debtor to cooperate with his trustee in the performance of his duties. Bankruptcy Rule 4002(4) requires the debtor to "cooperate with the trustee in the preparation of" the complete inventory of the debtor's property required by Rule 2015(a)(1). Fed. R. Bankr.P. 4002(4). Section 521(a)(4) requires a debtor to surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate.
>
> Filing bankruptcy is a serious undertaking and these are serious duties.

In re Belk, 509, BR 513, 518 (Bankr. W.D.M.C. 2014)(emphasis added). See also *Olson v. Slocombe (In re Slocombe)*, 344 B.R. 529, 534 (Bankr. W.D. Mich. 2006).("In order to avail oneself of the protections and the benefits of the Bankruptcy Code, providing comprehensive, accurate, detailed and relevant records to the Trustee is a small but necessary price to pay for the safeguard and shelter offered by the automatic stay.")

The debtor's responsibilities are set forth under Section 521 of the Bankruptcy Code and Bankruptcy Rule 4002(b). Many of the debtor's obligations under section 521 of the Bankruptcy Code and Bankruptcy Rule 4002(b) must be completed prior to the 341 meeting of creditors;

however, both sections include provisions requiring the debtor to continue cooperating after the 341 meeting of creditors. The relevant provisions are:

A. 11 U.S.C. § 521(a)(3)

Section 521(a)(3) states that "the debtor shall…if a trustee is serving in the case or an auditor is serving under section 586(f) of title 28, cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title." The trustee's duties are found in section 704 of the Bankruptcy Code. The general nature of the debtor's duty to "cooperate with the trustee" under Section 521(a)(3) combined with the trustee's general duty to "investigate the financial affairs of the debtor" under Section 704(a)(4) results in a broad spectrum duty for the debtor to provide the trustee with any reasonable information and documentation regarding the debtor's financial affairs. For instance, courts have held that a debtor has a duty to provide the trustee with "any and all information regarding the debtor's financial affairs regardless of whether the information relates to exempt assets, whether the information relates to property of the estate and whether, in the debtor's opinion, the information is interesting." *In re Wengerd*, 2010 WL 4054322 (Bankr. N.D. Ohio 2010); See *In re Starky*, 522 BR 220, 227 (BAP, 9th Circuit, 2014) (recognizing that in order for a trustee to complete his or her "statutory duty to investigate the financial affairs and assets of the debtor", the information must by necessity "come primarily if not entirely from the debtor").

B. 11 U.S.C. § 521(a)(4)

Section 521(a)(4) states that "the debtor shall…if a trustee is serving in the case or an auditor is serving under section 586(f) of title 28, surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to

property of the estate, whether or not immunity is granted under section 344 of this title." A debtor's duty to turn over all documentation relating to property of the estate continues until the case is closed. "The mandatory language of these provisions suggests that they are self-executing, in other words, a debtor who has *at any time* during the case been in possession of property of the estate or recorded information about it has an affirmative duty to turn it over, without first requiring a demand or turnover motion by the trustee." *In re Auld*, 561, B.R. 512, 518 (BAP 10th Circuit 2017) (emphasis added). A debtor who fails to comply with his or her duties under section 521(a)(4) risks being held in contempt or being denied a discharge. *Auld* at 518.

Finally, a debtor's discharge can be revoked for failing to surrender minimal assets to the trustee. *In re Mrozinski*, 489 B.R. 818 (Bankr. N.D. Ind. 2013). In *Mrozinkski*, the trustee successfully sought to have the debtor's discharge revoked after the debtor failed to turn over $2,839.00 to the trustee. "The rules which require a debtor to surrender property to the trustee and to cooperate with the trustee contemplate a certain degree of willingness. Fulfilling those obligations should not be like pulling teeth and a trustee should not be required to hound the debtor into doing so." *Mrozinkski* at 822-23.

C. 11 U.S.C. § 521(f)

Section 521(f)(1)-(4) requires the debtor to provide the court, the United States trustee, or any party in interest with copies of the debtor's tax returns for each tax year while the case is pending, for each tax return that is filed for any tax year in the three year period prior to commencement of the case, and for each amendment to any tax return for the three years prior to commencement of the case through the period while the case is pending.

D. Bankruptcy Rule 4002(a)(4)

Bankruptcy Rule 4002(a)(4) requires the debtor to "cooperate with the trustee in the preparation of an inventory, the examination of proofs of claim, and the administration of the estate." Rule 4002(a)(4) clarifies and expands upon the debtor's duty under section 521 by imposing specific obligations upon the debtor to: (1) assist the trustee in preparation of an inventory; (2) assist the trustee in examination of claims; and (3) assist the trustee in administration of the estate.

E. Bankruptcy Rule 4002(a)(5)

Bankruptcy Rule 4002(a)(5) requires the debtor to "file a statement of any change of the debtor's address." Although Bankruptcy Rule 4002(a)(5) is simple and straight forward, the debtor's failure to adhere to the Rule can have substantial consequences. Bankruptcy Rule 7004(b)(9) provides that a service of a summons and complaint can be made by mailing a copy of the summons and complaint to the address on the debtor's petition. Service upon the debtor's address will support entry of a default judgment. *In re Redmond*, 399 B.R. 628, 632 (N.D. Ind. 2008). Furthermore, service of an order upon a debtor at the address on file with the Court is sufficient even when the mail is returned undeliverable or the debtor claims lack of knowledge of service. See *In re Diskey*, Adv. Pro. 14-1095 (Bankr.N.D. Ind. 2015);

F. When a debtor fails to comply with Section 521 of the Bankruptcy Code, what remedies are available to the trustee?

A Chapter 7 trustee has a range of remedies available to deal with a debtor who fails to comply with his or her duties under section 521(a)(3) and (4). When a debtor fails to comply with his or her statutory duties under section 521, the trustee may request an order to compel the

debtor to perform his or her duties, may seek denial of the debtor's discharge under § 727, or may seek to revoke the debtor's discharge. *In re Mathis*, 548 B.R. 465, 470-71 (Bankr. E.D. Mich. 2016). However, a Chapter 7 trustee cannot bring a cause of action against a debtor for failure to comply with the debtor's duties under § 521. *Mathis*, 548 B.R. at 472.

3. Issues related to debtor-education counseling

Another hurdle every debtor must clear post-petition is the completion of an instructional course concerning personal financial management. 11 U.S.C. § 727(a)(11). The failure to complete the education course leads to a closure of a case without an entry of discharge. *Id.* However, if a debtor can establish that he or she was exempt from the prepetition budget and credit counseling under a statutory exception, the debtor need not subscribe to the post-petition requirement. Specifically, those who are "unable to complete those requirements because of incapacity disability, or active military duty in a military combat zone" are exempted from needed to participate in credit counseling and post-petition debtor education programs. 11 U.S.C. § 109(h)(4). In order for "incapacity" to be present, the debtor must be "impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to her financial responsibilities." *Id.* For example, incapacity was present where a debtor had been diagnosed with dementia, suffered from strokes, and was largely incapable to communicate over the phone. *In re Faircloth*, 2006 WL 3731299 at *1 (Bankr. M.D. N.C. Dec. 18, 2006) (unreported). Alternatively, disability "means that the debtor is so physically impaired as to be unable, after reasonable effort, to participate in person, telephone or Internet briefing." *Id.*

However, courts are relatively stringent in their interpretation of incapacity or disability. For example, a debtor's blindness as the result of a brain tumor was not sufficient to constitute incapacity or disability under § 109(h)(4). *See In re Stockwell*, 2006 WL 1149182, at *2 (Bankr. D. VT Apr. 27, 2006) (not for publication). Further, "incapacity[] is not implicated simply because a person is incarcerated." *In re Denger*, 417 B.R. 485, 487 (Bank. N.D. Ohio 2009). Nor is incarceration a disability. *In re Anderson*, 3972 B.R. 363, 366 (6th Cir. BAP 2008). An inability to afford the course has also been rejected as a ground for a waiver, particularly in light of the fact that counseling agencies must "provide services without regard to ability to pay the fee" under 11 U.S.C. § 111(d)(1)(E). *See In re Washington*, 2013 WL 1091733 at *1 (Bankr. D. D.C Mar. 14, 2013) (slip copy). Likewise, a debtor deployed for military service may not be exempt from completing a post-petition financial management course unless the debtor can demonstrate to the court that the debtor cannot complete the course by phone or internet while deployed. *In re DeRoche*, Case No. 10-41072 (Bank. E.D. Mich. 2010).

A debtor may file a motion to reopen the case if his or her case was dismissed as a result of a failure to file the required certificate of debtor education. *See Denger*, 417 B.R. at 489. However, the debtor risks the chance that the court would deny the motion to reopen. After all, "[a] motion to reopen a bankruptcy case should be granted only where there is a compelling reason." *In re Johnson*, 500 B.R. 594, 597 (Bankr. D. Minn. 2013). In *Johnson*, the Court specified that:

> [c]ause for reopening a case to allow a late-filed certificate of completion of the required financial management course includes the following: 1) a reasonable explanation for the failure to comply with the financial course requirements; 2) a

> timely request for relief; 3) explanation of counsel's failure to monitor the debtors' compliance; and 4) no prejudice to creditors.

Id. Therefore, there may be significant hurdles to reopening the case should the debtor wait a substantial amount of time and lack a reasonable explanation. *Id.* at 598. For example, in *Johnson*, the court denied the motion to reopen because the debtors waited four years and their sole explanation for the failure to comply was that their life was "hectic" at the time. *Id.* at 597.

The Bankruptcy Court for the Eastern District of Michigan similarly subscribed to these four factors, denying a motion to reopen filed more than eight years after the case was closed for failure to file a debtor education certificate. *In re Barrett*, 569 B.R. 687, 687 (Bankr. E.D. Mich. 2017). The court rejected the debtor's explanation that he lost touch with his attorney, found the duration of eight years to be "extreme," and did not place blame on counsel. *Id.* Further, the court specified that "the longer the delay, the greater the prejudice" to creditors. *Id.*

3. Issues involving reaffirmation agreement and lease assumptions

Contract reaffirmation agreements and lease assumptions may also take place after the filing of a bankruptcy petition. In order for a reaffirmation agreement to be enforceable, it must be "made before the granting of the discharge under section 727." 11 U.S.C. § 524(c)(1). Within the Sixth Circuit, many courts have interpreted this provision to mean that a bankruptcy court generally may not vacate a discharge in order to allow participating parties to enter into a reaffirmation agreement. *See In re Vozza*, 569 B.R. 686 (Bankr. E.D. Mich. 2017); *In re Smith*, 467 B.R. 122, 125 (Bankr. W.D. Mich. 2012); *In re Davis*, 273 B.R. 152 (S.D. Ohio 2001) (stating "[i]t is the general practice of this Court to deny motions to reopen cases filed for the purpose of filing reaffirmation agreements after the discharge order has been entered"). In fact,

"[v]irtually all circuits require strict compliance with the requirements spelled out in section 524(c), and all agree that the *fiat* of executing the reaffirmation agreement *after* the granting of a discharge renders the agreement unenforceable as a matter of law." *In re Herrera*, 380 B.R. 446, 450 (Bankr. W.D. Tex. 2007) (emphasis in original)

There are strong policy reasons supporting decisions to deny motions to vacate a discharge for the purpose of entering into a reaffirmation agreement. After all, were such actions possible, "then creditors could exert substantial economic leverage *after* the discharge had been granted, to induce debtors to reaffirm a pre-petition debt, comfortable that the same leverage could be used to induce the debtors to file a motion." *Id.*(emphasis in original). For this very reason, Congress designed 11 U.S.C. § 524(c) "to require interested parties and the courts, where invited, to consider reaffirmation agreement issues early in the case." *Smith*, 467 B.R. at 125. It "intended to insulate debtors from post-discharge pressure to bargain away their fresh start." *Id.*

In *Smith*, Chief Judge Scott W. Dales of the Bankruptcy Court for the Western District of Michigan also highlighted that setting aside bankruptcy discharges in order to enter a reaffirmation agreement "could create unintended effects and opportunities for mischief because bankruptcy discharges may affect other statutory schemes." *Id.* at 126. For example, entry of a discharge automatically voids judgments. *Id.*at *125.* Thus, were courts to vacate discharges in favor of reaffirmation agreements, a debtor could plausibly obtain a discharge, wait for specified creditors "to write-off debts and remove them from their collection databases," and file a motion to reopen in order to enter into a reaffirmation agreement with a favored creditor. *Id.*

Nevertheless, some courts utilized the federal bankruptcy rules to vacate a discharge in order to allow parties to enter into a reaffirmation agreement in special circumstances. *See In re*

Edwards, 236 B.R. 124, 126-27 (Bankr. D. N.H. 1999). Specifically, Fed.R.Civ.P. 60(b) permits a court to vacate an order for "any . . . reason justifying relief from the operation of judgment." "The Supreme Court has interpreted this statutory provision liberally to allow the vacating of an order when 'appropriate to accomplish justice.'" *Edwards*, 236 B.R. 126 (quoting *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949)). Thus, in *Edwards*, the court utilized Fed.R.Civ.P. 60(b) to vacate a discharge order, as it "would result in no prejudice to the creditor" and a denial would "seriously prejudice the debtor." *Id.* at 128. The court also mentioned that a debtor could possibly use Fed.R.Bankr.P. 4004(c)(2) to motion for a court to vacate his or her discharge, as the rule allows a debtor to defer the discharge for up to thirty days. *Id.* at 127. However, most court have reasoned that this approach is contrary to Congress' explicit intent as expressed via 11 U.S.C. § 524(c) and have, in turn, required debtors to make a valid post-discharge agreement with the creditor. *Smith*, 467 B.R. at 128.

Another contested issue with regard to section 524(c) is "whether a lease assumption agreement under Section 365(p) [of the bankruptcy code] is enforceable following discharge even if the agreement has not been reaffirmed under Section 524(c)." *Williams v. Ford Motor Credit Co.*, 2016 WL 2731191, at *5 (E.D. Mich. May 11, 2016). While several courts have held to the contrary, the District Court for the Eastern District of Michigan concluded that lease assumptions agreements under 11 U.S.C. § 365(p) are enforceable even without a reaffirmation agreement under 11 U.S.C. § 524(c). *Id.* at *7.

In *Williams*, the district court first acknowledged the alternative approach and explained the supporting rationale. *Id.* at *5-6. Specifically, the court highlighted that opposing courts "frequently cite the Bankruptcy Code's policy favoring debtor protection. These courts explain that bankruptcy is a mechanism for providing debtors with a 'fresh start.' But by entering into

lease assumption agreements under Section 365(p), debtors are compromising that fresh start by 'releasing substantial and consequential rights, protections and benefits.'" *Id.* at *5 (quoting *In re Garaux*, 2012 WL 5193779, at *2 (Bankr. N.D. Ohio, Oct. 19, 2012)) (internal citations omitted). Further, other courts reasoned that the language "will be assumed" in the statute suggests that there are additional steps a debtor must satisfy before liability is assumed. *Id.* at *6.

The Eastern District, however, found the alternative approach more persuasive, reasoning that "[s]ection 365(p) specifically addresses lease assumption agreements and does not expressly require that the underlying debt be reaffirmed under Section 524(c)." *Id.* at *7. It also noted that "[r]equiring such reaffirmation would be adding a step that Congress chose not to include; would strip Section 365(p) of its independent significance; and would create anomalous results." *Id.* Therefore, in the Eastern District, a lease assumption agreement entered into after discharge was enforceable even if the parties did not gain the court's approval. *Id.*

4. Objection to Exemptions

Sometimes, assets may emerge during the proceeding, and a debtor has a duty to disclose them. However, a debtor is nevertheless entitled to claim exemptions on property that he or she had not disclosed prior, even if the non-disclosure constitutes fraud. The Sixth Circuit has conclusively held that "bankruptcy courts do not have authority to use their equitable powers to disallow exemptions or amendments to exemptions due to bad faith or misconduct." *Ellman v. Baker (In re Baker)*, 791 F.3d 677, 683 (6th Cir. 2015). The Court cited in support a Supreme Court decision that concluded, in dicta, "that the Bankruptcy Code does not grant courts authority to disallow an exemption . . . based on a debtor's fraudulent concealment of assets

alleged to be exempt or other bad-faith conduct." *Id.* at 681 (referencing *Law v. Siegel*, 134 S.Ct. 1188, 1196 (2014)).

In *Siegel*, the Supreme Court held that, even though 11 U.S.C. § 105(a) gives bankruptcy courts equitable powers, these powers must be exercised within the confines of the Bankruptcy Code. *Siegel*, 134 S. Ct. at 1194. Thus, because 11 U.S.C. § 522 gives debtors the option to exempt certain property, courts cannot use their equitable powers to deny the use of an exemption on the basis of concealment or non-disclosure. *Id.* at 1195.[4] The same reasoning applies to assets that a debtor does not disclose: because the Bankruptcy Code gives the debtor the option of exempting specified property, a bankruptcy cannot contravene these specified exemptions in the name of equity. *Baker*, 791 F.3d at 682.

Nevertheless, courts still possess alternative options to sanction a debtor who engages in fraud or concealment. For example, courts can deny a debtor's discharge in a chapter 7 case under 11 U.S.C.§ 727(a)(4)(A). Alternatively, courts may dismiss the chapter 7 case "for cause" due to the debtor's bad faith and/or abuse of the bankruptcy proceeding under 11 U.S.C. § 707(a) or § 707(b)(3)(A). Monetary sanctions against the debtor and the debtor's attorney are also available. *See* Fed. R. Bankr. Pro. 9011(b) & (c); 11 U.S.C. § 105(a). Finally, courts can deny a debtor's motion to reopen a case or bar a debtor from refiling. *See* 11 U.S.C. §§ 349(a), 109(g), 105(a), 350(b); Fed. R. Bankr. Pro. 1009(a), 4003(b).[5]

---

[4] The court stated that "[t]he Bankruptcy Court thus violated § 522's express terms when it ordered that the $75,000 protected by Law's homestead exemption be made available to pay Siegel's attorney's fees, an administrative expense. In doing so, the court exceeded the limits of its authority under § 105(a) and its inherent powers."

[5] For a thorough discussion these, and other, courses of action, see Judge Thomas J. Tucker's materials for the 2015 ABI Detroit Consumer Bankruptcy Conference entitled "What Remedies Are Still Available After *Law v. Siegel*, to Address Debtor Non-Disclosure or Delayed Disclosure of Assets, Other Than Denial of or Surcharge Against Exemptions" Concurrent Session: Law v. Siegel, 111115 ABI-CLE (https://abi-org-corp.s3.amazonaws.com/materials/LawVSiegel.pdf)

TRUSTEE ACTIONS AFTER THE 341 MEETING IS CONCLUDED

by

Kevin C. Calhoun
Calhoun & Di Ponio, PLC
Southfield, Michigan

1. What can a debtor's attorney do to monitor and ensure the prompt administration of assets in the chapter 7 case?

   A. The attorney should stay in contract with the Trustee's office to ensure that the administration of assets continues (including filing a notice of appearance of the case if the attorney was not the attorney that filed the bankruptcy) and to review quarterly reports by the Trustee).

   B. The attorney can file a motion to abandon under 11 U.S.C.§ 554.

2. Legal standards related to abandonment.

   A. Current Law.

      11 U.S.C. § 554(b) states that "On a request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." Controlling precedent in the Sixth Circuit provides that "An order compelling abandonment is the exception, not the rule. Abandonment should only be compelled in order to help the creditors by assuring some benefit in the administration of each asset." In re K.C. Machine & Tool Co., 816 F.2d 238, 246 (6th Cir. 1987). In a more recent Western District of Michigan case the Court stated: "In sum, the Sixth Circuit has concluded that 'compelled abandonment is not available where administration promises a benefit to the estate.' Id. at 247 [citing In re K.C. Machine & Tool Co.]. See also In re Pepper Ridge Blueberry Farms, 33 B.R. 696, 698 (Bankr. W.D. Mich. 1983)('Congress only intended the abandonment proceeding to be used where there is no question of facts or law involved and for a trustee or debtor in possession to hold assets for

no benefit to the estate would [be] unconscionable.'). In re Heflin, 215 B.R. 530, (Bankr. W.D. Mich. 1997). Given the statutory language of "party in interest" and the focus of the creditor position in the opinion in In re K.C. Machine & Tool Co., a reasonable question would be: Is a debtor a "party in interest" to compel abandonment? This issue was recently addressed by a Sixth Circuit decision in the case of Jahn v. Burke (In re Burke), 863 F.3d 521 (6th Cir. July 14, 2017). This case has an interesting set of facts (Trustee filed a motion to evict debtors from residence in Tennessee to make the property "easier to sell" and a competing motion of the debtor's to compel the Trustee to abandon the property). In the case the Sixth Circuit stated the following: "A 'party in interest' refers, for example, to 'anyone who has a practical stake in the outcome of a case.' In re Morton, 298 B.R. 301, 307 (B.A.P. 6th Cir. 2003) (quoting In re Cowan, 235 B.R. 912, 915 (Bankr. W.D. Mo. 1999)). As has been noted by a bankruptcy court in Indiana, 'the debtor is, in a very real sense, the beneficiary of abandonment' because the debtor will get to keep the property (subject to the mortgage loan) if the trustee is ordered to abandon it. In re Drost, 228 B.R. 208, 210 (Bankr. N.D. Ind. 1998). The Burkes were therefore 'parties in interest' with respect to the abandonment of their residence because, if they won their motion, they would get to keep their property. Such an interest is as 'practical [a] stake in the outcome,' Morton, 298 B.R. at 307, as a party could have. The Burkes thus had standing to pursue a motion to compel abandonment." In re Burke, 863 f.3d at 526.

B. What can be done when a Trustee simply waits to see the sale price in a sheriff's sale and/or conducts a short sale?

After a number of cases were decided disallowing a Trustee to reopen a case after the abandonment of property (which occurs at the closing of the case pursuant to 11 U.S.C. § 554(c)) upon discovering that creditors were underbidding at sheriff sales on property owned by debtors, *see, e.g*. In re Reiman, 431 B.R. 901 (Bankr. E.D. Mich. 2010), some Trustees have simply been keeping cases open to avoid the abandonment issue. This situation should generally only occur when a debtor is surrendering property but could occur otherwise. If the debtor wants to keep the property (with or without an exemption), then the debtor should file a motion to compel the abandonment of the property as indicated above. However, with respect to property intended to be surrendered by the Debtor, the recent case of Brown v. Ellmann (In re Brown), 851 F.3d 619 (6th Cir. April 20, 2017) found the Sixth Circuit ruling on the question of whether the Debtor could amend her exemption on a residence (that was listed in her schedules as having no equity because the two consensual liens on the property exceeded the value) to include a state right of redemption in the property after the Trustee had filed a motion to sell the property. The Sixth Circuit denied the attempted exemption and upheld the Trustee's right to sell the property and rejected the debtor's arguments citing the U.S. Supreme Court case of Law v. Siegel, 134 S. Ct. 1188, 188 L.ed.2d 146, (2014) because the Sixth Circuit stated that Law v. Siegel dealt with a surcharge on an undisputed homestead exemption not a disallowed exemption as found in the Brown v. Ellmann case. The Brown v. Ellmann case has been appealed to the U.S. Supreme Court. It should be noted that no motion to abandon was filed in the

Brown v. Ellmann case but it raises the question of what would happen if one had been filed.

3. Standards related to a revocation of discharge for non-cooperation with the Trustee pursuant to 11 U.S.C. § 727(d).

A. Current Law.

Once a discharge has been granted to a debtor, the discharge can only be revoked under 11 U.S.C. §727(d) under certain conditions including situations where the debtor fails to cooperate with the trustee, the relevant sections of §727(d) are:

> **(d)** On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if--
>
> **(1)** such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;
>
> **(2)** the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee;
>
> **(3)** the debtor committed an act specified in subection (a)(6) of this section; . . . . [727(a)(6) provides that a discharge can be denied if: 1) the debtor obeys lawful orders of the court; 2) invokes a 5th amendment right against self-incrimination or fails to testify after being granted immunity; and 3) on a ground other than the properly invoked assertion against self-incrimination where the debtor did not respond to a material question approved by the court to testify].

B. Who has the burden of proof in these situations?

The Trustee bears the burden of proof when attempting to revoke a debtor's discharge. As a fairly recent opinion from a bankruptcy court in Ohio states: "In order to prevail on her claim for revocation of discharge under *§ 727(d)(2)*, the

Trustee must prove that Defendant (1) acquired, or became entitled to acquire, property of the estate and (2) acted with intent to defraud in failing to surrender property of the estate. *See* Wyss v. Fobber (In re Fobber), 256 B.R. 268, 272 (Bankr. E.D. Tenn. 2000).” Parker v. Ferguson (In re Ferguson), 2105 Bankr. LEXIS 4263; 2015 WL 9306430 (Bankr. N.D. Ohio, 20150). In discussions with some of the Trustees in the Eastern District of Michigan on revocation of discharge, many of them simply rely on violation of an order of the court in a proceeding to revoke the discharge of a debtor. However, as the above cited case of Parker v. Ferguson states simply violating a court order is not necessarily enough: “’Noncompliance with a court order is, however, insufficient by itself to warrant revoking a debtor's bankruptcy discharge.’ Hunter v. Magack (In re Magack), 247 B.R. 406, 409 (Bankr. N.D. Ohio 1999). A debtor must have "refused" to obey a lawful order of the court. Id.; 11 U.S.C. § 727(a)(6)(A). Courts have determined that the showing necessary to revoke a debtor's discharge for refusing to obey an order is the same as that for determining whether to hold a party liable for civil contempt. Magack, 247 B.R. at 409-10; Hazlett v. Gorshe (In re Gorshe), 269 B.R. 744, 747 (Bankr. S.D. Ohio 2001); United States v. Richardson (In re Richardson), 85 B.R. 1008, 1011 (Bankr. W.D. Mo. 1988). In a civil contempt proceeding, three elements must be established: "(1) the alleged contemnor had knowledge of the order which he is said to have violated; (2) the alleged contemnor did in fact violate the order; and (3) the order violated must have been specific and definite." Magack, 247 B.R. at 410.” Parker v. Ferguson, 2015 Bankr. LEXIS at *5. *See also* McDermott v. Davis (In re Davis), 538 B.R.

368 (Bankr. S.D. Ohio 2015) (a case in which the debtors inherited property that they did not know was property of the estate and were not denied a discharge for failing to turn over the inheritance to the Trustee). For a very interesting recent case on this issues from the Sixth Circuit Bankruptcy Appellate Panel (including Judge Opperman) *see* Stein v. Stubbs (In re Stubbs), 565 B.R. 115 (6th Cir. BAP March 9, 2017) [Stein v. Stubbs deals with a pro se debtor who had not filed her tax returns at the time of the bankruptcy filing for the previous year, the Trustee instructed the debtor to send the return to him once it was filed. Later (after the debtor received a discharge), the Trustee (after not hearing from the debtor) moved for an order requiring a 2004 examination (and to bring the federal and state tax returns) that was granted; the debtor failed to appear. The Trustee then filed an adversary proceeding against the debtor to revoke her discharge pursuant to 11 U.S.C. § 727(d)(2) and (3). The debtor did not file an answer and the Trustee filed a motion for an order revoking the discharge of the debtor for failing to obey a court order. The court set a hearing on the motion and vacated the order scheduling the 2004 exam and denied the Trustee's default motion and dismissed the adversary case because at the time the discharge was entered there was no indication that the debtor had failed to cooperate with the Trustee. The BAP reversed the bankruptcy court on the dismissal of the adversary proceeding because the doctrine of laches did not apply; the BAP also reversed the order vacating the 2004 exam noting that even if the adversary proceeding was

dismissed the trustee still had the right to pursue an asset of the estate for creditors.]

4. Changing asset values after the bankruptcy petition is filed.

A. Is a Trustee bound by the valuations provided in a debtor's schedules?

Generally speaking, a Trustee is bound by a debtor's exemptions listed in the schedules (unless an objection is filed) but is not bound by the valuations listed in Debtor's schedules. *See* Klein v. Chappell (In re Chappell), 373 B.R. 73 (9th Cir. BAP 2007), Lewandowski v. Lim (In re Lewandowski), 386 B.R. 643 (E.D. Mich. 2008) and 11 U.S.C. § 541(a)(6). A debtor is limited to the amount stated when selecting the wild card exemption pursuant to 11 U.S.C. § 522(d)(5) and cannot argue that the exemption precludes a later sale of property by the trustee if the trustee finds that it is worth more than what was stated on the schedules (it is not "removed" from the bankruptcy estate). There are many cases involving the amendment of exemptions and what the result will be. *See* Lewandowski v. Lint (In re Lewandowski), 386 B.R. 643, 647-48 (E.D. Mich. 2008); In re Erickson, 406 B.R. 522 (Bankr. W.D. Mich. 2009) [Debtors claimed an exemption in unencumbered non-residential real estate under 11 U.S.C. § 522(d)(5) and after discovering that they were owed $13,810.00 in previously undisclosed tax refunds they attempted to amend their exemption to include the tax refunds and reduce their exemption under 11 U.S.C. § 522(d)(5) in the real estate. The Bankruptcy Court disallowed the exemption citing, among other things, Supreme Court dicta in Owen V. Owen, 500 U.S. 305, 308, 111 S.Ct. 1833, 1835, 114 L. Ed. 2d 350 (1991) that "exemption is an interest withdrawn from the estate (and hence from

creditors) for the benefit of the debtor."; In re Cormier, 382 B.R. 377 (Bankr. W.D. Mich. 2008) [Debtors amended their schedules to include a corporation interest valued at $1.00 and exempted the interest pursuant to 11 U.S.C. § 522(d)(5). The bankruptcy court rejected the exemption of the stock that would remove it from the bankruptcy estate and permitted the Trustee to sell the stock and pay the Debtors' exemption.]; In re Powell, 399 B.R. 190, 195 (Bankr. W.D. Tex. 2008) [Debtor listed value of real property and exempted the equity in the property under 11 U.S.C. § 522(d)(1) and (5), no objection to the exemption was claimed and the Debtor filed a lien avoidance action claiming that the judgment lien creditor could not challenge her exemption through the lien avoidance action with respect to valuation. The bankruptcy court held that the exemptions claimed by the debtor were limited to the statutory limits and that if the valuations at the time of filing were accurate in the debtor's schedules then the lien was avoided but the court held that valuation remained an issue in the lien avoidance action.]

These cases were all decided before the case of Law v. Siegel, 134 S.Ct. 1188 (2014), which holds that a debtor's claimed exemption cannot be surcharged to offset a Trustee's attorney's fees even in light of bad acts on behalf of the debtor. The above listed cases deal with the amendment of previous exemptions and/or the inclusion of assets and the exemption of same after the bankruptcy petition was filed. Since no surcharge is associated with these cases, it is this writer's opinion that Law v. Siegel, on its own does not overrule the opinions in these cases.