Educational Materials

Saturday, October 29, 2016 | 8:00 AM – 9:00 AM

Presented by: NCBJ | National Conference of Bankruptcy Judges

TO TELL THE TRUTH: BANKRUPTCY ETHICS ARE COMPLICATED

To Tell the Truth: Bankruptcy Ethics are Complicated

National Conference of Bankruptcy Judges
Plenary Session, Saturday, October 29, 2016
San Francisco, California

Honorable Sheri Bluebond, Chief Judge, Moderator
U.S. Bankruptcy Court for the Central District of California

Honorable Arthur B. Federman
U.S. Bankruptcy Court for the Western District of Missouri

Professor Lois R. Lupica
University of Maine School of Law

Susan M. Freeman
Lewis Roca Rothgerber Christie LLP
Phoenix, Arizona

Table of Contents

I. DISCLOSURE ISSUES AND CERTIFICATIONS REQUIRED OF COUNSEL

A. What is the Mortgage Balance?

You regularly do work for a mortgage lender in chapter 13 cases. Another firm in town also does some work for the same client. The client requires all motions for relief from stay to be filed within seven days after local counsel receives authorization. Your client has advised you that the debtor has missed five post-petition payments totaling $10,000, and that the lender has also incurred expenses for inspections and real estate taxes totaling $3,700. Even with those missed payments, the loan balance your client provides is significantly higher than it appears on the debtor's schedules. When you ask for a payment history, your client representative says that other firms do not require that, and they remind you that if the motion is not timely filed, you will lose them as a client. What would you do?

Attorney #1: I'd file the motion, and tell them I need a payment history prior to the hearing.

Attorney #2: I'd contact the debtor's attorney, and ask that attorney what the scheduled loan balance amount was based on.

Attorney #3: I'd tell them that I will not file the motion until they provide a payment history.

Background for the Panel Discussion:

Attorneys for both debtors and mortgagees complain that they are often unable to get a payment history or other relevant information from mortgagees. Mortgagee attorneys often appear at hearings asking for continuances because there is a dispute about the amount owed and they have not been provided updated information by their clients. Similarly, many mortgagees do not send all the information needed for an accurate escrow analysis in the new Proof of Claim form, leading to confusion as to whether the outstanding escrow balance is or is not included in the monthly payment amount. It is difficult, if not impossible in some cases, to provide a requesting debtor attorney with copies of paid bills for such items as inspections. From speaking with mortgagee attorneys, there is a race to the bottom. Firms are under increasing pressure to handle assignments with less than perfect information or risk losing revenue. Similar issues exist with respect to dischargeability complaints, for example, on credit card debt. *See, e.g., Target Nat'l Bank v. Nelson* (*In re Nelson*), 503 B.R. 466 (Bankr. C.D. Cal. 2013) (imposing monetary and non-monetary sanctions under Rule 9011 for filing a complaint without conducting an objectively reasonable investigation into the facts and circumstances surrounding the allegations in the credit card non-dischargeability complaint), *aff'd in part, rev'd in part,* 2016 WL 3018830 (9th Cir. May 26, 2016) (affirming monetary sanctions but reversing non-monetary sanction due to lack of due process warnings that such sanctions might be imposed).

Relevant Cases:

In re Taylor, 655 F.3d 274 (3d Cir. 2011) (The Third Circuit addressed the extent to which attorneys may rely on their clients' computerized data under Rule 9011. It noted that attorneys constantly and appropriately rely on information from their clients' records and cannot be expected to independently investigate every factual representation. It is usually reasonable for a lawyer to rely on information provided by the client, especially if it is superficially plausible and the client provides its own records that appear to confirm the information. But the lawyer must, exercising independent professional judgment, make a reasonable effort to determine what facts are likely to be relevant to a particular court filing and to obtain those facts from the client. The lawyer may not ignore clear warning signs as to the accuracy of data received, which may come from opposing counsel's filings).

In re Nelson, 503 B.R. 466 (Bankr. C.D. Cal. 2013) (sanction for pattern of frivolous non-dischargeability complaints based on computer program analyzing indicia of fraud. Rule 9011 due diligence requires inquiry at the § 341 meeting or otherwise into subjective intentions of the debtor).

B. Should You Take the Case?

At 4:30 in the afternoon you are contacted by a man who says the two duplexes he owns are being foreclosed upon the next morning at 9:00 a.m. He says his tenants pay regularly, but he got behind on mortgage payments because he had to help his son with some financial problems. He also says he has a job at a car assembly plant. He has been talking to the bank and he thought they were going to enter into a work-out arrangement before the foreclosure. He represents that he has just been advised that the bank is not willing to give him any more time. He assures you that he is current on filing his tax returns and that his other bills are current. You tell him that you do not file chapter 11 cases without a retainer of at least $10,000, plus the filing fee, and he says he can bring you that amount in cash that evening. Should you file the case?

Attorney #1: Yes, and tell him what information you will need to properly fill out schedules and other documents within the fourteen-day deadline.

Attorney #2: Send him away and let him lose his properties.

Attorney #3: Tell him that you will only file the case if he brings you his most recent tax returns, six months of pay stubs and bank statements, leases on his duplexes, and other documents by 8:00 the next morning.

Background for the Panel Discussion:

As a young lawyer, in a similar situation, I (Judge Federman) filed a chapter 11 case for a couple who said they owned farmland. While they did in fact own farmland, their real business was gambling. What documents should I have reviewed in order to satisfy my Rule 9011 obligations prior to filing the bankruptcy case? In a perfect world, I would have obtained and reviewed six months worth of pay stubs and bank statements, at least two years of tax returns, all lawsuits, correspondence from creditors, a credit report, a budget, and other items. But the world

debtors live in is not perfect, so lawyers sometimes file cases without knowing what they are getting into.

Applicable Rules:

Rule 9011(b):

By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, --

> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

ABA Model Rule 3.1: A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. . . .

Comment:

> [2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

ABA Model Rule 1.1: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment:

> [3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

ABA Model Rule 1.2:

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

*** * ***

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

Comment:

> [1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.
>
> [2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

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

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

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

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

ABA Model Rule 1.3: A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment:

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

ABA Model Rule 1.16:

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

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

* * *

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

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

* * *

(7) other good cause for withdrawal exists.

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

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

Comment:

> [1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

ABA Model Rule 3.3(a)(1): A lawyer shall not knowingly. . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer . . . .

Comment:

> [3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Relevant Cases:

In re Villa Madrid, 110 B.R. 919, 924 (B.A.P. 9th Cir. 1990) ("The importunities of a desperate client do not relieve an attorney of the affirmative duty of reasonable inquiry imposed by Rule 9011. The evident warning flags and the inadequate time available to make such inquiry should have impelled [the attorney] to consider the ever-present option of declining a questionable engagement.").

II. FEE AND EMPLOYMENT ISSUES

A small firm personal injury lawyer has been representing a plaintiff for over one year now on a contingency basis. The attorney has been negotiating to resolve the suit with the insurance company. The limitations period expires on Monday and the complaint is ready to file, but the client has just told the lawyer that she filed bankruptcy six months ago and her bankruptcy lawyer has taken care of everything, so just WIN, please. The personal injury lawyer calls the bankruptcy lawyer, who tells him: "don't worry, all's fine." Maybe it is all fine, but the personal injury attorney has been stung before. He has his secretary churn out a form disclosure that he holds no adverse claim against the debtor and will continue to represent her on the same 40% pretrial settlement/60% trial or later resolution fee basis agreed to originally. He sends the disclosure form to the client's bankruptcy lawyer. Should the personal injury lawyer file his client's complaint on Monday?

Attorney #1: You bet I will. I'm not bankruptcy counsel and should not do his job. I'm doing my job, and that means filing a complaint that benefits everybody. If he screws this up, he committed malpractice and I'll sue him.

Attorney #2: I cannot trust some bankruptcy hack I've never met. I'll make him show me what he filed to obtain court approval or I won't do anything more. Then the statute of limitations will run and they will all be sorry.

Attorney #3: Come on. Why now, when I'm so busy? Now I have to get my client to give me more bankruptcy paperwork to find out if there's a trustee and then deal with that trustee as well as the bankruptcy lawyer and get them to talk to me. I still better file something on Monday.

Background for Panel Discussion:

Ordinary course and special counsel need to make sure their employment is authorized. Can they simply depend on bankruptcy counsel to do it? If this was a chapter 7 case, would counsel also need trustee approval? Should the cause of action be scheduled as an asset, regardless of the type of bankruptcy proceeding? However, should the lawyer wait to file the lawsuit, letting the limitations period run? If he were sued for malpractice for doing so, could he recover from bankruptcy counsel?

Applicable Rules:

Model Rule of Professional Responsibility 1.1 Competence
Model Rule of Professional Responsibility 1.16 Declining or Terminating Representation

Relevant cases:

In re Grant, 507 B.R. 306 (Bankr. E.D. Ca. 2014) (efforts to preserve collection rights on a prepetition contingency fee agreement may create an adverse interest).

In re Crook, 79 B.R. 475 (B.A.P. 9th Cir. 1987) (special counsel cannot simply rely on the DIP's primary bankruptcy counsel to handle necessary filings).

In re Gorski, 519 B.R. 67 (Bankr. S.D.N.Y. 2014) (reduced sanction when divorce attorney with limited knowledge of bankruptcy law and late knowledge of bankruptcy case inadvertently failed to disclose).

Matter of CF Holding Corp., 164 B.R. 799 (Bankr. D. Conn. 1994) (general bankruptcy counsel sanctioned for failure to disclose lack of disinterestedness of other estate professionals).

III. LAWYERS AND SOCIAL MEDIA

You maintain a profile on LinkedIn and Facebook. Your LinkedIn public profile includes the high school, college (Cornell, Go Big Red) and law school you attended. It also includes your work history, current area of practice, a list of skills ("Specializing in helping business and consumer debtors conquer their debt") and a list of endorsements written by former clients and professional colleagues. One of the endorsements from a former business client says, "The best bankruptcy lawyer I've ever hired. My business sailed through bankruptcy, and yours will too!" Another endorsement reads, "I worked with her for 10 years and found her to be an excellent lawyer." You also include a summary that reads: I am a lawyer with 20 years of experience representing business and consumer debtors. If you are experiencing financial distress, call me for a free consultation."

Your Facebook post includes a profile picture of you with your son at his college graduation. The page also lists your education, the name and location of your current law firm, your practice area and city of residence. In the private area of the page, you periodically post links to news articles describing the crazy things being said in the run-up to the presidential election, and links to scholarly articles you have written about payday lending abuses. You wake up every day to news feeds posted by your 20 Facebook "friends."

Does your LinkedIn or Facebook profile or other content constitute attorney advertising?

Attorney # 1: No, the information in both profiles is so general that it does not rise to the level of attorney advertising. As such, I'm not required to comply with any Rules of Professional Conduct.

Attorney # 2: Yes and No. My LinkedIn profile and content rise to the level of attorney advertising, but my Facebook profile does not.

Attorney # 3: Yes, both my LinkedIn profile and content and my Facebook page are considered attorney advertising.

Background for Panel Discussion:

According to a recent New York state ethics opinion, a LinkedIn profile that contains only a person's college and graduate school and employment history does not constitute Attorney Advertising. The more information that is included about an attorney's practice, however, may cross the line and constitute attorney advertising. If the profile is deemed to be advertising, all information included must be truthful and not misleading, which would include any endorsements and recommendations.

If an attorney holds herself out to be a "specialist," then that statement must be truthful. If the statement includes a representation that the attorney is "specializing" in a particular practice area, is that the equivalent of identifying herself as a "specialist?" To make such a statement as a bankruptcy attorney, must the attorney be certified by the American Board of Certification?

The New York ethics opinion states:

> Attorney's individual LinkedIn profile or other content constitutes attorney advertising only if it meets all five of the following criteria: (a) it is a communication made by or on behalf of the lawyer; (b) the primary purpose of the LinkedIn content is to attract new clients to retain the lawyer for pecuniary gain; (c) the LinkedIn content relates to the legal services offered by the lawyer; (d) the LinkedIn content is intended to be viewed by potential new clients; and (e) the LinkedIn content does not fall within any recognized exception to the definition of attorney advertising.[1]

The Association of the Bar of the City of New York Committee on Professional Ethics, Formal Opinion 2015-7: Application of Attorney Advertising Rules to LinkedIn, December 2015.

ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 10-457, August 5, 2010.

New York County Lawyers Association Professional Ethics Committee, Formal Opinion 748, March 10, 2015.

Applicable Rules:

ABA Model Rule 7.1 Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

ABA Model Rule 7.2 Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

[1] The Association of the Bar of the City of New York Committee on Professional Ethics, Formal Opinion 2015-7: Application of Attorney Advertising Rules to LinkedIn, December 2015.

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a non-lawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

ABA Model Rule 7.4 Communication of Fields of Practice and Specialization

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.…

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

IV. RECUSALS

A. How to Offend a Judge

You are debtor's counsel in a long-running chapter 11 case. You regularly appear before the judge assigned to this case. You have just learned that the judge has become romantically involved with an accountant in the accounting firm that the debtor retained for this case. What should you do?

Attorney #1: I'd file a motion to disqualify the judge from the case and, if the judge refuses, report the judge to the appropriate authority.

Attorney #2: Because I believe bringing up the subject would irritate the judge (negatively affecting his view of me in other or future cases), I'd do nothing at all, not even tell my client.

Attorney #3: Since I know the judge well, I'd ask for a private chambers conference with the judge to find out the facts.

Background for Panel Discussion:

If a judge shares a household and intimate relationship with another person, that person is treated as a spouse for purposes of disqualification. *See* Commentary to Canon 3C of the Code of Conduct for United States Judges. We are not sure if the nature of the relationship between the judge and accountant fits this definition. Should we ask? Does it matter if the accountant is a partner in the firm or a non-partner? Does it matter if the accountant has actually performed services for this debtor? How should you obtain these additional facts? If you request a private conference with the judge, will you run afoul of the rules against *ex parte* communications? What else could you do? Do you have an obligation to disclose this issue to your client?

Applicable Rules:

Canon 3A(4) of the Code of Conduct for United States Judges states:

A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law. Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested. A judge may:

(a) initiate, permit, or consider ex parte communications as authorized by law;

(b) when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication;

(c) obtain the written advice of a disinterested expert on the law, but only after giving advance notice to the parties of the person to be consulted and the subject matter of the advice and affording the parties reasonable opportunity to object and respond to the notice and to the advice received; or

(d) with the consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

ABA Model Rule 8.2(a): "A lawyer shall not make a statement that the lawyer knows[2] to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office."

[2] The term "knows" "denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Rule 1.0(f).

Comment:

> [1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.
>
> * * *
>
> [3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

ABA Model Rule 8.3(b): "A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial[3] question as to the judge's fitness for office shall inform the appropriate authority."

Comment:

> [1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.
>
> [2] A report about misconduct is not required where it would involve violation of Rule 1.6 [concerning client confidentiality]. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.
>
> [3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[3] "'Substantial' when used in reference to degree or extent denotes a material matter of clear and weighty importance." Rule 1.0(*l*).

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers' assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

ABA Model Rule 8.4:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Comment:

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as

adultery and comparable offenses that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

V. PROTECTING THE ATTORNEY-CLIENT PRIVILEGE

A chapter 11 debtor sold substantially all of its assets in a § 363 sale to Business Buyer, using a standard Asset Purchase Agreement. Your client, Business Buyer, is now complaining that the Debtor not only breached its representations and warranties in the Asset Purchase Agreement, but it may even have made fraudulent misrepresentations. It has found a few emails on the Debtor's computers it purchased that just might make that case.

If you file an adversary proceeding to recover damages, can you depose chapter 11 counsel on the basis that Business Buyer now holds the Debtor's attorney-client privilege or that the privilege has been waived?

Attorney #1: Absolutely. The privilege is an asset; you bought all the assets and you can now use all assets, including asserting control over this privilege. Alternatively, when a debtor sells its "unscrubbed" computers, any argument that the content found on the computer is privileged, will be deemed waived.

Attorney #2: This was a § 363 sale, not a corporate merger. The buyer is not the successor-in-interest in a § 363 sale. DIP counsel will be able to assert that any privileged documents residing on the purchased computers would be considered inadvertent and not a waiver of the privilege.

Attorney #3: Business Buyer has an obligation to return inadvertently produced emails instead of using them. When the Debtor failed to "scrub" its computers, it did so in order to allow Business Buyer have access to emails needed to collect receivables and run the business, but it never intended to waive the attorney-client privilege. Moreover, I sure wouldn't advise my client to spend time and money litigating a claim to have acquired the Debtor's privilege either – it's very unlikely we'd win.

Background for Panel Discussion:

Does a sale of all business assets results in a transfer of the privilege in same way that it does with a corporate merger? Does it depend on whether the asset purchase agreement covers this issue explicitly? Or in the Order Authorizing Sale itself? If a § 363 sale transfers the privilege to the buyer, does it do so for all purposes? Including for purposes of discovery against the seller? Does a lawyer for the buyer and his client have any obligations with respect to receipt of privileged documents that may have been inadvertently produced?

Applicable Rules:

Model Rule of Professional Responsibility 4.4 Respect for rights of others
Federal Rule of Evidence 502
Federal Rule of Civil Procedure 26(b)(5)(B)

Relevant Cases:

CFTC v Weintraub, 471 U.S. 343, 349 (1985) (the attorney-client privilege passes to corporate successors who can assert or waive it, including bankruptcy trustees).

Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP, 80 A.3d 155 (Del. Ch. 2013) (The purchaser or a corporation's stock/merger successor generally acquires the previous owner's attorney-client privileges, including the seller's privileged communications about that very transaction, unless the parties negotiated for different post-closing ownership of the privileged communications. Emails on transferred computers belonged to the successor by merger and could be used against the seller in litigation).

Tekni-Plex, Inc. v. Meyner & Landis, 674 N.E.2d 663, 668 (N.Y. 1996) (The successor-by-merger acquired the right to assert the attorney-client privilege with respect to business operations, but not merger negotiations. The rule turns on the practical consequences rather than the formalities of a particular transaction).

Schleicher v. Wendt, 2010 WL 1948218 (S.D. Ind. May 14, 2010) (acquirer of substantially all of a debtor's business operations in a bankruptcy asset purchase, which continues to operate the debtor-seller's business, acquires the right to assert or waive the attorney-client privilege).

Coffin v. Bowater, Inc., 2005 WL 5885367 (D. Me. May 13, 2005) (the practical consequences of an asset sale that included all of the seller's right, title and interest in all assets and rights of any kind, tangible or intangible in connection with the operation of the business was to transfer control of the business, including the right to waive the attorney-client privilege).

United States v. Stewart, 287 F.Supp.2d 461 (S.D.N.Y. 2003) (Martha Stewart waived the attorney-client privilege when she forwarded to her daughter an email she had sent to her attorney. However, it was prepared in anticipation of litigation and thus, protected by the work product doctrine).

VI. E-DISCOVERY IN A BANKRUPTCY CASE: THE DUTY OF COMPETENCY

Your client, Canon Foundry Corporation ("CFC") is a manufacturer, specializing in forging iron hardware for custom home construction. On your advice, CFC instituted a document retention policy in 2015 that included a detailed description of how e-mails and other electronic documents are to be purged and retained. The policy required automatic deletion of current e-mails after 90 days, unless the employee was notified of a "litigation hold." The litigation hold and notice would come into effect whenever CFC became aware of potential litigation. Although all employees were notified of this policy at the outset of their employment, CFC does not otherwise routinely remind its employees of the policy and it is fair to say that most employees routinely ignore the policy. In 2013, CFC's largest customer, Décor Garage ("DG") filed for bankruptcy. CFC is DG's largest trade creditor and, at the time of filing, DG owed CFC approximately $5 million. However, DG disputes the amount owed and is embroiled in litigation with CFC regarding its claim.

DG filed suit against CFC in a judicial district that specifically addresses e-discovery[4] in its formal case management orders. When DG's counsel requested the production of e-discovery, you met with DG's counsel to reach an agreement on the appropriate search terms. Your joint proposal also included a "clawback" provision that would permit CFC to retrieve any inadvertently produced "Electronic Stored Information" or "ESI" that would otherwise be "protected by law" ("protected ESI"). Upon submission of the joint proposal, the Judge incorporated it into a Case Management Order.

When you received a copy of the data retrieved by the search, you put it in your desk drawer without reviewing it. You were unconcerned about what exactly was produced because you knew you could simply clawback anything inappropriately produced, asserting "inadvertent" production. At the next Case Management Conference, you assure the Judge that you have reviewed everything and the e-discovery is in full compliance with the Court Order and CFC's discovery obligations.

Two weeks after that hearing, you receive a letter from DG's counsel accusing CFC of destruction and spoliation of evidence. You then, for the first time, attempt to open your copy of the data search report. You recognize that you do not know how to analyze the production and that you need to hire an e-discovery expert ("Expert"). The Expert conducts a forensic search, and tells you that it appears that CFC has deleted potentially responsive non-protected ESI in accordance with it normal document retention policy, without regard to any litigation holds, resulting in gaps in the document production.

Expert also advises you that due to the breadth of the jointly agreed search terms, it appears that DG's counsel received both privileged information, as well as highly proprietary

[4] Electronic Stored Information ("ESI") is information that is stored in technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

information about CFC's upcoming product lines, even though such proprietary information was not relevant to the issues in the lawsuit.

Did You Violate The Duty of Competence Arising From Your Own Acts and Omissions?

Attorney # 1: No, I'm a lawyer, not a computer scientist. And most of my cases don't involve e-discovery so I don't need to understand Electronic Stored Information or any of that digital stuff. It is enough that I understands the rules of evidence.

Attorney # 2: Yes, I breached my duty of competence in the manner in which I handled the e-discovery in this case.

Attorney # 3: Yes, I risked breaching my duty of competence but I mitigated my error when I hired an e-discovery Expert. Bullet dodged!

Background for Panel Discussion:

In today's world, almost every litigation matter involves e-discovery issues. The chances are great that a party or a witness has used email or other electronic communication and stores information digitally. The ethical duty of competence requires an attorney to assess at the outset of each case what electronic discovery issues might arise during the litigation, including the likelihood that e-discovery will be sought by the other side.

The attorney should then assess his or her own skills and resources as part of the duty to provide the client with competent representation.

According to a recent California ethics opinion, an attorney handling e-discovery should be able to perform the following:

- Initially assessing e-discovery needs and issues, if any;
- Implementing/causing implementation of appropriate preservation;
- Analyzing and understanding a client's ESI systems and storage;
- Advising a client on available options for collection and preservation of ESI;
- Engaging in competent and meaningful "meet and confer" sessions with opposing counsel concerning an e-discovery plan (as required by federal rules and many state cognates);
- Performing data searches;
- Collecting ESI in a manner that preserves the integrity of the ESI (including such metadata as may be relevant or necessary); and

- Producing responsive and non-privileged ESI in a recognized and appropriate manner (for example, including redaction or other special treatment of personal information).[5]

Even if the Attorney in the case at hand had a "generally acceptable degree of competence for an average case, the duty of competence may require a higher level of technical knowledge and ability, depending on the e-discovery issues involved in a matter, and the nature of the ESI. Competency may require even a highly experienced attorney to seek assistance in some litigation matters involving ESI."[6]

If the attorney determines he lacks the requisite skills, the Formal Opinion (tracking the basic rule on competence) states that the attorney has three choices: (1) acquire sufficient learning and skill before performance is required; (2) associate with another ESI-competent attorney or consult a technical consultant; or (3) decline the client representation.[7]

If the attorney decides to associate with an ESI Expert, the attorney also has an obligation under ABA Model Rules at 5.1 and 5.3. The obligation of competency belongs "to the attorney who is counsel in the litigation, and who remains the one primarily answerable to the court."[8] The attorney responsible for the litigation cannot simply sub-contract the e-discovery responsibility to an Expert, and get off the hook. As the California opinion concludes: "Attorneys who handle litigation may not ignore the requirements and obligations of electronic discovery."[9]

Applicable Rules:

The State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion Interim No. 11-0004 (discussed above)

ABA Model Rule 1.1: Competence

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

Official Comments:

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the

[5] The State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion Interim No. 11-0004.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*

matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

ABA Model Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ABA Model Rule 5.3 Responsibilities Regarding Nonlawyer Assistance

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

VII. BANKRUPTCY DISCLOSURE OF CONNECTIONS BETWEEN AND AMONG COUNSEL

A Big Law firm was debtor's counsel in a chapter 11 case. "Solo" was renowned solo practitioner, representing an important creditor, who claimed a secured position in the debtor's assets, but was probably "out of the money." After a lengthy and unproductive negotiating session over an acceptable Plan Support Agreement with Solo, the lawyers called it quits for the evening and headed to a bar together. In the morning, the DIP lawyer groggily recalls discussing his unhappiness with a certain lawyer with whom he was currently sending referrals, promising to refer all future cases to the creditor's lawyer, and agreeing that Solo's client qualified for payment in full under § 1111(b). Does DIP counsel need to file a supplemental disclosure with the bankruptcy court of this conversation?

Attorney #1: Collegiality and cross-referrals are important to the smooth functioning of the bankruptcy system. Everybody does it and even if disclosure is technically required, nobody bothers to make such disclosures.

Attorney #2: Yes, if the creditor's lawyer remembers the same promises and they agree it wasn't an inebriated mistake.

Attorney #3: Yes, but only if and when he actually follows through by referring the creditor's lawyer a significant case.

Background for Panel Discussion:

Disclosure obligations regarding "connections" with other professionals are hard to pin down and frequently ignored. When does the supplemental disclosure need to be made? When the adversity arises, which may be at the negotiation stage of a relevant deal, or only when final terms are agreed upon? Is the referral promise the only issue here? What about the "agreement" that a creditor should be paid in full under 1111(b) when that treatment might be disputed because of the creditor's collateral position having "insignificant value?"

Applicable Rules:

Bankruptcy Rule 2014
Model Rule 1.7 Conflict of interest current clients
Model Rule 1.1 Competence
Model Rule 1.2 Scope of representation and allocation of authority

Relevant Cases:

In re West Delta Oil Co., Inc., 432 F.3d 347 (5th Cir. 2005) (Special counsel took steps to acquire an interest in debtor that was not consummated but was nevertheless held to be an adverse interest requiring full disgorgement of fees. "The ultimate success of these efforts is irrelevant. The active pursuit of success is sufficient to give rise to an adverse interest here.")

Matter of Arlan's Dept. Stores, Inc., 615 F.2d 925, 932 (2d Cir. 1979) (When DIP counsel argued that the predecessor to Rule 2014 required **"**disclosure only of present connections 'that are adverse to the debtor'" and that **"**every large New York firm has had prior relations with almost every other large New York firm, and to require the specifications of all of these past associations would engulf the court in trivia, the court responded that the undisclosed fee sharing agreement at issue in the case was a connection that was "hardly trivia," and indeed could reasonably be construed as trafficking in bankruptcy appointments."**)**

In re US Bentonite, Inc., 536 B.R. 948 (Bankr. D. Wy. 2015) (delinquent disclosure of DIP counsel lawyer's acceptance of employment at creditor's counsel's firm).

In re Digerati Techs, Inc., 2015 Bankr. LEXIS 123 (Bankr. S.D. Tex.) (investment banker sanctioned for failure to disclose that DIP counsel represented him in appeal of adverse fee ruling; professional-client relationship must be disclosed).

KLG Gates v. Brown, 506 B.R. 177 (E.D.N.Y. 2014) (bankruptcy court sanctions for failure to disclose professional relationships with counsel for insiders was reversed on due process grounds).

In re eToys, Inc., 331 B.R. 176, 195-98 (Bankr. D. Del. 2005) (participating as professionals in the same cases was not a relationship that needed to be disclosed, but hiring a professional as a consultant in previous cases and the professional being a joint owner with committee counsel of an LLP providing asset disposition services for troubled companies did need to be disclosed).

In re Condor Systems, Inc., 302 B.R. 55, 70-72 (Bankr. N.D. Cal. 2003) (separate business venture negotiations with debtor's shareholders is a connection that must be disclosed).

In re Rusty Jones, Inc., 134 B.R. 321, 344 (Bankr. N.D. Ill. 1991) (It was not necessary for debtor's counsel to disclose that he had owned a hot dog stand 20 years before with one of the debtor's indirect owners, because that connection was remote, *de minimus*, and irrelevant to a Code **§**327 analysis. What is important are connections that presently exist or recently existed between the attorney and the parties in interest, and also past connections of a business or personal nature that are either related to the bankruptcy proceedings or could reasonably have an effect on the attorney's judgment in the case).

VIII. LIMITED SERVICES REPRESENTATION IN CONSUMER BANKRUPTCY PRACTICE

You are a consumer bankruptcy lawyer. Mr. Canberra, 82 years old and in deteriorating health, approaches you about helping him file a bankruptcy petition. Canberra warns you that he had very little cash on hand to pay your fee. You agree to help him under a Limited

Representation Agreement ("LSR") (permitted in the jurisdiction in which you practice) and you tell him, "don't worry, I'll take care of you." In a nine-page, 8-point-type, single-spaced contract, you agree to counsel Canberra concerning which chapter to file under (chapter 7 was your advice) and to help him determine which assets to retain or surrender and which to exempt. You also agree to provide Canberra with information about completing his Statement of Financial Affairs. For these services, you charge Mr. Canberra only $500. However, you do not sign or file the petition, do not formally appear in the case, or attend the meeting of creditors. At the creditors' meeting, the trustee obtained Mr. Canberra's signature on a turnover stipulation. Mr. Canberra did not really understand what he was signing and when he failed to turn over certain documents and his tax refund, he lost his discharge.

Have you met your duty of professional responsibility? What if anything should you have done differently in your effort to provide low-cost representation to Mr. Canberra?

Attorney # 1: No, I did not meet my duty of professional responsibility. In consumer bankruptcy practice, when you represent a client, it is your duty to be in, or be out. You can't represent your client half-way and then disappear. If a client can't afford your services, you can discount your fee or do the case *pro bono*. But in this case I did my client a disservice by not staying in the case.

Attorney #2: Yes and no. In my district, a Limited Services Representation ("LSR") is permitted. It is recognized as a good alternative to a *pro se* filing. But I am not sure that I fully complied with the Court's rules and my ethical duties in entering into the LSR in this case.

Attorney # 3: Yes, I performed the services that required judgment and advice enabling client decision-making. Chapter selection requires the weighing and balancing of numerous factors, as does the selection of exemptions. Retention and surrender of assets is another determination that is aided by professional representation. I complied with applicable ethical and court rules regarding LSR arrangements. I should be applauded for providing a low-cost alternative to what otherwise would have been a *pro se* debtor.

Background for Panel Discussion:

As described in the ABI Ethics Task Force Report on Limited Services Representation in Consumer Cases:

> LSR on behalf of a consumer debtor typically consists of the provision by an attorney of a subset of legal services in connection with the filing of a consumer bankruptcy case. LSR is in contrast to the plenary representation of a debtor, where the lawyer is paid a full fee to represent a debtor with respect to all aspects of his bankruptcy case—from pre-filing counseling to post-discharge proceedings. LSR is undertaken to achieve a lower overall cost, and typically in lieu of filing *pro* se or filing with the assistance of a petition preparer. This arrangement allows for legal representation by an attorney for cost containment purposes.[10]

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

The problem of the high cost of consumer bankruptcy representation is well documented.[11] The recent Consumer Bankruptcy Fee Study revealed a 24% increase in attorney fees post-BAPCPA for Chapter 13 cases, with mean fees in some jurisdictions approaching $5,000.[12] For no-asset cases filed under Chapter 7, mean attorney fees have increased 48%—as high as $1,500 at the mean in some jurisdictions. . . .[13]

The problem of *pro se* representation is … compelling in Chapter 7 …

The burden that *pro se* debtors place on the court system has been widely recognized.[14] Judges, trustees, and court staff have detailed the extra time and system resources eaten up by aiding *pro se* debtors who are attempting to navigate the complexities of the bankruptcy process.[15] Moreover, these efforts and resource expenditures are often for naught. The chance that a *pro se* debtor's case will be dismissed because of a failure to comply with the dictates of the Bankruptcy Code and Rules is considerably higher than if the debtor were represented.[16]

In considering the issue of Limited Services Representation, the Task Force recognizes the necessity of reconciling the need to protect debtors from receiving inadequate and ineffective representation, even for a limited fee, and the interest of providing debtors with the option of limited legal representation in lieu of self-help resources or non-legal assistance. . . .

The Model Rules of Professional Conduct, largely adopted in some form in most states, permit Limited Scope Representation under certain, defined circumstances. Rule 1.2(c) reads, "[a] lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent."[17] The Official Comments to Rule 1.2(c) provide:

> The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client . . . . A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.[18]

The comments to Rule 1.2 further state that lawyers and clients may enjoy "substantial

---

addressing access to the consumer bankruptcy system to a discussion of the issue of Limited Services Representation.

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

[12] *Id.* at 30.

[13] *Id*.

[14] Lupica, *supra* note **Error! Bookmark not defined.**, at 102.

[15] *Id.*

[16] *Id.* at 103.

[17] Model Rules of Prof'l Conduct R. 1.2(c) (2011).

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

latitude to limit the representation," so long as the proposed limitations are "reasonable under the circumstances." The Official Comment [7] offers the following illustration.

> If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely.[19]

Model Rule 1.0(h) defines "reasonable" as being consistent with the "conduct of a reasonably prudent and competent lawyer.[20] In determining the reasonableness of a proposed representation, the legal knowledge, skill, thoroughness and preparation required is informed by the nature of the unbundled representation.[21]

Currently, dozens of federal judicial districts have adopted a local rule of bankruptcy procedure or written an opinion addressing LSR. The degree of enthusiasm for LSR by courts, who have examined this issue, ranges from high to very low. Some courts have embraced LSR as a tool to address the growing problem of *pro se* debtors.[22] As reported above, legal fees have increased in almost every jurisdiction, pricing some debtors out of legal representation. Moreover, diminished funding for legal services organizations has decreased the availability of low- or no-cost legal representation for low-income debtors. Although the incidence of *pro se* debtors varies from jurisdiction to jurisdiction, at all levels *pro se* cases are reported to add to the already considerably administrative burdens on the courts and the trustees.[23]

Other courts, however, have viewed the practice of unbundling more skeptically.[24] Those courts that have viewed limited scope representation less favorably have expressed concern

---

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

[20] Model Rules of Prof'l Conduct R. 1.0(h) (2011).

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

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

[23] Lupica, *supra* note **Error! Bookmark not defined.**, at 102.

[24] *See In re Egwim*, 291 B.R. 559, 578 (Bankr. N.D. Ga. 2003); *In re Carvajal*, 365 B.R. 631, 631 (Bankr. E.D. Va. 2007); *In re Hodges*, 342 B.R. 616, 61920 (Bankr. E.D. Wa. 2006). Despite differing views as to the degree to which unbundling is permissible, no court appears to have allowed the exclusion of all post-petition services altogether. *See In re Wagers*, 340 B.R. 391, 398 (Bankr. D. Kan. 2006).

that LSR leaves debtors without guidance in the thick of the bankruptcy case, when they are most vulnerable.[25] Moreover, some judges see full service representation as necessary to meet the minimum standards of a lawyer's professional responsibility. Yet others have noted that what falls under the umbrella of "basic services" is fact-intensive and varies from case to case.

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

In recognizing that the concept of reasonableness is both fact-intensive and situation-specific, the Restatement (Third) of Law Governing Lawyers offers the following guidelines: (i) a client must be informed of and consent to any "problems that might arise related to the limitation," (ii) a contract limiting the representation is construed "from the standpoint of a reasonable client," (iii) if any fee is charged, it must be reasonable in light of the scope of the representation, (iv) changes to representation made after an unreasonably long time after beginning representation must "meet the more stringent tests…for post inception contracts or modifications," and (v) the limitation's terms must be reasonable in light of the client's sophistication level and circumstances.[26]

In the case at hand, while Attorney provided Mr. Canberra some sound advice, the agreement as described did not provide adequate disclosure for him to provide fully informed consent. In most jurisdictions, the informed consent disclosure offered under these facts was inadequate. Moreover, Attorney should have, at a minimum, signed the petition, filed the petition, formally appeared in the case and attended the 341 meeting with her client.

Applicable Rules:

ABA Model Rule 1.2(c)

"[a] lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent."[27]

Official Comments:

The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client . . . . A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such

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

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

[27] Model Rules of Prof'l Conduct R. 1.2(c) (2011).

limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.[28]

The comments to Rule 1.2 further state that lawyers and clients may enjoy "substantial latitude to limit the representation," so long as the proposed limitations are "reasonable under the circumstances."

Rule 9011. Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers

(a) SIGNATURE. Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) REPRESENTATIONS TO THE COURT. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

SEE APPENDIX A FOR MODEL FORMS AND RULES ON LIMITED SERVICES REPRESENTATION.

IX. SOLICITING CREDITORS ABOUT COMMITTEE COUNSEL REPRESENTATION

In most parts of the country, it is a rare chapter 11 case that can handle the expense of a creditors' committee and its counsel. But a Big Case was just filed in your district and your partner wants to call everyone on the Top 20 creditors list to: (1) tout the firm's expertise as potential committee counsel, (2) encourage each of these creditors to express interest to the U.S.

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

Trustee in serving on the committee, and (3) line up proxies to represent them at the first meeting of creditors. She also wants to join forces with a local accountant, urging the creditors to hire both firms, and asking the accounting firm to send out its own targeted calls and emails. Can you do it?

Attorney #1: No problem; no committee has been formed yet so there is no "client" that is being solicited. Besides, the Constitution protects such communications.

Attorney #2: If I don't make the calls, some big L.A. or N.Y. firm will line up the representation before the committee even hears from me. They need to know I can serve them just as well before this judge and I'm a lot cheaper. Judges here don't care about calling creditors – it's okay.

Attorney #3: I can contact anybody my firm has dealt with, and the GCs or outside lawyers for the creditors that I track down online, and even to ask one to circulate my letter. And I can team up with an accounting firm, where we plug each other, as long as the accountant doesn't get out of line.

Background for panel discussion:

Committees generally choose their counsel shortly after members are appointed and it is common for counsel desiring committee representation to approach potential committee members once the list of 20 largest creditors is filed. An attorney asking for consideration as potential counsel approaches creditors in their capacity as potential committee members, so it is likely that state bar authorities would consider restrictions on prospective client solicitation as applicable.

Applicable Rules:

Model Rule of Professional Responsibility 7.1 Communications concerning a lawyer's services
Model Rule of Professional Responsibility 7.2 Advertising
Model Rule of Professional Responsibility 7.3 Solicitation of clients

Relevant Cases:

In re Universal Bldg. Products, 486 B.R. 650 (Bankr. D. Del. 2010) (court rejected arguments that solicitation of committee members was protected by the Constitution, and held that the lawyers violated Professional Conduct Rule 7.3 through an intermediary. The court held that the lawyers could communicate with creditors with whom they had an existing professional relationship, but not acting together with another to **"**cold call creditors**"** with the intention of being retained by them to attend the committee formation meeting and cast proxies in favor of the law firm. The court rejected the debtor's argument that the lawyers were not disinterested on account of advice given to creditors about their claims in the course of soliciting their committee membership, since 11 U.S.C.A. **§**1103 does not disqualify counsel based on representation of an individual creditor pre-appointment. The court held that counsel's failure to disclose all **"**connections**"** warranted disqualification and that the supplemental declarations were insufficient to cure the initial inadequacies.)

In re ABC Automotive Products Corp., 210 B.R. 437 (Bankr. E.D. Pa. 1997) (proposed committee counsel disqualified because of the nature of his involvement in the solicitation of committee members).

Edenfield v. Fane, 507 U.S. 761 (1993) (Court struck down a state statute which flatly prohibited CPAs from directly soliciting accounting clients, noting that business clients are different from the "unsophisticated, injured or distressed lay person" often targeted by attorney's solicitations. However, in rendering its decision, the *Edenfield* Court cited and did not overrule *Shapero.*)

Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 472 (1988) (Addressing an earlier version of Model Rule 7.3 in the context of letters targeted to potential foreclosure suit defendants, the Court held that States cannot categorically prohibit lawyers from soliciting business for pecuniary gain by sending truthful and non-deceptive letters to potential clients known to face particular legal problems, but the Court also said it is permissible for a State Bar to regulate targeted solicitation letters to such potential clients. Current Model Rule 7.3 and the versions applicable in most states appear to meet the parameters of appropriate regulation described by the Court in *Shapero*.)

X. EXEMPTION PLANNING

Jack Orman is the defendant in an arbitration proceeding brought by his former business partner. His litigation attorney told him that the case was frivolous, so he is surprised when, although the arbitrator has not yet issued a ruling, the arbitrator forecasted that she will likely make a significant award against Orman. Quite upset, Orman calls you for advice as to whether he should consider filing bankruptcy if the arbitrator rules against him. At your meeting with him, you learn that he does not have a retirement plan, but that he holds a carryback note in the amount of $1.245 million from the sale of a prior home. He tells you that he has been counting on the note payments to pay for his grandchildren's education. What should you do?

Attorney # 1: I'd tell him to come back if the arbitrator rules against him.

Attorney #2: I'd tell him to sell the note if he can, and use the money to buy an IRA (after paying your fee), since IRA's are exempt under your state law.

Attorney #3: I'd tell him that he shouldn't do anything, because moving assets around could be fraudulent and lead to denial of his discharge in a bankruptcy proceeding.

Applicable Rules:

ABA Model Rule Preamble:

> [9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the

> exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

"A familiar but squirmingly uncomfortable area for an insolvency lawyer is the space between, on the one hand, the lawyer's obligation to provide counsel to imminently insolvent clients about their legal rights to shelter or protect their assets from the reach of rapacious creditors, and, on the other, the potential for ethical violation or civil liability for the lawyer who aids a client in a scheme to hinder, delay or defraud his or her creditors." Joseph A. Dworetzky, *Counterpoint: A Caution for Counsel*, 14-OCT Bus. L. Today 27 (September/October 2004).

"Debtors who engage in prebankruptcy planning to convert nonexempt property into exempt property play a high-risk game. The rewards for playing are shielding assets as exempt property, and the punishment for crossing the nebulous line of improper prebankruptcy planning is the denial of discharge for all debts or denial of the exemption. In light of some of the seemingly inconsequential conduct that is characterized as fraud for purposes of denying discharge, this punishment seems harsh, especially so in light of great divergence of opinions on the matter. Often the result will depend on the circuit in which the case arises and the inclinations of the judge before whom the matter is heard." Peter Spero, *Prebankruptcy Planning—Generally*, Asset Protection: Legal Planning, Strategies and Forms ¶ 12.02.

Law v. Siegel, 134 S.Ct. 1188 (2014) (suggesting, in dicta, that bankruptcy courts lack the equitable power to deny exemptions based on a debtor's bad faith conduct).

Exemption Strategies After Law v. Siegel, 070915 ABI-CLE 525 (American Bankruptcy Institute, the Northeast 10th Annual Consumer Forum, July 9-11, 2015) (citations omitted).

In re Delcorso, 382 B.R. 240 (Bankr. E.D. Pa. 2007) (sanctioning attorney for advising debtor to execute and record a deed transferring title to her home from herself to herself and her spouse as tenants-by-the-entirety on the eve of bankruptcy).

In *In re Addison*, 540 F.3d 805 (8th Cir. 2008), the Eighth Circuit held that there must be "extrinsic evidence" of fraud, besides keeping assets out of the hands of creditors, to deny an exemption. Such "extrinsic evidence" includes borrowing money to place in exempt assets; buying a new home – as opposed to paying down a loan on an existing home; obtaining goods on credit, selling them, and placing into exempt property; and/or concealing the transfers. Generally, it is "conduct intentionally designed to materially mislead or deceive creditors about the debtor's position or use of credit to buy exempt property." The Eighth Circuit also looks at the size of the exemption planning, *i.e.*, the "when a pig becomes a hog it is slaughtered" analysis. Note that the "principle of too much" has been criticized by some. In *In re Tveten*, on which *Addison* relied, the dissenting judge pointed out that exemption amounts should be decided by legislatures, not bankruptcy judges. 848 F.2d 871 (8th Cir. 1988). *See also In re Crater*, 286 B.R. 756 (Bankr. D. Ariz. 2002) ("Debtors deserve more definite answers than each bankruptcy judge's sense of proportion.") (quoting Judge Arnold's dissent in *Tveten*); *In re*

Stern, 345 F.3d 1036 (9th Cir. 2003) (holding that exemption planning was not fraudulent, even though made with the intent to keep nonexempt assets away from creditor).

XI. CLIENT CONTROLS AND DUTY TO THE COURT

After getting the DIP CEO's agreement, DIP counsel executed a cash collateral stipulation with Lender requiring net proceeds of any Going Out of Business ("GOB") sales to be segregated from normal inventory sales and used as adequate protection payments to pay down Lender's secured claim. The DIP lawyer skimmed and filed monthly operating reports signed by the CFO. While the DIP had hoped to be able to return to profitability by shedding unprofitable store locations, its strategy does not seem to be working. Lender has moved for conversion or appointment of a trustee. When preparing the CFO for his deposition, DIP counsel learned that he didn't get a clear message from the CEO about the GOB sale proceeds. He used them not only for payroll and payroll taxes for employees working those sales, but for all employees – to avoid responsible person liability if the employee taxes weren't paid. Now what?

Attorney #1: Well, this was clearly a misunderstanding, not a defalcation. I did everything anyone would expect me to do. Let's all stay calm.

Attorney #2: OMG. I should have scrutinized the MORs for their treatment of the GOBs. I should never have relied on the CEO instead of the CFO. Now I'm SOL on my FEES.

Attorney #3: I'm not my client's policeman or big brother. This is the CEO's fault or the CFO's fault, but it's not my fault.

Applicable Rules:

Model Rule of Professional Responsibility 1.2 Scope of representation
Model Rule of Professional Responsibility 1.4 Communications
Model Rule of Professional Responsibility 1.13 Organization as a client

Relevant Cases:

Hansen, Jones & Leta, P.C. v. Segal, 220 B.R. 434 (D. Utah 1998) (The first and still most thorough court analysis of legal theories underpinning claims of fiduciary duties by DIP counsel to the bankruptcy estate. The court concludes that duties of loyalty and care are owed to the DIP client and that ethical duties (including candor) and duties imposed under the Bankruptcy Code, Bankruptcy Rules (including 2014, 2016 and 9011) are owed to the court. But the bankruptcy estate is not the client and DIP counsel does not owe duties to estate beneficiaries).

ICM Notes, Ltd. v. Andrews & Kurth, L.L.P., 278 B.R. 117 (S.D. Tex. 2002), aff'd, 324 F.3d 768 (5th Cir. 2003) (adopts reasoning of *Hansen*, and holds that DIP counsel does not owe a fiduciary duty to a particular creditor, although counsel may owe a general fiduciary duty to preserve the bankruptcy estate).

In re Macco Properties, Inc., 540 B.R. 793 (Bankr. W.D. Okla. 2015) (chapter 11 trustee's counsel owed fiduciary duties to trustee client, and not to creditors, equity holders, or other constituents or beneficiaries of the estate).

In re Count Liberty, LLC, 370 B.R. 259 (Bankr. C.D. Cal. 2007) (rejects *Hansen*, reasons that DIP counsel owes duties to the estate, but also acknowledges that DIP counsel's duty **"**may not rise to the level of a policeman for the debtor's postpetition conduct,**"** and holds that counsel must advise the DIP of its responsibilities under the Code and assist its management in discharging those responsibilities).

In re Food Management Group, LLC, 380 B.R. 677 (Bankr. S.D. N.Y. 2008) (follows *Count Liberty*, and adds as a framework for interpreting DIP counsel's duties based on Restatement (Third) of the Law Governing Lawyers § 51(4) regarding when a lawyer owes a duty of care and may be liable for a breach of such duty to a non-client).

See also S. Freeman, *Are DIP and Committee Counsel Fiduciaries for Their Clients' Constituents or the Bankruptcy Estate? What is a Fiduciary, Anyway*?, 17 Amer. Bankr. Inst. L. Rev. 291 (Winter 2009).

XII. ADVERTISING AND CLIENT SOLICITATION

A. Should You Rat on a Sleazy Lawyer?

As a consumer debtors' lawyer, you pay attention to the social media presence of your competitors. One lawyer in your city blogs that he files more bankruptcy cases than any other lawyer in town, which you think is probably not true. He also advertises on television and social media sites that he handles Chapter 7 cases for $500 up front, plus the filing fee. Yet, while waiting in the hallway for § 341 meetings, you have heard that lawyer tell clients that he won't represent them at their 341 meeting without an additional payment. What should you do?

Attorney #1: I'd notify the bar and our judges that the lawyer is engaged in false and deceptive advertising practices.

Attorney #2: I'd ask the lawyer for proof as to the number of cases he has filed, and also ask if he advises his clients that any obligation to him for fees is being discharged in their bankruptcy case.

Attorney #3: I'd probably stew about it for a while, and do nothing.

Background for Panel Discussion:

Lawyers may of course advertise, including on social media, but not in a way that creates unjustified expectations for their prospective clients, and of course not by misrepresenting facts. One local lawyer told me of another, no longer practicing, whose website referred to a $197 charge for bankruptcy cases but that, after clients showed up, they were told that that was a typo and the actual charge is $1,097. Also, attorneys may compare themselves to other attorneys, but only if they are able to back up their claims with proof. The facts given may or may not provide sufficient factual information with which to make a bar complaint but, if not, the question might be under what circumstances a lawyer is obligated to inquire further as to the conduct of another lawyer.

Applicable Code and Rules:

11 U.S.C. § 526(a)(2).

ABA Model Rule 7.1: A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment:

> [1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.
>
> [2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.
>
> [3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

ABA Model Rule 7.2(a): Subject to the requirements of Rule 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

Comment:

> [1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition.

Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. But see Rule 7.3(a) for the prohibition against a solicitation through a real-time electronic exchange initiated by the lawyer.

Relevant Cases:

In re Congoleum Corp., 426 F.3d 675 (3d Cir. 2005) (The Third Circuit recognized concerns about the tactical use of disqualification motions. While the court explicitly did not decide if a noncreditor's (insurer's) lawyer had a duty to disclose a conflict of interest on the part of special counsel, it held counsel had standing, and the right to raise the issue of a conflict under state Rules of Professional Conduct, and require adjudication of the conflict issue by the court. The court went on to state that counsel has a responsibility, if not a duty, to alert the court to ethical conflicts on the part of other counsel. The court cited Model Rule 8.3 to explain its ruling in a case where a lawyer had a conflict of interest from inadequately disclosed representation of creditors and the debtor in possession as special counsel.

XIII. CONFLICTS OF INTEREST: DIVORCE AND BANKRUPTCY

You were retained by Gordon to represent her in a divorce proceeding. While the divorce was still pending, Gordon and her soon-to-be ex-husband, Fisher, discussed with you the possibility of both of them filing bankruptcy to resolve some of their outstanding financial problems. Mindful of the couple's financial stressors, you advised the couple it would be "cheaper and easier" if you were to represent both of them in a joint chapter 7 filing.

Just before filing the petition, you disclosed the possibility of a potential conflict of interest arising from your joint representation of them in their chapter 7. You did not, however, cease representing Gordon in the divorce proceedings. You sought and received a waiver from

both Gordon and Fisher concerning the joint bankruptcy representation and the divorce representation. Each party paid you $1,000 and you filed a joint chapter 7 bankruptcy petition on their behalf.

Can you represent both Gordon and Fisher in their joint Chapter 7 case?

Attorney # 1: Yes, because I disclosed the potential for a conflict of interest and sought and received waivers from both parties. I should be applauded for providing help to a couple who cannot afford separate counsel.

Attorney # 2: No, because representing a wife in the bankruptcy case and in the divorce proceeding placed me at direct adversity to another client of mine, the soon-to-be-ex-husband, and also materially limited my ability to represent both the wife and the ex-husband in their chapter 7.

Attorney # 3: Maybe, it depends on the facts of the case.

Background for Panel Discussion:

An attorney has the duty not to represent one client if that representation would be directly adverse to the interests of another client. In addition, an attorney may not represent a client if the representation of that client would be materially limited by an attorney's responsibility to another client.[29] Given the nature of a divorce, a bankruptcy attorney should see a big red flag when considering whether to represent a divorcing husband and wife in a joint chapter 7 case, at the same time he is representing one of the parties in the divorce case. Even if an attorney believes that the interests of a divorcing couple are not adverse when they file a joint chapter 7, a divorce can get adversarial very quickly. The attorney must consider whether he will be limited in his representation of either the husband or the wife by his professional duties to the other party. Finally, attorneys have the duty to maintain confidences of clients. Although most of the information in a bankruptcy case will ultimately be public information, there may be certain confidences of the divorce client that an attorney might have to take steps to protect (or get a waiver). In theory, it may be possible under these facts for an attorney to represent both the husband and wife in a pre-divorce joint chapter 7 bankruptcy. Waivers of conflicts are commonly used. A waiver only works, however, if the attorney:

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

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.[30]

Under the facts of a given case, if an attorney believes the amount of adversity between the husband and wife is so severe that it will adversely affect or materially limit the attorney's

[29] Model Rule of Professional Conduct 1.7.
[30] *Id.*

ability to represent one or both of the individuals in a joint chapter 7, then the attorney is ethically prohibited from undertaking that representation.

Applicable Rules:

Rule 1.7 Conflict Of Interest: Current Clients

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

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

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

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

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

(2) the representation is not prohibited by law;

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

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

Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

Rule 1.6 Confidentiality of Information

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

APPENDIX A

Best Practices for Limited Services Representation in Consumer Cases

Final Report of the American Bankruptcy Institute National Ethics Task Force (April 21, 2013)

Reprinted with Permission from the American Bankruptcy Institute

Given the fact-specific nature of limited scope representation in the context of consumer bankruptcy, it is difficult to design the contours of a limited scope representation that fully addresses the client's needs for affordable counsel and that also meets the standard of competent representation.[31] Best practices, at a minimum, require the following:

1. The initial client interview and counseling should make clear the expected scope of representation and the expected limited fee.
2. Attorneys counseling unsophisticated consumer debtors must be mindful, when gathering initial information to assess a case, to avoid the formation of the debtor's perception that a full-scale attorney-client relationship is being formed.
3. An engagement letter and informed consent should be prepared in plain language and carefully reviewed with the debtor. This letter must clearly and conspicuously set forth the services being provided, the services *not* being provided, and the potential consequences of the limited services arrangement.
4. The engagement letter must also clearly describe the fee arrangement, including a statement of how fees for additional services will be charged.[32]
5. All documents and disclosures filed with the bankruptcy court should be done with full candor consistent with the attorney's duty of confidentiality, disclosing the exact nature of the representation and the calculation of fees for services being provided.

---

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

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

6. In the event that withdrawal from the unbundled representation becomes warranted, attorneys must be mindful of protecting their client's interests to the fullest extent practical when exiting the case.
7. As is the case with all legal representation, if the attorney becomes aware of a legal remedy, problem, or alternative outside of the scope of his or her representation, the client must be promptly informed. The attorney has the further obligation to provide his or her client with a thorough explanation of the potential benefits and harms implicated, in order for the client to make an informed decision as to how to proceed.

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

Even in the context of providing limited services representation, a lawyer representing a Chapter 7 debtor must comply with all of the relevant governing Rules of Professional Conduct. These rules include the requirements of (i) competency (Rule 1.1.),[33] (ii) diligence (Rule 1.3),[34] (iii) communication (Rule 1.4),[35] (iv) confidentiality (Rule 1.6)[36] , and (v) conflicts of interest (Rules 1.7,[37] 1.8,[38] 1.9,[39] 1.10,[40] and 1.11[41]).[42]

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

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

[35] (a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
Id. at R. 1.4.

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

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

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

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

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

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

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

Proposed Rule Providing for Limited Scope

Representation in Consumer Bankruptcy Cases

(1) If permitted by the governing Rules of Professional Conduct, a lawyer may limit the scope of the representation of an individual debtor (or debtors in a joint case),[43] whose debts are primarily consumer debts, if the limitation is reasonable under the circumstances and the client gives informed consent in writing.

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

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

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

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

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

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

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

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

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

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

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

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

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

Model Agreement and Consent to Limited Representation in Consumer Bankruptcy Cases

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

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

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

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

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

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

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

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

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

II. For Chapter 7 Debtors Who Have Secured Debts.

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

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

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

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

III. The Fee

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

❒ **A flat fee of $ _____,** plus $___ for out of pocket expenses,[44] **OR**

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

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

You acknowledge that the fee for additional services (on top of those services set forth in Section ____ (I or II) above) requested after your bankruptcy petition is filed must be paid from funds that are not part of your bankruptcy estate (such as your post-petition earnings).

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

a. that I am not promising any particular outcome;

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

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

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

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

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

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

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

Signature of client/s 1._____

2._____

Signature of attorney _____

Date: _____