

Ethical Responsibilities as to Continuing Representation

Hon. Audrey R. Evans
U.S. Bankruptcy Court (E.D & W.D. Ark.)
Little Rock

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**THE DUTY OF CONTINUING REPRESENTATION
IN CONSUMER BANKRUPTCY CASES**

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I. Ghostwriting

a. A client asks the attorney to represent the client in a chapter 7 bankruptcy proceeding. The attorney is not really equipped for ecf filing and, therefore, does not want to get involved in a bankruptcy case. But, for a \$400 up-front fee, the attorney agrees to prepare a paper petition, SOFA and schedules for the client to file as a *pro se* case.

11 U.S.C. Section 101(3)(definition of “assisted person)

11 U.S.C. Section 101(4)(definition of “attorney”)

11 U.S.C. Section 101(4A)(definition of “bankruptcy assistance”)

11 U.S.C. Section 329. Debtor’s transactions with attorneys.

11 U.S.C. Section 526. Restrictions on debt relief agencies.

11 U.S.C. Section 527. Disclosures

11 U.S.C. Section 528 Requirements for debt relief agencies.

Rule 2016 F. R. Bankr. P. Compensation for Services Rendered

Rule 2017 F. R. Bankr. P. Examination of Debtor’s Transactions with

Rule 9011 F. R. Bankr. P. Signing of Papers; Representations to the Court

Rule 1.2(c) ABA MRPC - Scope of Representation and Allocation of

Rule 3.3 ABA MRPC – Candor Toward the Tribunal

ABA Formal Opinion 07-446 (2007)(there is no prohibition in the Model Rules of Professional Conduct against ghostwriting)

“Topic: Can a Lawyer Ethically Remain Behind the Scenes of a Litigation and Prepare Pleadings and Other submissions for a Pro Se litigant Without Disclosing the Layer’s Participation to the Court and Adverse Counsel?”
New York County Lawyers’ Association Committee on Professional Ethics, 2010 WL 4260878 (April, 2010)(limited-scope representation agreements with *pro se* litigants provide substantial benefits to individual litigants and, therefore, absent a more specific rule of the court, are permissible)

In re West, 338 B.R. 906 (Bankr. N.D.Okla 2006)(attorney, who allegedly was not equipped to file bankruptcy pleadings electronically, violated Rule 9011 by drafting paper pleadings for client to file *pro se*)

In re Cash Media Systems, Inc. 326 B.R. 655 (Bankr. S.D.Tex. 2005) (attorney’s ghostwriting creates the impression that the client drafted the pleading thereby violating both Rule [9011] and the duty of honesty and candor to the court)

In re Mungo, 305 B.R. 762 (Bankr. D.S.C. 2003)(attorney’s violation of bankruptcy local rule prohibiting ghost writing is a deliberate evasion of the

bar member's obligations and prevents the policing of ethical, professional and substantive rules, including attorney's duty of candor to the court)

In re Merriam, 250 B.R. 724 (Bankr. D.Colo. 2000)(chapter 7 debtor's attorney was required to sign the petition that he prepared, even if he was retained only for limited representation)

II. Limitations on Representation – Unbundling Services

- a. A client asks the attorney to represent the client in a chapter 7 bankruptcy proceeding. The attorney does not want to get too involved in the bankruptcy case but agrees to charge the client a flat fee to prepare and file the petition, schedules, SOFA, etc., with the understanding that his representation is limited to only those services performed up to and including the filing of the petition (i.e. no appearance at the 341 Meeting of Creditors, no negotiations for reaffirmations, no lien avoidances, etc.).
- b. A client asks the attorney to represent the client in a chapter 7 bankruptcy proceeding. The attorney does not see anything out-of-the-ordinary about this client's case. The client has a car loan, a mortgage, and some credit card and medical debt. The attorney agrees to represent the client for a flat fee, but the contract explicitly provides that the attorney will not represent the client in any adversary proceedings or contested matters.
- c. A client asks the attorney represent the client in a chapter 7 bankruptcy proceeding. The attorney does not see anything out-of-the-ordinary about this client's case. The client has a car loan, a mortgage, and some credit card and medical debt. The attorney agrees to represent the client for a flat fee of \$500 with the agreement that the attorney will charge additional fees if he has to represent the client in any adversary proceeding or contested matter.
- d. A client asks the attorney to represent the client in a chapter 7 bankruptcy proceeding. The client's case would be fairly run-of-the-mill, except for a complicated breach of copyright suit that has been filed against the client. The attorney knows little, if anything, about copyright law. The attorney agrees to take the case with the understanding that, if an adversary proceeding is filed against the client relating to the copyright claim, the client will need to retain separate counsel to represent the client in that adversary proceeding.
- e. A client retains the attorney to represent the client in a chapter 13 proceeding. The attorney takes the case under a flat fee contract based upon the attorney's estimation of the amount of work and time the case will require. The case turns out to be more complicated than the attorney expected - the value of the attorney's services far exceed the amount of the

original fee. The attorney files a fee application with the court for the additional fees.

- f. A client retains the attorney to represent the client in a chapter 13 proceeding. The attorney agrees to take the case for a general flat fee plus “a la carte” fees for specific, additional services which might arise during the course of the case.

11 U.S.C. Section 329. Debtor’s transactions with attorneys

11 U.S.C. Section 330(a)(4)(B). Compensation of officers

Rule 2016 F. R. Bankr. P. Compensation for Services Rendered

Rule 2017 F. R. Bankr. P. Examination of Debtor’s Transactions with

Rule 1.1 ABA MRPC - Competence

Rule 1.2(c) ABA MRPC - Scope of Representation and Allocation

Rule 1.16 ABA MRPC - Declining or Terminating Representation

In re Wesseldine, 434 B.R. 31 (Bankr. N.D.N.Y. 2010)(chapter 13 no-look fee – as opposed to an hourly billing arrangement - contemplated all services rendered and to be rendered in connection with the case; the attorney’s attempt to create and charge extra for carve-outs was impermissible)

In re Snyder, 2010 WL 3719074 (Bkrtcy.E.D.Pa.)(a flat fee is not intended to serve as a retainer against which an attorney charges time expended until the retainer is exhausted, followed by an application for any remaining unpaid service)

In re Minardi, 399 B.R. 841 (Bankr. N.D.Okla 2009)(attorney’s attempt to limit his services to exclude negotiation of reaffirmation agreements was an impermissible limitation on his representation of the chapter 7 debtor)

In re Goines, 2007 WL 2410592 (Bkrtcy.M.D.N.C.)(attorney allowed to withdraw as counsel for the debtor where fee contract excluded representation in adversary proceedings and withdrawal would not have material adverse effect on the debtor)

In re Cuddy, 322 B.R. 12 (Bankr. D.Mass. 2005)(chapter 7 debtor’s failure to “replenish” attorney’s retainer was not sufficient cause to allow the attorney to withdraw)

In re Johnson, 291 B.R. 462 (Bankr. D.Minn. 2003)(Rules of Professional Conduct that allow an attorney to limit the scope of representation are superceded by the applicable local rules of the court.)

In re Egwim, 291 B.R. 559 (Bankr. N.D.Ga. 2003)(the general rule is that, absent special circumstance, an attorney representing a chapter 7 debtor may not limit the scope of the representation and must represent the debtor in all aspects of the bankruptcy case until the court allows the attorney to withdraw. When the reason to withdraw is the payment of fees, the attorney must show that continued representation imposes an unreasonable burden on counsel that justifies withdrawal)

III. Unpaid Fees

- a. Client retains the attorney to represent the client in a chapter 7 case. The client pays the attorney's fees with a post-dated check to be cashed a week later (after the client gets paid by his employer). The attorney waits one week, then deposits the check and files the case on the same day. The check subsequently is returned by the bank for insufficient funds.
 - i. The attorney refuses to do any more work for the client until the client makes the check good.
 - ii. The attorney threatens criminal charges against the client unless the client makes the check good.

11 U.S.C. Section 362(a). Automatic stay

11 U.S.C. Section 526. Restrictions on debt relief agencies

Rule 1.16(b)(5) ABA MRPC - Declining or Terminating Representation

In re Cuddy, 322 B.R. 12 (Bankr. D.Mass. 2005)

In re Egwim, 291 B.R. 559 (Bankr. N.D.Ga. 2003)

IV. Husband and Wife

- a. Attorney represents Husband and Wife as joint debtors in a chapter 13 case. Husband and Wife are involved in an acrimonious divorce. Wife makes an appointment to meet with the attorney by herself to "weigh her options" in light of the divorce action and to determine the best way to protect her interests.
- b. Attorney represents Husband and Wife as joint debtors in a chapter 13 case. Husband and Wife are involved in an amicable divorce. They, however, cannot decide who should be responsible for the chapter 13 payments and who will retain certain marital property. They make an appointment to meet with the attorney, together, to discuss their situation.

- c. Attorney met with Husband and Wife to discuss filing a proceeding under chapter 7. Because the residence was titled only in Wife's name, the attorney recommended and filed a chapter 7 case for Husband, only. However, Husband and Wife failed to disclose to the attorney that Husband had transferred the residence to Wife during the prior two years. The chapter 7 trustee filed an adversary proceeding seeking to undo the transfer of the residence from Husband to Wife. Because they originally met with the attorney together, Husband and Wife now insist that the attorney represent them both in the adversary proceeding.

Rule 1.6 ABA MRPC – Confidentiality of Information

Rule 1.7 ABA MRPC – Conflict of Interest: Current Clients

Rule 1.16 ABA MRPC – Declining or Terminating Representation

In re Morey, 416 B.R. 364 (Bankr. D.Mass. 2009)(debtor's attorney was disqualified in representing debtor's ex-husband in defense of trustee's complaint to set aside alleged fraudulent transfer)

V. Disagreements With Clients

- a. Attorney represents the client in a confirmed chapter 13 case. The plan provides for a 00% dividend to the client's general, unsecured creditors. The client's ex-wife has filed a general, unsecured claim in the amount of \$500. The client informs counsel that he paid that debt prior to filing and provides a receipt from the ex-wife to prove it. Client wants the attorney to object to the proof of claim. The attorney advises the client that, because the claim will be paid \$00 under the plan, filing an objection to the proof of claim essentially would be a meaningless waste of time and resources. The client insists that the attorney file the objection, anyway.
- b. Attorney represents the client in a confirmed chapter 13 case. The plan provides for a high-percentage dividend to general, unsecured creditors. The client's schedules list Discover Bank as a general, unsecured creditor in the amount of \$3,000 on a credit card account. Discover Bank files a proof of claim in the amount of \$3,000 based upon its credit card agreement with the client. Discover Bank, however, does not provide any supporting documentation with its proof of claim. Client instructs the attorney to object to Discover Bank's proof of claim based solely on its failure to provide supporting documentation.
- c. Attorney represents the client in a chapter 13 case. The confirmation hearing will take place in a week. The client meets with the attorney to prepare for the hearing. During the meeting, the client states that he, in fact, did not disclose that he has \$15,000 in a bank account in another state. The client tells the attorney that he considers this information to fall

within the attorney-client privilege and tells the attorney that the attorney is not authorized to disclose this information to anyone.

- d. Attorney represents the client in a chapter 7 case. An adversary proceeding has been filed against the client alleging, among other things, willful and malicious injury and fraud. During the trial, the attorney calls the client to the stand for direct examination. Shortly into the client's testimony, the attorney realizes that the client is fabricating material facts that never existed.
- e. Attorney represents the client in a chapter 13 case. During the 341 Meeting of Creditors, the client admits that he owns real estate that was not listed in his bankruptcy schedules. This is a surprise to the attorney. When asked by the trustee why the property was not listed, the client states, "My attorney told me that I didn't have to."
- f. Attorney represents the client in a chapter 13 case. The day after the petition was filed, the client's car creditor repossessed the client's car. The creditor did not have knowledge of the pending case and, when contacted by the attorney, the creditor immediately released the vehicle to the client. The client wants the attorney to bring an action against the creditor for a violation of the automatic stay. The attorney declines to do so. The client then writes a letter to the court, complaining that the attorney is not adequately representing the client and demanding a reduction in the attorney's fees. The court sets the matter down for a hearing.

18 U.S.C. Section 152. Concealment of assets; false oaths and claims

18 U.S.C. Section 157. Bankruptcy fraud.

11 U.S.C. Section 329. Debtor's transactions with attorneys

11 U.S.C. Section 330. Compensation of officers

11 U.S.C. Section 526. Restrictions on debt relief agencies

Rule 2017 F. R. Bankr. P. Examination of Debtor's Transactions with

Rule 9011 F. R. Bankr. P. Signing of Papers; Representations to the Court

Rule 1.2(a) ABA MRPC – Scope of Representation and Allocation

Rule 1.2(d) ABA MRPC - Scope of Representation and Allocation

Rule 1.4(a)(5) ABA MRPC - Communication

Rule 1.6(b)(6) ABA MRPC – Confidentiality of Information

Rule 1.16(b) ABA MRPC – Declining or Terminating Representation

Rule 3.1 ABA MRPC – Meritorious Claims and Contentions

Rule 3.3(b) ABA MRPC – Candor Toward the Tribunal

Rule 4.1(b) ABA MRPC – Truthfulness in Statements to Others

VI. Reaffirmation Agreements

- a. Attorney's chapter 7 client wishes to enter into a reaffirmation agreement on an automobile. The attorney thinks it is a very bad deal for the client but does not believe it will create a financial hardship for the client.
- b. Attorney's chapter 7 client wishes to enter into a reaffirmation agreement on an automobile. The attorney thinks that it is a very bad deal for the client and that it will create a financial hardship for the client. The client insists that the attorney sign off on the reaffirmation agreement.

11 U.S.C. Section 524(c)(3)

11 U.S.C. Section 526

Rule 1.2 ABA MRPC - Scope of Representation and Allocation

Rule 1.16 ABA MRPC – Declining or Terminating Representation

In re Barron, 441 B.R. 131 (Bankr. D.Ariz. 2010)(debtor's counsel could not unilaterally withdraw from representing the debtors in the reaffirmation process; failure on the part of debtor's counsel to endorse the reaffirmation agreement by itself rendered it unenforceable)

In re Perez, 2010 WL 2737187 (Bkrcty.D.N.M.)(counsel's refusal to sign certification regarding reaffirmation agreement renders the agreement unenforceable)

In re Goodman, 2009 WL 936910 (Bkrcty.N.D.Ga.)(debtor's counsel properly represented the debtor in the reaffirmation process; although counsel would not certify that the agreement was in the debtor's best interests; the court can consider approving the agreement notwithstanding the absence of counsel's certification)

In re Collmar, 417 B.R. 920 (Bankr. N.D.Ind. 2009)(debtor's attorney could not limit representation of debtor to exclude assistance with respect to decision to reaffirm; court could not approve a reaffirmation agreement which lacked the participation of debtors counsel)

In re Minardi, 399 B.R. 841 (Bankr. N.D.Okla. 2009)

In re DeSantis, 395 B.R. 162 (Bankr. M.D.Fla. 2008)(debtors' attorneys could not decline to represent debtors in the negotiation of a reaffirmation agreement while continuing to represent the debtors in other parts of the case)

VII. When is the Representation Over?

- a. Attorney represented the client in a chapter 13 case. The client completed all of his payments under the plan but did not complete the post-filing personal financial management course on a timely basis. The court closed the case without a discharge. One year later, the client demands that the attorney move to reopen the case and file the appropriate certificates so that the client can obtain a discharge.
- b. The attorney represented the client in a chapter 13 case. The client listed SunTrust Bank as a creditor in his schedules. While the case was pending, SunTrust Bank assigned the debt to a different entity who then obtained a judgment and filed a judicial lien against the client's real estate. The client subsequently received his discharge. Three years later, when the client attempted to re-finance his house, he learned of the judgment lien. He now expects the attorney to have the lien removed.
- c. Attorney represented the client in a chapter 7 case. Client obtained his discharge. Six months later, the client is sued by a creditor whose pre-petition debt was not listed in the client's bankruptcy schedules. The state court has set a hearing on the creditor's motion for summary judgment. Client wants attorney to "take care of" the matter as part of his bankruptcy representation.
- d. Attorney represented the client in a chapter 7 case. At the time the case was filed, the client had a claim against his former employer for wrongful termination. The client did not list the claim in his bankruptcy schedules. The client obtained his discharge and a few months later retained another attorney to file a lawsuit against his former employer. The former employer moves to dismiss the lawsuit on the grounds of judicial estoppel. The client returns to the bankruptcy attorney to have the attorney "fix the problem."

Rule 1.16 ABA MRPC – Declining or Terminating Representation

In re Metropolitan Mortg. & Sec., Co., Inc., 2010 WL 1998153 (Bkrcty.D.Hawaii)(an attorney's duty of loyalty continues after an engagement is completed)

In re Frazin, 2008 WL 5214036, 56 (Bkrcty.N.D.Tex.)(the scope of the attorney-client relationship has two aspects: a temporal aspect and a substantive aspect Although there are some exceptions, an attorney's fiduciary duties do not generally extend beyond the time period of the representation)