# 17th Annual Great Debates

**Jeffrey N. Pomerantz, Moderator**
*Pachulski Stang Ziehl & Jones LLP; Los Angeles*

## Resolved: The Bankruptcy Code should be revised to eliminate a debtor in possession's and trustee's ability to recover preferential transfers.

**Pro: John D. Penn**
*Haynes and Boone LLP; Fort Worth*

**Con: Andrew W. Caine**
*Pachulski Stang Ziehl & Jones LLP; Los Angeles*

## Resolved: A claim against the debtor's estate, transferred to a third party, should be treated the same as if it was in the hands of the original holder.

**Pro: Hon. Arthur J. Gonzalez (ret.)**
*New York University School of Law; New York*

**Con: Hon. Kevin J. Carey**
*U.S. Bankruptcy Court (D. Del.); Wilmington*

## Resolved: An attorney in a consumer case should be able to limit the scope of her employment.

**Pro: Brian Michael Shockley**
*Clark & Washington, PC; Atlanta*

**Con: August B. Landis**
*U.S. Department of Justice; Las Vegas*

# LIMITING REPRESENTATION IN CONSUMER BANKRUPTCY CASES

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This paper was presented at ABI's 2012 Winter Leadership Conference in Tucson, AZ.

•**In General**

▪**Rule 1.2(c) ABA MRPC - Scope of Representation and Allocation of Authority Between Client and Lawyer**

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

▪**Rule 1.3 Diligence ABA MRPC – Diligence**

"A lawyer shall act with reasonable diligence and promptness in representing a client."

▪**Rule 1.16 ABA MRPC - Declining Or Terminating Representation**

"(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;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or ....

"(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."

▪**Bankruptcy Local Rule 2091-1 (Bankr. M.D.Fla.)**

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

▪**Bankruptcy Local Rule 2017-1 (Bankr. E.D. Cal.): Attorneys – Appearances, Scope of Representation and Withdrawal**

*(a) Scope of Representation in Bankruptcy Cases and Proceedings.*

*(1)* An attorney who is retained to represent a debtor in a bankruptcy case constitutes an appearance for all purposes in the case, including, without

limitation, motions for relief from the automatic stay, motions to avoid liens, objections to claims, and reaffirmation agreements. However, an appearance in the bankruptcy case for a party does not require the attorney to appear for that party in an adversary proceeding.

*(2)* An attorney appearing in a bankruptcy case or in an adversary proceeding may not withdraw from representation, or decline to act on behalf of the client, without first complying with the withdrawal requirements of Subpart (e) of this Rule. Any contract or agreement which purports to limit the scope of an attorney's representation, except as permitted by Subpart (a)(1) of this Rule, will not be recognized by the Court.

*(b) Appearance as Attorney of Record.*

*(1) Appearance Required*. Except as permitted in Subpart (c) of this Rule, no attorney may participate in any action unless the attorney has appeared as an attorney of record. A single client may be represented by more than one attorney of record to the extent authorized by the applicable Rules of Professional Conduct.

*(2) Manner of Making Appearance.* Appearance as an attorney of record is made:

*(A)* By signing and filing an initial document;
*(B)* By causing the attorney's name to be listed in the upper left hand corner of the first page of the initial document;
*(C)* By physically appearing at a court hearing in the matter, formally stating the appearance on the record, and then signing and filing a confirmation of appearance within seven (7) days; or
*(D)* By filing and serving on all parties a substitution of attorneys as provided in Subpart (h) of this Rule.

[ . . . . . ]

*(e) Withdrawal.* Unless otherwise provided herein, an attorney who has appeared may not withdraw leaving the client in propria persona without leave of court upon noticed motion and notice to the client and all other parties who have appeared. The attorney shall provide an affidavit stating the current or last known address or addresses of the client and the efforts made to notify the client of the motion to withdraw. Withdrawal as attorney is governed by the Rules of Professional Conduct of the State Bar of California, and the attorney shall conform to the requirements of those Rules. The authority and duty of the attorney of record shall continue until relieved by order of the Court issued hereunder. Leave to withdraw may be granted subject to such appropriate conditions as the Court deems fit.

▪**Guidelines for Services to be Provided by Debtor's Attorney in Chapter 7 Cases (Bankr. N.D. Cal):** Available at the following link:

http://www.canb.uscourts.gov/procedures/dist/guidelines/guidelines-legal-services-be-provided-debtors-attorney-chapter-7-cases

The Guidelines promulgated by the Northern District of California address three different levels of service:

-Services Always Included in the Pre-Petition Fee;

-Services Always Included, but for Which an Additional Fee May Be Charged Pre- or Post-Petition, as Mutually Agreed; and

-Optional Services Not Included in the Pre-Petition Fee – Subject to Separate Agreement, if Any

▪**Bankruptcy Local Rule 2014 (Bankr. D. Nev.): Attorneys of Record**

(a) Appearances. An attorney who appears in a case on behalf of a party is the attorney of record for the party for any and all purposes except adversary proceedings until an order is entered permitting the withdrawal of the attorney or the case is closed or dismissed.

(1) An attorney approved as special counsel for the bankruptcy estate and/or the debtor under 11 U.S.C. § 327(e) (or any other applicable code section) is attorney of record for that special purpose only. The attorney is attorney of record for the special purpose until an order is entered permitting the withdrawal of the attorney or the case is closed or dismissed.

(2) Unless the court orders otherwise or further appearance is made in an adversary proceeding, an attorney who has appeared for a party only in the main bankruptcy case is not automatically the attorney of record for the party in the adversary proceeding.

•**Matters outside attorney's competence**

▪**Rule 1.1 ABA MRPC – 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."

▪***In re Younger*, 360 B.R. 89 (Bankr. W.D. Pa. 2006)**(An attorney should not, without associating competent counsel, accept cases that he or she is incompetent to handle.)

•**Ghost writing**

▪**Rule 3.3 ABA MRPC – Candor Toward the Tribunal**

"(a) A lawyer shall not knowingly:

(1) 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;"

▪**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)**(An attorney, who allegedly was not equipped to file bankruptcy pleadings electronically, violated Fed. R. Bankr. P. 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)**(An 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)**(An 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 Castorena*, 270 B.R. 504 (Bankr. D. Idaho 2001)**("Preparing pleadings for a party who will then appear unrepresented has been characterized by some as "ghostwriting." Courts generally disapprove of such conduct and find it sanctionable.") 270 B.R. at 514 note 14, *citing In re Merriam*, 250 B.R. 724, 733 (Bankr. D. Colo. 2000).

•**Contract/appearance attorneys**

▪***In re Johnson*, 411 B.R. 296 (Bankr. E.D. La. 2008)**(Attorney who arranged for non-associate counsel to appear at clients' 341 meeting of creditors violated the disclosure requirements of FED. R. BANKR. P. 2016; client must consent to hiring

substitute counsel beforehand; only attorneys who have made an appearance as counsel of record, who are co-counsel, or who are an associate in counsel's firm, are authorized to represent the debtor before the court, including at 341 meetings.)

▪***In re Wingster*, 1999 WL 33581626 (Bkrtcy. S.D. Ga.)**(Counsel who was hired has not fulfilled his or her professional responsibilities to appear at each hearing on behalf of the debtor when he employs outside counsel to represent the debtor at the 341 meeting.)

•**Basic services vs. litigation/contested matters**

▪***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.)

▪***In re Johnson*, 291 B.R. 462 (Bankr. D. Minn. 2003)**(The Rules of Professional Conduct that allow an attorney to limit the scope of representation are superceded by the applicable local rules of the court; the local rules expressly limited unbundling of legal services to representation in adversary proceedings.)

▪***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.)

•**Pre-petition vs. post-petition services (two-contract procedure)**

▪***Walton v. Clark & Washington*, *P.C.*, 469 B.R. 383 (Bankr. M.D. Fla. 2012)**(The firm's two-contract procedure does not conflict with any applicable Bankruptcy Code provision or rule of professional conduct; there is no prohibition against a debtor making postpetition installment payments for postpetition services.)

▪***In re Bethea,* 352 F.3d 1125 (7th Cir. 2003)**( "Those [debtors] who cannot prepay in full can tender a smaller retainer for prepetition work and later hire and pay counsel once the proceeding begins – for a lawyer's aid is helpful in prosecuting the case as well as in filing it.")

•**Additional Cases and Resources**

▪***Hale v. U.S. Trustee,* 509 F.3d 1139 (9th Cir. 2007)** (Debtor attorney sought to unbundle services, limiting his involvement in debtor's case to pre-petition legal services rendered. Attorney was sanctioned under bankruptcy court's inherent power to achieve the orderly and expeditious disposition of cases. On appeal, the 9th Circuit stated: "We agree with the bankruptcy court that it should 'not countenance [an

attorney's] exclusion of critical and necessary services, or endorse the pretense of adequately advised and informed consent in [. . . . . ] bankruptcy cases.' Although the court effectively barred Hale from assisting *pro se* debtors in a limited manner that allows the debtors to remain *pro se*, the court ordered those sanctions in response to specific and repeated acts of incompetent and irresponsible representation. Under the specific facts of this case, we cannot say that the bankruptcy court abused its inherent power to impose sanctions." 509 F.3d at 1148-49.)

▪***In re Brown*, 408 B.R. 509 (Bankr. D. Idaho 2009)**(rejecting "on multiple grounds, [attorney's] practice of providing 'limited pre-filing legal services' to debtors and sending his clients into their bankruptcy cases as pro se litigants. Despite whatever theoretical support the 'unbundling' of legal services might have, [the attorney's] approach abdicated any pretense of adequate counseling and advice to his 'clients' and ignored the ethical requirement of 'informed consent' by the clients to this approach to representation.") 408 B.R. at 513.

▪***In re Castorena,* 270 B.R. 504 (Bankr. D. Idaho 2001)** ("This court agrees that there is no excuse for a lawyer, who counsels a debtor regarding a bankruptcy and prepares that debtor's petition, schedules, and related documents, to fail to sign the petition. The attorney is responsible for what appears in such pleadings, and his signature is a required certification under Rule 9011(b). The argument that some or all post-filing services are to be contractually limited does not obviate the attorney's duty to sign what he caused to be prepared, nor does it modify the scope of his accountability under the Rules for the representations made in and by the pleadings." 270 B.R. at 514.

▪***In re Pair*, 77 B.R. 976 (Bankr. N.D. Ga. 1987)**("[A]n attorney has certain obligations and duties to a client once representation is undertaken. These obligations do not evaporate because the case becomes more complicated or the work more arduous or the retainer not as profitable as first contemplated or imagined. Attorneys must never lose sight of the fact that 'the profession is a branch of the administration of justice and not a mere money getting trade.' As Canon 44 of the Canons of Professional Ethics so appropriately states: 'The lawyer should not throw up the unfinished task to the detriment of his client except for reasons of honor or respect.'") 77 B.R. at 978-79, *quoting* Kriegsman v. Kriegsman, 375 A.2d 1253, 1256 (N.J. Super. 1977).

▪**Heather Navo, *The Limits of "Unbundling" Legal Services*, 1 ST. JOHN'S BANKR. RESEARCH LIBR., No. 27 (2009)**
http://www.stjohns.edu/academics/graduate/law/journals/abi/sjbrl/volume/v1/Navo.stj
(follow "View Full PDF")

▪**Robert Charles, *Hale: Limited Scope Representation*, Norton Bankr. L. Advisor (June 2008)**